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

JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics
Volume 31, No. 4 Winter 2010

State Judicial Discipline in 2009

Between 1980 and the end of 2008, approximately 367 state judges had been removed from office as a result of judicial discipline proceedings. In 2009, four judges or former judges were removed (in one of those cases, the judge was permanently disbarred, effectively removing him from office).

In addition, one former part-time judge was permanently barred from serving in any judicial capacity, and one judge was suspended without pay until the end of his term. Eleven judges resigned (or agreed not to run at the expiration of their terms) in lieu of or in addition to discpline pursuant to agreements with judicial conduct commissions that were made public. (These figures do not include proceedings pending before a state supreme court at the end of the year.)

93 additional judges (or former judges in seven cases) received other public sanctions in 2009. In approximately 54 of those cases, the discipline was imposed pursuant to the consent of the judge. In addition to the sanction in some of those cases, the judges were ordered to complete judicial ethics training or were placed on probation and required to complete a mentorship.

There were 19 suspensions without pay, ranging from 30 days to one year. One suspension also included a reprimand, a second included a reprimand and censure, and a third included a reprimand as an attorney.

In addition, 21 judges were publicly censured, 37 were publicly reprimanded (one reprimand also included a $25,000 fine), 15 were publicly admonished, and five received public warnings. Two private reprimands were made public with the judge's agreement. In one case, a

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Discipline for Delay *by Cynthia Gray*

As in every year, delay was one of the common grounds for discipline in 2009. In some cases, a single late decision was sanctioned, for example, a ruling on one post-conviction petition that took seven years. *Public Reprimand of Blackett* (Tennessee Court of the Judiciary April 17, 2009). *See also Public Reprimand of Rich* (Tennessee Court of the Judiciary August 26, 2009) (eight months to decide custody petition).

Most cases, however, involved delay in more than one case. *See, e.g., Inquiry Concerning Hinson*, Order (Arizona Supreme Court June 2009) (www.supreme.state.az.us/ethics/Complaints/2008_Complaints/Hinson_08-3080001.pdf) (failing to issue decisions within 60 days in 25 cases over a three-year period, filing inaccurate salary certifications, and failing to institute case-tracking system; censure based on stipulation following resignation); *Reprimand of Keaton* (Arkansas Judicial Discipline & Disability Commission January 16, 2009) (www.arkansas.gov/jddc/decisions.html) (failing to decide several cases promptly and to report delays); *Commission on Judicial Performance v. Agin*, 17 So. 3d 578 (Mississippi 2009) (public reprimand for 11-month delay deciding summary judgment motion, following previous public reprimand and private admonishment for failing to issue rulings in several cases); *In the Matter of Turner*, Determination (New York State Commission on Judicial Conduct June 30, 2009) (www.scjc.state.ny.us) (admonition for failing to render timely decisions in 29 cases over six-year period and failing to report 10 cases).

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Model Code Adoption

Eleven state supreme courts have adopted new codes of judicial conduct based on the *American Bar Association Model Code of Judicial Conduct* as revised in 2007: Arizona (effective September 1, 2009); Arkansas (July 1, 2009); Hawaii (January 1, 2009); Indiana (January 1, 2009); Kansas (March 1, 2009); Minnesota (July 1, 2009); Montana (January 1, 2009); Nevada (January 19, 2010); Ohio (March 1, 2009); Utah (April 1, 2010); and Wyoming (July 1, 2009).

All 11 states adopted the reorganization of the code, which reduced the number of canons from 5 to 4, with numbered rules under each canon. The new codes included many, but not all of the 2007 model code revisions and adopted some changes unique to each state. (The Delaware Supreme Court and U.S. Judicial Conference adopted changes to their codes after reviewing the 2007 ABA model code but did not adopt the re-organization or most of the other changes.) In over 20 states, review of the code is currently pending at either the committee or recommendation stage. For more information, see www.abanet.org/cpr/jclr/mcjc.shtml.

Pro se litigants

Rule 2.2 of the 2007 model code provides that "a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." Comment 4 to Rule 2.2 states: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."

Ten states have adopted that comment. Eight states (Arkansas, Arizona, Hawaii, Indiana, Minnesota, Nevada, Utah, and Wyoming) have adopted that exact language (except that Arizona uses the term "self-represented" rather than pro se).

What They Said That Got Them in Trouble

"Someone has to generate money for the Village to support the expensive police department." Judge Hermann to attorneys while rejecting a plea agreement that did not include fines that would go to the village. *In the Matter of Herrmann*, Determination (New York State Commission on Judicial Conduct December 15, 2009) (www.scjc.ny.us).

"I need $500 or you paddle her." Judge Garza to parent in truancy proceeding. *Public Warning of Garza* (Texas State Commission on Judicial Conduct March 9, 2009) (www.scjc.state.tx.us/pdf/actions/FY09-PUBSANC.pdf).

"Just in case you want to go fishing." Judge Cummings while handing a note to a state trooper correcting another witness's testimony during a trial. *In re Cummings*, 211 P.2d 1136 (Alaska 2009).

"That's good. Good for you," and **"Heat, big smoke, but no fire. You want a divorce, get a divorce. You're not getting a TRO. See y'all later."** Judge Ellender in a domestic violence hearing after the father testified that he had said he was going to make his daughter's "booty bleed" and in dismissing petition for protection for abuse. *In re Ellender*, 16 So. 3d 351 (Louisiana 2009).

