



To promote
the effective
administration
of justice

JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics
Vol 27, No 1 Spring 2005

Misuse of Influence *by Cynthia Gray*

Invoking the judicial office to cajole or bully a favor is a classic example of judicial misconduct that violates the Canon 2B prohibition on lending “the prestige of judicial office to advance the private interests of the judge or others.” If the pressure is express and the favor is granted, the improper use of the prestige of office and the violation of the code of judicial conduct are obvious.

More subtle, implied attempts to misuse the prestige of office are captured by the Canon 2 prohibition on creating the appearance of impropriety. This application of the appearance

standard reflects that the reasonable person knows that much of human communication is unspoken, between-the-lines, accomplished with winks and nods, and depends on what goes without saying. Gratuitous references to the judicial office, for example, have been held to inappropriately invoke the prestige of the office even absent an express request for favorable treatment.

In a recent case, the New York State Commission on Judicial Conduct found that, regardless of intent, a judge’s repeated, pointed references to his judicial status in a dispute with a

snowmobile dealer created the appearance that he was attempting to use his judicial prestige to further his personal interests. *In the Matter of the Dumar, Determination* (New York State Commission on Judicial Conduct May 18, 2004) (www.scjc.state.ny.us) (censure pursuant to agreement). The judge had identified himself as a judge while talking to a salesman, a secretary, the manager, and the proprietor even though his judicial status was irrelevant to whether he was entitled to be reimbursed for repairs to his snowmobile.

(continued on page 6)

Conduct Challenges With *Pro Se* Litigants *by Margaret Childers*

Pro se litigants present a myriad of challenges under the code of judicial conduct. Self-represented parties often expect the judge to assist them, not understanding the function of the judge as an impartial arbiter in the context of self representation, and feeling the judge is biased against them if the judge does not help them present their case, or if he or she tries to advise them to obtain an attorney.

This may manifest itself in claims that the judge has a general bias against people who do not hire an attorney, or that he or she is in league with the local bar to generate fees for attorneys.

Pro se litigants also often appear in types of cases where emotions run high and can easily get out of hand, compounding the difficulty of controlling a proceeding in which the litigant

does not know applicable procedural and evidentiary rules. A *pro se* litigant may not understand that the judge cannot talk with them about their case *ex parte* and may trouble the judge’s staff with frequent calls. They may take their grievances with the court to the media, resulting in the reporting of inaccurate information as to which the

(continued on page 8)

Recent Judicial Ethics Advisory Opinions: Family Matters

✦ A judge's spouse may circulate a nominating petition for a candidate in a non-judicial primary election. *Illinois Opinion 03-6*.

✦ A judge's spouse or other family member may circulate nominating petitions for candidates, work on a political campaign, and hold office in a political party or organization. *Arizona Opinion 03-5*.

✦ A judge's spouse may place in the front yard a campaign sign in support of a candidate (but should be discouraged from doing so) as long as it is made as clear as practical that the decision is that of the spouse and not the judge. A judge's spouse may contribute to the campaign of a candidate but may not use checks that include the judge's name. *Oklahoma Advisory Opinion 00-7*.

✦ A judge whose spouse is running for political office may permit his/her picture and name to be used in a campaign advertisement if no reference is made to the judicial office. *Oklahoma Opinion 00-6*.

✦ A judge whose spouse is a candidate for elective public office may appear in a family photograph to be used in the campaign provided no reference is made to the judge's title or position. The judge may accompany his or her spouse to civic and social functions that are within the normal activity of the organizations if the judge does not campaign. The judge should not co-host with the judge's spouse at a private party at the couple's summer home shortly after a fund-raiser held for the spouse at the home. *New York Opinion 04-41*.

✦ A judge whose spouse is running for the legislature may allow the spouse to use a family photograph in the campaign if the photograph iden-

tifies the judge only as a spouse and not as a judge. The judge may not accompany his or her spouse to partisan political functions, such as meetings or strategy sessions with supporters and advisors, or other gatherings for the spouse even if the functions are not fund-raisers. The judge may accompany his or her spouse to civic, social, religious, community, cultural, or recreational gatherings even if the spouse engages in some campaigning as long as the judge is discreet and low profile, is not introduced by title, and does not participate in any activity that could be seen as campaigning. *Vermont Opinion 2728-10* (2004).