"I don't want to have an Oprah Winfrey conversation with you" and **"I don't want to tell you what you really are, but I'm a street guy."** Judge Toth to defendant at arraignment. *In the Matter of Toth* (New Jersey Supreme Court September 14, 2009) (www.judiciary.state.nj.us/pressrel/D-150-08%20Toth%20ACJC.pdf; www.judiciary.state.nj.us/pressrel/ACJC%2008-201%20Presentment.pdf).

"I firmly believe that [recusal] is the only weapon we have that has any likelihood of making some of those clowns suffer for their actions," and **"Why doesn't every judge in the state immediately recuse? Grow some stones people**." Judge Himelein to other judges in e-mails regarding recusal from cases involving law firms in which legislators were members during a judicial salary dispute. *In the Matter of Himelein*, Determination (New York State Commission on Judicial Conduct December 17, 2009) (www.scjc.state.ny.us).

"I'll do whatever I want. Do you know who I am? I can make problems for you." Judge Sasso to bar manager when asked for a driver's license and credit card to begin running a tab. *In the Matter of Sasso*, Order (New Jersey Supreme Court June 2, 2009) (www.judiciary.state.nj.us/pressrel/D-97-08%20Sasso.pdf; www.judiciary.state.nj.us/pressrel/Sasso%20Presentment.pdf).

"**Mr. Negro Washington"** and **"I will kick your ass."** Judge Cofield to African-American police officer during stop

Montana adopted a slightly different version that states: "A judge may make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard." In addition, to the Rule 2.5 requirement of competent, diligent disposition of judicial and administrative duties, Montana added a unique comment that provides: "In accomplishing these critical goals in the increasing number of cases involving self-represented litigants, a judge may take appropriate steps to facilitate a self-represented litigant's ability to be heard."

Ohio's version of Comment 4 provides:

> To ensure self-represented litigants the opportunity to have their matters fairly heard, a judge may make reasonable accommodations to a self-represented litigant consistent with the law. See also Rule 2.6, Comment [1A].

Rule 2.6 requires that a judge accord to every person who has a legal interest in a proceeding the right to be heard according to law. Comment 1A to that Rule in the Ohio code provides:

> The rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant's ability to be heard. By way of illustration, individual judges have found the following affirmative, nonprejudicial steps helpful in this regard: (1) providing brief information about the proceeding and evidentiary and foundational requirements; (2) modifying the traditional order of taking evidence; (3) refraining from using legal jargon; (4) explaining the basis for a ruling; and (5) making referrals to any resources available to assist the litigant in the preparation of the case.

for drunk driving. *In re Cofield*, Memorandum of Decision (Connecticut Judicial Review Council February 27, 2009).

"This case needs to be heard" and "**This is my sister**." Judge Smith to clerk about putting domestic violence petition on docket contrary to court policy. *Public Reprimand of Smith* (North Carolina Judicial Standards Commission April 1, 2009) (www.nccourts.org/Courts/CRS/Councils/JudicialStandards/PublicReprimands.asp).

"I have two good parents to choose from." Judge Terry on Facebook to attorney for father in custody dispute. *Public Reprimand of Terry* (North Carolina Judicial Standards Commission April 1, 2009) (www.nccourts.org/Courts/CRS/Councils/JudicialStandards/PublicReprimands.asp).

"White folks don't praise you unless you're a damn fool. Unless they think they can use you. If you have your own mind and know what you're doing, they don't want you around." Judge Osborne to Greenwood Voters League. *Commission on Judicial Performance v. Osborne*, 11 So.3d 107 (Mississippi 2009).

"Try not to get arrested and then come into court to straighten this out." Judge Aldaz-Mills warning acquaintance after bail bondman had asked for certified copy of his bond. *In the Matter of Aldaz-Mills*, Formal Reprimand (New Mexico Supreme Court May 21, 2009).

"You should have gone to a smaller school like Alma [which would fit your] small chest better." Judge Servaas to a clerk about a college sweatshirt she was wearing. *In re Servaas*, 774 N.W.2d 46 (Michigan 2009).

"Maybe you could make some sense to him." Judge Delehey to defendant's brother in an ex parte conversation promoting a plea agreement. *In the Matter of Delehey*, Order (New Jersey Supreme Court October 6, 2009) (www.judiciary.state.nj.us/pressrel/D-164-08%20Delehey%20ACJC%20Order.pdf; www.judiciary.state.nj.us/pressrel/ACJC%2008-056%20Delehey%20Presentment.pdf).

"82% of her opponent's contributors are Criminal Defense Attorneys...What are they trying to buy?" Campaign ad for Judge Baker. *Inquiry Concerning Baker* (Florida Supreme Court November 5, 2009).

"There's going to be a basket going around because I'm running for Traffic Court Judge, right, and I need some money. . . . Now you all want me to get there, you're all going to need my hook-up right?" Judge Singletary to gathering of motorcycle club in park during campaign. *In re Singletary*, Opinion (December 11, 2008), Order (Pennsylvania Court of Judicial Discipline January 23, 2009) (www.cjdpa.org/decisions/jd08-01.html).

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judge was ordered to establish his primary residence in the county where the law required that he reside. Bar discipline authorities sanctioned one former judge for conduct on the bench.

Removals

Failure to decide on the evidence

Agreeing with the recommendation of the Judiciary Commission, the Louisiana Supreme Court removed a judge for failing to decide a case on the evidence and testimony presented at trial, allowing outside influences to dictate her decision, and failing to recuse despite her relationships with the plaintiff and his attorney and the attempts of another judge to influence her decision. *In re Benge*, 24 So.3d 822 (Louisiana, 2009). The Court agreed with the Commission that "no litigant appearing before the judge in the future will ever be confident of an impartial decision."

On November 16, 2001, Judge Joan Benge presided over the bench trial of a lawsuit filed by Phillip Demma, a juvenile court employee and reserve deputy sheriff, against the other driver in an accident and State Farm Insurance. Demma claimed the accident had cracked his tooth, requiring a root canal. Demma was represented by John Venezia, who had contributed to Judge Benge's 2001 campaign.

Demma was friends with Judge Ronald Bodenheimer, who was Judge Benge's mentor, having been her supervisor when they were prosecutors. The FBI was wiretapping Judge Bodenheimer's home telephone as part of its "Operation Wrinkled Robe" investigation. In several conversations, Demma urged Bodenheimer to influence Judge Benge's decision. For example, the day prior to the trial, Demma reminded Judge Bodenheimer to "tell her to award it ... it's 20, you hear?" Bodenheimer responded, "I gotcha."

On November 29, Judge Benge called Judge Bodenheimer to discuss the Demma case, which she had taken under advisement. The FBI wiretaps recorded the conversation. The Court identified 17 reasons Judge Benge gave during the conversation for why she believed Demma had not proven causation. For example, Judge Benge told Judge Bodenheimer that State Farm's attorney had "ripped up" Demma on the stand and that she had caught Demma's dentist pantomiming to Demma what to say. At the conclusion of the call, the two judges had the following exchange:

> Benge: Well, I mean, you know, really, if it wasn't for the Venezia, I'd zero it, cause I think the dentist screwed him.
>
> Bodenheimer: Well, you get, you know, [sic]
>
> Benge: I think the dentist Ya [sic] know the dentist blew the whole thing in the courtroom.
>
> Bodenheimer: Besides helping John, help Phil cuz he'll be there for you.
>
> Benge: Huh?
>
> Bodenheimer: He'll be there for you when you need him.
>
> Benge: Well —
>
> Bodenheimer: He helped me big time. He'll be there for you.

One week after the conversation, Judge Benge awarded Demma damages of $3,373.

In 2003, Demma pleaded guilty to federal charges of conspiring with Bodenheimer to influence Judge Benge to rule favorably in his case, as well as other illegal conduct. The judgment entered by Judge Benge was vacated, and Demma's suit was dismissed with prejudice. Bodenheimer also pleaded guilty to acts uncovered in Operation Wrinkled Robe, although none related to Demma or Benge.

The Commission opened a file regarding Judge Benge after a newspaper published stories about Demma's guilty plea, monitoring the case until the FBI completed its investigation in 2007. No criminal charges were brought against Judge Benge, but the United States Attorney's Office gave information to the Commission, including evidence from the wiretaps. Judge Benge was re-elected in 2008.

The Commission found that Judge Benge "could have made the award because Mr. Venezia had contributed to her campaign, because she hoped to receive his political support in the future, because she hoped to receive, or did not want to lose, the political support of others in the future, because she personally liked Mr. Venezia, or because she felt a loyalty to Judge Bodenheimer." The Court agreed that, although it was "not wholly clear why Judge Benge made the award she did, there is clear and convincing evidence that her award was not based upon the evidence presented at the trial . . . and further, she allowed her relationships with Judge Bodenheimer and her bias and partiality for Mr. Venezia to influence her decision." Further, noting that judges may discuss cases pending before them with other judges, the Court stated that Judge Bodenheimer's knowledge of the facts and his suggestion that Judge Benge should give Demma an award because he would "be there" for her clearly indicated the conversation was designed to "influence .... her judicial action," and thus, constituted an impermissible ex parte communication.

Course of deliberately deceptive behavior

Reviewing a determination of the State Commission on Judicial Conduct, the New York Court of Appeals concluded that removal was the appropriate sanction for a judge who, for over two years, contrived to delay repayment of a campaign loan, intentionally withheld information about the loan on financial disclosure statements and loan applications, and gave misleading and evasive testimony during the Commission investigation. *In the Matter of Alessandro,* 918 N.E.2d 116 (New York, 2009). The Court noted that it had repeatedly emphasized that "deception is antithetical to the role of a Judge who is sworn to uphold the law and seek the truth." It explained:

> Joseph Alessandro accepted a $250,000 loan from [Barbara Battista] his campaign manager and promised to repay her within a year. He failed to keep that promise and, more importantly, he strung Battista and her attorney along with repeated assurances that he would soon obtain financing to repay the loan. After he took judicial office, Joseph persuaded . . . Battista's attorney, to procure an affidavit from her, downplaying the attorney's misgivings that this might not serve his client's best interest. And then Joseph later, in fact, used this affidavit against Battista in the foreclosure action she commenced to recover the loan. In this regard, we find it particularly troubling that Joseph gave changeable answers when asked to identify the bank that asked for information regarding Battista's mortgage. His evasiveness creates a strong inference that he was dishonest in his dealings with Battista and her attorney with respect to the requested affidavit, and in his testimony in these proceedings.