✦ The chief judge of a city court whose son or daughter has recently been elected to the same court must consult with and seek the approval of the deputy chief administrative judge in devising and implementing procedures for the judge's exercise of supervisory authority over his or her child. *New York Opinion 03-136*.

✦ The spouse of a chief district judge who has control over the assignment of cases may not serve as a district magistrate judge. The spouse of a district judge who is not the chief judge may serve as a district magistrate judge as long as the district judge does not consider appeals from decisions by the spouse. *Kansas Opinion JE-116* (2004).

✦ A judge may not appoint his or her son or daughter as acting judge to serve during the judge's vacation. *Ohio Opinion 04-10*.

✦ A judge whose spouse is mayor is not disqualified from criminal jury trials, motions to suppress or exclude evidence, and


youthful offender applications or trials in which city police officers may be witnesses or from trials in which the defendants are charged with assault of a city police officer unless the judge's spouse has a personal interest or direct involvement in the case, but should disclose the relationship in all cases in which city police are witnesses. *Alabama Opinion 04-845*.

✦ Other judges in the court may appoint a judge's relative to represent indigent defendants in criminal cases and preside over cases in which the relative appears. *New York Opinion 03-19*.

✦ A judge may attend a meeting and informal appeal at a school regarding harassment of the judge's children and a special education child living temporarily with judge's family. The judge may write a letter seeking the appointment of a neutral with regard to the harassment and mention that he or she is a judge in a description of his or her background but should not use judicial stationery. *Illinois Opinion 04-1*.

✦ A judge whose spouse is a director of a parochial school may be included in a family photograph in an informational brochure about the school. *New York Opinion 04-37*.

✦ A judge may serve on the local school improvement council at the school attended by the judge's children. *West Virginia Opinion* (October 12, 2004).

✦ A judge as an ordinary spectator may observe his or her son or daughter arguing before an appellate court. *New York Opinion 04-126*. 

The Center for Judicial Ethics website has links to judicial advisory committees at www.ajs.org/ethics/

Private Sanctions and Informal Dispositions

Prior to the filing of formal charges and without a formal hearing, most judicial conduct commissions have the authority to privately sanction a judge or informally resolve a complaint. These dispositions may involve imposing conditions, requiring the judge to appear before the commission, referrals to counseling, treatment, mentorships, and other diversion programs. Other resolutions available in some states include letters of warning or advice; private admonishments, reprimands, or censures; dismissals with caution; and cease and desist orders.

For example, after an investigation and in-person appearance by a judge, the Wisconsin Judicial Commission may “dismiss the matter with such expression of concern or warning as the commission deems appropriate upon finding that there is credible evidence” of a violation that is not aggra-

vated or willful or if the allegation “does not warrant prosecution because of its minor nature or other circumstances.” A “warning” is “a non-disciplinary disposition of an allegation in which the commission cautions the judge . . . not to engage in specified proscribed behavior, and may advise the judge . . . to follow a specified corrective course of action.”

The Georgia Judicial Qualifications Commission can issue admonitions and private reprimands. An admonition is “a private communication reminding a judge of ethical responsibilities and giving a gentle or friendly warning to avoid future misconduct or inappropriate practices. An admonition may be used to give authoritative advice and encouragement or to express disapproval of behavior that suggests the appearance of impropriety even though it meets minimum standards of judicial conduct.” A private

reprimand is a “private communication that declares a judge’s conduct unacceptable under one of the grounds for judicial discipline but not so serious as to merit a public sanction.”

Annual reports

Although these actions are confidential, some commissions include retracted versions in their annual reports. For example, “to educate judges and the public, and to assist judges in avoiding inappropriate conduct,” the California Commission on Judicial Performance summarizes private admonishments and advisory letters issued by the Commission, “omit[ting] certain details and obscur[ing] others” to maintain confidentiality.