Judicial Conduct Reporter
Winter 2010

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Published quarterly,
$36 per year, single copy $11

ISSN: 0193-7367

To subscribe or if you have a change of address or questions about your subscription, contact 515-271-2285 or llieurance@ajs.org

An index to the Judicial Conduct Reporter is available on the AJS web-site at www.ajs.org/ethics/.

Criminal conviction

The Ohio Supreme Court permanently disbarred a judge for burning down his house to defraud an insurance company. *Disciplinary Counsel v. McAuliffe*, 903 N.E.2d 1209 (Ohio 2009). The judge had been found guilty in federal court on charges of mail fraud, use of fire to commit mail fraud, conspiracy to use fire to commit mail fraud, and money laundering. The U.S. Court of Appeals for the Sixth Circuit affirmed his convictions and sentences.

Prior sanctions

Adopting the recommendation of the Commission on Judicial Performance, the Mississippi Supreme Court removed a former judge for committing a minor to detention without a hearing and taking other action after recusing himself from the case. *Commission on Judicial Performance v. Osborne*, 16 So. 3d 16 (Mississippi 2009). The Court stated it could not ignore that the judge "had had several prior sanctions imposed on him within a fairly short period of time, five years." The Court had reprimanded the judge in 2004 for practicing law, had suspended him for 180 days without pay in 2008 for his response to the repossession of an automobile, and had suspended him without pay for one year earlier in 2009 for disparaging remarks about Caucasian officials and their African-American appointees.

Permanent disqualification

Adopting the recommendation of the Advisory Committee on Judicial Conduct, the New Jersey Supreme Court permanently disqualified a part-time judge from holding judicial office for a variety of misconduct. *In the Matter of Sasso*, Order (June 2, 2009) (www.judiciary.state.nj.us/pressrel/D-97-08%20Sasso.pdf). The court order does not describe the judge's conduct; the summary is based on the Committee's presentment (www.judiciary.state.nj.us/pressrel/Sasso%20Presentment.pdf). The judge had resigned and accepted the recommended discipline.

The judge twice presided while intoxicated. For example, when the judge eventually appeared almost an hour late for evening court, he was visibly impaired; both the prosecutor and the court administrator observed that his speech was slow and slurred and his breath smelled like alcohol. Several police officers in the courtroom warned the judge that they would arrest him if he tried to drive himself home. The judge insisted on taking the bench, but the prosecutor cancelled the session and arranged for the judge's wife to drive him home. The judge had ingested Vicodin, for which

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he had a prescription, and alcohol, despite knowing the warnings against such a mixture. After the second incident, the assignment judge urged the judge to take a leave of absence and enroll in a drug rehabilitation program. The judge failed to follow that advice.

Late one night, the judge arrived at Torpedo's Go-Go Bar after consuming some alcohol. When the judge wished to start a tab, the bartender explained that he had to provide a driver's license and credit card. The judge refused and became irate, slamming his hands down on the bar and exclaiming in a very loud and angry voice: "Do you know who I am? I'm the Bound Brook Judge. I've left you guys alone for, oh, three years and I – I'm not – this is bullshit." His conduct drew the attention of the other patrons. The bartender asked for the manager and had the bar's bouncers stand near the judge. The judge became "nasty" and started to threaten the manager in an angry and belligerent tone, stating, "Well, I don't have to do that. You don't know who I am. I'll do whatever I want. Do you know who I am? I can make problems for you." When the manager asked the judge to leave, he refused, and the manager and the bouncers forcibly removed him from the bar.

The Court agreed with the Commission that "no litigant appearing before the judge in the future will ever be confident of an impartial decision."

Four police vehicles responded to the 911 call from the bar. At least one of the police officers recognized the judge, and the judge told one of the officers that he had identified himself to the manager as a judge. The manger told the officer that he was afraid to sign a complaint because he feared that the judge would use his position to retaliate.

Further, the judge abused the contempt power, displayed intemperate conduct in several matters and routinely sanctioned defendants and attorneys who were late to court calls. He also imposed lower fines on high school students charged with motor vehicle violations, characterizing them as, for example, the "Warrior Discount," referring to the particular school's mascot. Finally, while a municipal court judge, he had consulted with the municipality's volunteer fire department from time to time without compensation and was listed as the department's attorney on documents.

Practice of law

The Arkansas Supreme Court suspended a judge without pay until the end of his term (December 31, 2010) for practicing law and serving as a fiduciary of an estate of someone other than a family member. The Court did not foreclose the possibility of the judge running for re-election in 2010, but stated he could not practice law during his suspension unless he resigns. *Judicial Discipline and Disability Commission v. Simes* (Arkansas Supreme Court November 5, 2009).

On March 19, 1976, Simes was appointed administrator of the estate of Quincy Chandler. All farm rental income of the estate was paid to him as administrator. On November 5, 1996, Simes assumed the bench as a full-time judge, but he did not take action to remove himself as the administrator or attorney of record for the estate. He continued to receive rent checks, but filed no accounting.

In 2004, pursuant to a petition filed by the estate's heirs, a probate judge ordered Judge Simes to file a final accounting for the estate and discharged him as administrator. The judge filed a petition seeking $13,940.77, for fees as administrator and lawyer from January 1976 through March 1998. The probate judge found that Judge Simes had breached his fiduciary duty and owed the estate $24,138.03, including interest, for the rent payments he had collected but failed to disburse. Judge Simes paid the judgment. The probate judge also denied Judge Simes's petition for fees and referred him to the Committee on Professional Conduct, which cautioned him and forwarded the order to the Judicial Discipline and Disability Commission.

The Court acknowledged that merely overlooking that he had inadvertently remained listed as the attorney of record on a case after becoming a judge would not constitute the practice of law. However, the Court noted the judge had knowingly continued to receive rent on behalf of the estate after he was sworn in as a judge, had corresponded with the probate clerks in 1998, had worked with the estate's new attorney to construct an accounting for the years before and after he assumed the bench, and had petitioned for attorney's and administrator's fees. Thus, the Court concluded, "it is clear that he wore both hats after he assumed the bench. His actions went beyond mere inadvertence or inaction." The Court added, "his negligence and inadequate performance of his duties did not change the fact that he continued to be the court-ordered administrator of the estate after he became a judge.

Discipline for Delay *(continued from page 1)*

Supervising judges

There were two recent pairs of cases in which court commissioners were disciplined for delays in deciding cases and their supervising judges were sanctioned for failing to ensure that the court commissioners were disposing of cases in a timely manner.

The Indiana Judicial Qualifications Commission became aware of a problem in Court 5 when Harold Buntin complained in January 2007 that Commissioner Nancy Broyles had not ruled on his petition for post-conviction relief even though it had been fully briefed since April 2005, and he, his attorney, and his family had contacted the court several times. (The petition was based on DNA evidence not available during his 1986 trial and ineffective assistance of trial counsel.) Although the commissioner had signed an order granting Buntin post-conviction relief on May 20, 2006, the order was not processed by court staff.

In most cases in which delay is sanctioned, the delay is attributable to the judge's poor management, not to calendar overload.

The order was issued on March 8, 2007, after the Commission contacted Judge Grant Hawkins. Judge Hawkins thought the order was "taken care of" at that point, but, for reasons he could not explain, it was not entered on the chronological case summary until March 27. Even then, no further action was taken until after Buntin's family called the court. At a hearing on April 20, the state elected not to retry Buntin, and he was released.

The Commission's investigation into the Buntin complaint uncovered rulings delayed from six to 28 months in seven other post-conviction relief cases over which Commissioner Broyles had presided. The investigation also revealed that Judge Hawkins regularly permitted the commissioner to enter final orders without reporting her findings to him for review as required by court rules.

Pursuant to an agreement, the Indiana Supreme Court permanently banned the commissioner, who had retired, from serving in any judicial capacity. *In the Matter of Broyles*, Order (Indiana Supreme Court October 10, 2008). In disciplinary proceedings against Judge Hawkins, the Court concluded that, although the commissioner was primarily responsible for the inexcusable delays, "it was ultimately Judge Hawkins' responsibility to ensure that Court 5 operated in compliance with the law." The Court noted the masters' findings that Judge Hawkins had little to no organization of case files in his office. The Court also stated that the "Can't Find File" file kept by the court "should have alerted Judge Hawkins to a serious problem in need of immediate attention." Finally, the Court found that the judge had provided inaccurate information to the Commission. The court suspended him for 60 days without pay. *In the Matter of Hawkins*, 902 N.E.2d 231 (Indiana 2009).

Persistent failure to rule

Beginning in 2001, monthly reports indicated that Ann Dobbs, a family law commissioner in the Los Angeles Superior Court, had numerous undecided cases that had been submitted for over 90 days. (90 days is the benchmark because the California constitution prohibits judges from receiving a salary while he or she has any case that remains undecided for 90 days after submission.) Between 2006 and 2007, the court transferred to other judges 354 new cases that would have been assigned to Commissioner Dobbs, and she was twice given a week off to complete her submitted cases. Still, the commissioner did not complete all of her submitted cases on time.

When the commissioner retired in October 2007, she agreed to complete work at home on 15 cases that had been under submission for over 90 days and 14 that had been under submission for less than 90 days. When she did not complete any cases after three months, the court retrieved the files, and several judicial officers were required to complete the cases. Some cases were decided based on transcripts or previous proceedings, but some had to be retried.

The California Commission on Judicial Performance concluded that Dobbs's "protracted delays ha[d] a significant and palpable impact on the litigants, both financially and emotionally." The Commission also found that the judiciary had been adversely impacted, noting that substantial and persistent failure to rule damaged public esteem and that the court had had to expend resources to investigate the delays and dispose of the cases. The Commission censured the commissioner and barred her from serving again. *In the Matter Concerning Dobbs*, Decision and Order (California Commission on Judicial Performance July 15, 2009) (http://cjp.ca.gov/).

Judge Robert Schnider was the family law supervising

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judge when Dobbs was a court commissioner. He either failed to contact her to discuss ways to ensure cases appearing on the submission reports were timely decided or failed to verify her representations that the cases had been decided or that the submission dates were erroneous or had been vacated. Judge Schnider received complaints from several litigants and an attorney about the commissioner's delays, but he did not respond. The Commission publicly admonished Judge Schnider after his retirement in December 2008. *In the Matter Concerning Schnider*, Decision and Order (California Commission on Judicial Performance August 31, 2009) (http://cjp.ca.gov/).

Causes

In most cases in which delay is sanctioned, the delay is attributable to the judge's poor management, not to calendar overload. For example, in *In the Matter of O'Donnell*, Determination (New York State Commission on Judicial Conduct February 5, 2009) (www.scjc.state.ny.us), most of the case files for the 28 criminal cases in which the judge had failed to schedule hearings or enter dispositions were kept in unorganized stacks on the clerk's desk and atop a file cabinet or were misfiled. Case records did not include such important information as appearance dates or the reasons for adjournments. The delays in those cases were for up to six years and five months; the judge also failed to render decisions on motions to dismiss in four cases for from two and a half to 17 months.

The judge acknowledged that supervising court staff and ensuring that files are effectively monitored and cases timely disposed of were his responsibilities. As a result of the inquiry, the judge had implemented case management controls. Censuring the judge, the New York State Commission on Judicial Conduct noted in mitigation that most of the cases had been finally disposed of; the court was a high volume court; the delayed cases represented less than two percent of the cases handled by the court; apparently no defendant raised speedy trial issues; and that no prosecutor raised any objections regarding delay.

In *Inquiry Concerning Spitzer*, Decision and Order (California Commission on Judicial Performance October 2, 2007) (cjp.ca.gov/pubdisc.htm), the California Commission noted the judge's "dysfunctional practices" and the "chronic state of disorganization and gross neglect of court records. . . . Numerous witnesses . . . testified that the judge's courtroom and chambers were in shambles. Files and loose documents were strewn about without any discernable organization. As a result, court records were routinely lost or misplaced."

In addition, the judge failed to cooperate with his presiding judge's repeated inquiries regarding the status of cases, resented being "micro-managed," and "became passive-aggressive and actually ignored some of the directions he received from the [presiding judge] (for example, an order to not start a new trial until all overdue matters were decided).…" The Commission found that the judge's "conduct demonstrates an inability to properly attend to and prioritize his judicial obligations. Faithful discharge of judicial responsibilities requires the ability to multi-task."

See also Admonition of Keaton (Arkansas Judicial Discipline & Disability Commission September 22, 1998) (www.arkansas.gov/jddc/decisions.html) (two-year delay rendering decision; judge misplaced court file and trial notes); *In the Matter of Kouros*, 816 N.E.2d 21 (Indiana 2004) (removal for delays up to 27 months in issuing written orders following oral announcement of sentence in at least 35 felony cases and misrepresentations about measures taken to remedy the problem; judge's office and bench were in substantial disorder); *In re Lee*, 933 So. 2d 736 (Louisiana 2006) (120-day suspension without pay for, in addition to other misconduct, failing to issue judgments in 18 cases for from three to nine months and failing to timely and accurately report cases; delays were attributable to judge's inefficiency); *In re Emanuel*, 731 So. 2d 229 (Louisiana 1999) (censure for, in addition to other misconduct, one-year delays deciding two cases due to judge's inefficiency or neglect); *Commission on Judicial Performance v. Former Judge UU*, 875 So. 2d 1083 (Mississippi 2004) (private reprimand for delays in six cases; judge failed to maintain adequate control of docket); *In the Matter of Robichaud*, Determination (New York State Commission on Judicial Conduct August 1, 2007) (www.scjc.state.ny.us) (admonishment for judge who lost track of cases and failed to render judgments in 10 cases for up to 23 months, to decide motions in 12 cases for up to 20 months, and to report delays); *In the Matter of Assini*, 720 N.E.2d 882 (New York 1999) (removal for, in addition to other misconduct, refusal to deal with more than 100 cases over eight months due to pique about the suspension of his court clerk); *In re Shaffer*, Opinion and Order (Pennsylvania Court of Judicial Discipline September 15, 2005; November 18, 2005) (www.cjdpa.org/decisions/index.html) (public reprimand for delays of six to 34 months in rendering decisions in nine divorce and child custody cases and filing inaccurate reports; court found delays were not justified by either the factual or legal complexity of the issues); *In re*

Frye, Public Reprimand (North Carolina Judicial Standards Commission June 9, 2008) (www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/ jsc08-020.pdf) (reprimand for failing to provide written judgment for almost four years after trial; judge had no excuse for his inaction).

In *Inquiry Concerning Freedman* (California Commission on Judicial Performance June 26, 2007) (cjp.ca.gov/pubdisc.htm), the California Commission severely censured a judge for failing to decide 21 cases for between three and 485 days past the 90-day deadline, submitting false salary affidavits, and failing to act on over 200 fee waiver applications within the time allowed by law. The Commission found that, in some instances, the judge simply failed to keep track of the matters and, despite warnings by several presiding judges, failed to implement any meaningful tracking system or to take advantage of the court's computerized case management system. In other instances, the judge erroneously believed that some matters were not submitted until tasks he alone had in mind were performed or failed to act even after being reminded by counsel or parties that the matters were pending.

The judge explained that his other commitments interfered with his ability to decide pending matters, noting his active participation in numerous voluntary administrative activities with both the county court and the state Judicial Council. The Commission stated: "While these activities may be laudable in the abstract, they do not excuse or mitigate his failure to attend to his first duty, to resolve the matters brought before him for judicial decision. To the extent Judge Freedman was distracted from his duty by these activities after he had been chastised by [a presiding judge], they tend to aggravate rather than mitigate his misconduct."

Similarly, even though the Iowa Commission on Judicial Qualifications had privately warned a judge to forego teaching at judges' school and speaking at legal and civic functions until he became current in his workload, the judge continued to engage in considerable quasi-judicial activities and remained dilatory in completing assigned work. Some pretrial rulings were delayed so long that criminal cases had to be dismissed, and delayed rulings in juvenile cases resulted in delayed adoption proceedings. The Iowa Supreme Court suspended him from office for 60 days without pay for delays that averaged between 173 and 944 days in 101 cases from 1995 through 2000, in addition to other misconduct. *In the Matter of Gerard*, 631 N.W.2d 271 (Iowa 2001).

A Louisiana judge attributed his delays (he held 56 cases under advisement for one to three years during 18 years on the bench) to his concern about being right and fair rather than "speedy." Concluding there was no legitimate justification for the pattern of delayed decision-making, however, the Louisiana Supreme Court noted the cases did not involve particularly complex legal issues and that the judge did not carry an unusually heavy administrative or judicial workload or have any special assignments. *In re Wimbish*, 731 So. 2d 229 (Louisiana 1999) (censure). The prompt disposition of cases, the court stated, was especially important at the trial court level where the primary function was finding facts and applying the law, not making "weighty pronouncements" of binding law.

The court noted, however, that the damage caused by the judge's delay had been mitigated by his vast improvement in rendering timely decisions. The judge had reorganized his schedule to permit more time to decide cases, notified attorneys that he would require strict adherence to the rule requiring him to render judgments within 30 days, and assumed responsibility for filing reports of cases under advisement.

Similarly, in *In re Clark*, 866 So. 2d 782 (Louisiana 2004) , the Court suspended from office for 30 days a judge who failed to issue timely rulings in 19 cases and failed to timely and accurately report cases taken under advisement. The Court found that there was no indication that any of the cases was inordinately complex and that the cases simply fell through the cracks on account of the judge's own inefficiency. The Court noted that the judge did not attribute any of the delays to his lack of experience in the civil law, the judge's large docket, especially given his involvement in the drug court, or his participation in a number of administrative matters for the district court. The Court recognized that the judge worked diligently, took few if any vacations, and traveled frequently on weekends to obtain medical treatment for his daughter but accepted his own testimony that his failure to decide the cases could not reasonably be attributed to his daughter's medical requirements or the absences of his secretary and his law clerk. Most importantly, the Court noted that there had been previous instances of decisional delay, but the judge's previous appearance before the Commission did not cure the problems.

Inherent injury

Before publicly reprimanding a judge for allowing six cases to languish in his court for 18-51 months, the Ohio Supreme Court reviewed the judge's caseloads and caseflow performance, both individually and compared to other judges

(continued on page 10)

Discipline for Delay *(continued from page 9)*

in his county and in similar counties. *Disciplinary Counsel v. Sargeant*, 889 N.E.2d 96 (Ohio 2008). The court found that the judge "frequently kept cases pending for longer than the time guidelines" and "reported a far greater percentage of such pending cases than his peers." For example, in contested divorces in which the parties had children, other judges averaged between two percent and five percent of their cases pending beyond the guidelines. From 2002 through 2005, Judge Sargeant kept between 13% and 19% of those cases pending beyond the guidelines, although he reduced the numbers to eight percent in 2006 and three percent in 2007.

The court explained:

> The timely resolution of cases is fundamental to the judicial system. . . . Lengthy, unjustified delays in the disposition of a court's docket compromise the interests of parties and diminish confidence in the judiciary and the legal system. By failing to efficiently resolve the cases before him, respondent left the parties . . . in a legal limbo, often for a period of years. Respondent's conduct was inherently injurious, as it prevented timely resolution of disputes that profoundly affected the lives of those, in particular children, whose interests were before his court.
>
> Parties rightfully expect to receive prompt, efficient, and fair resolutions of their cases. Judges must meet these expectations impartially and diligently. By failing to manage his docket, respondent injured the parties before him and the public's perception of the legal system.

The California Commission noted that, while inordinate delay is unacceptable in all cases, the failure to promptly decide criminal cases is particularly egregious in light of the potential for harm to the parties and the public. *Public Admonishment of Oliver* (California Commission on Judicial Performance June 16, 1998) (http://cjp.ca.gov/). The judge had held motions in a criminal case under submission for seven months and demurrers in two misdemeanor cases for 13 months and signed declarations stating that he had no cases undecided for longer than 90 days even though he had received written and verbal reminders.

Noting that the "informal and simplified" procedures for small claims cases are intended to provide litigants with efficient and just resolutions, the New York Commission stated that "this goal is thwarted when cases are delayed inexcusably for extended periods." *In the Matter of Scolton*, Determination (New York State Commission on Judicial Conduct August 1, 2007) (www.scjc.state.ny.us). Based on an agreement, the Commission admonished the judge for failing to take any action in one small claims case, delaying hearings from four to 10 months in five small claims cases, and delaying decisions from 23 to 33 months in two small claims cases. The judge had no excuse. *See also In the Matter of Baldwin*, Determination (New York State Commission on Judicial Conduct August 22, 2008) (www.scjc.state.ny.us) (agreed admonishment for significant delays in three small claims actions, in addition to other misconduct).

Mitigating factors

In *In re Van Nuys*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct June 7, 2002) (www.cjc.state.wa.us/CJC_Activity/public_actions.htm), the Washington State Commission on Judicial Conduct admonished a judge for a delay of over four years rendering a final detailed opinion following a preliminary letter opinion in one case. In mitigation, the Commission noted the physical and emotional demands placed on the judge associated with the in-home hospice care and death of her stepmother; her prompt completion of the case after the Commission's inquiry; her immediate self-report of a similar delay; her acceptance of responsibility and demonstration of remorse; her enrollment in training at the National Judicial College; and her arrangement for a secondary check on pending decisions through the clerk's office and independent reporting to the presiding judge.

In *In re Clark*, Stipulation, Agreement and Order (Washington State Commission on Judicial Conduct February 7, 2003) (www.cjc.state.wa.us/CJC_Activity/public_actions.htm), the Washington Commission publicly admonished a judge for delays in four cases from six to 14 months. In mitigation, the stipulation noted that, at the time of the delays, the judge was the sole family law judge, and compliance with time standards improved considerably after a second judge was added. Finally, the Commission noted that the judge had changed the way she processes cases by setting a specific hearing date to render a decision.

As mitigating circumstances, the Florida Judicial Qualifications Commission considered that a judge was relatively new to the bench without significant prior civil experience and had protracted staffing problems and significant family issues. Its recommendation that a judge be reprimanded for delays in rendering decision in nine cases and for, in several cases, offering to make a decision in exchange for waivers of prejudice was approved. *Inquiry Concerning Allawas*, 906 So. 2d 1052 (Florida 2005). *See*

also In the Matter of Borst, Stipulation, Agreement, and Order (Washington Commission on Judicial Conduct April 6, 2001) (www.cjc.state.wa.us/CJC_Activity/public_actions.htm) (admonishment for failing to decide summary motion for more than 10 months; judge accepted responsibility and initiated new procedures); *Letter to Keith* (Arkansas Judicial Discipline & Disability Commission January 20, 1999) (www.arkansas.gov/jddc/decisions.html) (admonishment for not acting for almost six months on a writ of mandamus issued by the Arkansas Supreme Court to act upon a Freedom of Information Act request; judge had implemented a program to ensure that such delay would not recur); *Letter to Isbell* (Arkansas Judicial Discipline & Disability Commission January 24, 2000) (www.arkansas.gov/jddc/decisions.html) (informal resolution for failure to file final judgment for almost 18 months; judge apologized to parties and took steps to prevent future delay); *In the Matter of Waddick*, 605 N.W.2d 861 (Wisconsin 2000) (suspension without pay for six months for recurring delay in deciding cases, filing false certifications of status of pending cases, and stating falsely to the Judicial Commission that he had no cases awaiting decision beyond the prescribed period; judge had become current with his decisions, with no cases pending for more than two weeks).

Factors

In 1990, the New York Court of Appeals had dismissed charges brought by the State Commission on Judicial Conduct against a judge who failed to render decisions promptly in eight cases *In the Matter of Greenfield*, 557 N.E.2d 1177 (New York 1990). The Court found that the delays were the result of serious administrative failings but stated the Commission did not have jurisdiction to discipline judges absent proof of persistent or deliberate neglect of judicial duties. The Court concluded it was important to draw a line "between the role of the Commission and court administrators." *Cf., In the Matter of Washington*, 800 N.E.2d 348 (New York 2003) (removal for failing to render timely decisions in 67 small claims matters, despite a small caseload and the active intervention and assistance of the administrative judge; failing to file accurate, timely reports; and failing to respond to repeated inquiries).

In 2009, however, the Court decided that, "after nearly twenty years of experience with *Greenfield*, . . . it is not workable to exclude completely the possibility of more formal discipline for such behavior, in cases where the delays are lengthy and without valid excuse. . . ." *In the Matter of Gilpatric* (New York Court of Appeals December 15, 2009). Noting "not every case involving caseload delays will rise to the level of misconduct," the Court emphasized that "the context in which the delays occurred [must] be fully explored," and "statistics alone are insufficient to support a finding of misconduct . . . ." The Court remanded the matter to the Commission to develop the record.

The Court identified relevant factors for determining whether discipline for delay is appropriate and, if so, which sanction is adequate:

- The number of cases
- The length of the delays
- The number and complexity of cases that the judge presided over during the relevant period
- The judge's other judicial obligations
- The extent and nature of efforts by administrators and the judge's response to those efforts

As identified in other cases, additional aggravating and mitigating factors in delay cases include:

- Whether the parties or attorneys contacted the judge about the delays
- The type of case
- Whether the judge failed to file required case reports or filed inaccurate reports
- Any harm to litigants and the court system
- Changes implemented by the judge to prevent delay in the future
- Personal problems experienced by the judge
- Staff problems
- Vacancies on the local bench
- The judge's experience

Discipline for delay is based on Canon 3B(8) of the code of judicial conduct: "A judge shall dispose of all judicial matters promptly, efficiently and fairly." Despite courts' repeated emphasis on the injury inherent in delay, "promptly" was deleted from the *American Bar Association Model Code of Judicial Conduct* in 2007, so that Rule 2.5(A) now only states: "A judge shall perform judicial and administrative duties competently and diligently." The requirement of promptness was in most drafts of the revised model code, but was deleted from the final draft without explanation. Several states have retained "promptly" in their new codes despite adopting other revisions from the 2007 model code.

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