The Commission’s annual report explains that private admonishments are designed to correct problems at an

(continued on page 9)

Charity Image Campaigns

Universities often engage in advertising campaigns designed to recruit students and improve their image and ask their alumni—including judges—to appear in the ads. Judicial ethics committees have given a variety of advice on whether judges may participate in such campaigns.

Recently, for example, the Wisconsin advisory committee advised that a judge’s image, name, and title may not be featured on a billboard as part of an advertising campaign by one of the University of Wisconsin System campuses. *Wisconsin Advisory Opinion 05-1*. The billboards were to be part of an advertising campaign featuring former students and would state “I got

my start at” and then identify the specific campus the judge attended. The committee noted, “obviously, the campus hopes that viewers of this advertisement will believe that this University of Wisconsin System campus is a good place to start a successful career.” The Wisconsin code of judicial conduct expressly provides that a judge shall “not participate in or permit the judge’s name to be used in connection with any business venture or commercial advertising that indicates the judge’s title or affiliation with the judiciary” The committee concluded that the university’s provision of education in exchange for tuition fits within the meaning of “commercial” as used in the code.

Similarly, the Massachusetts advisory committee stated that a judge may not appear in an ad for a university that pictured the judge in front of a university building above the words “become what you believe.” *Massachusetts Advisory Opinion 00-6*. The committee stated that the words “become what you believe” were used in a manner that reasonably could be viewed as the judge’s opinion of the likely result of an education at the university. The university proposed printing the advertisement in newspapers and magazines that would be distributed locally, nationally, and internationally. The committee noted that the campaign was designed

(continued on page 10)

Halloween Costume

The Louisiana Supreme Court suspended a judge from office for one year without pay for attending a Halloween party dressed in a prison jumpsuit and black face. *In re Ellender*, 889 So. 2d 225 (2004). The court deferred six months of the suspension on the condition that the judge enroll in a course that will allow him “to gain insight into the attitude of other racial groups, particularly racial groups where interrelations are marked by antagonism, discrimination and conflict.”

On October 31, 2003, the judge and his wife attended a Halloween party at restaurant owned by a relative. The party guests were the majority of persons in the restaurant, but five or six other persons were there, and the restaurant remained open for take out. Staff of the restaurant, including one African-American, were also present. The judge was dressed as a prisoner, wearing an orange jumpsuit, handcuffs, and black afro wig; his wife was dressed as a police officer. When they arrived at the party, their costumes did not generate the laughs they had expected from the implication that his wife, who was newly married to the judge and reportedly young and attractive, had her husband under her control. The restaurant’s owner offered the judge some black make-up to enhance his costume, and both the judge and his wife applied the make-up to their faces. On November 9, a local newspaper printed an article entitled “Local judge’s masquerade sparks racial concerns.” Local broadcast media picked up the story, followed by CNN, and two New Orleans television stations. The Judiciary Commission received six complaints from the NAACP, the judge’s colleagues, and others.

The court found that the judge’s

conduct brought the judiciary of Louisiana into disrepute, caused the public to question his integrity and ability to be fair to African-Americans, and diminished the integrity and respect citizens hold for Louisiana’s judiciary. In mitigation, the court stated that there was no evidence that the judge treated African-Americans disparately, noting that a review revealed no disparity in his sentencing based on race and that four African-Americans had testified that he is a good judge they consider fair and impartial. Although agreeing that the judge did not intend to offend the African-American community, the court concluded that “his behavior exhibits his failure to appreciate the effects of his actions on the community as a whole.”

RECENT DECISIONS

A concurring opinion wrote:

Those who would write off Judge Ellender’s lapse in judgment as a harmless prank requiring only a token sanction do not understand how deeply such an act resonates throughout the African-American community as a harsh reminder of a not too distant past. I believe, however, that educating a sitting judge as to the reality of racial injustice and insensitivity in our daily lives will have more far-reaching consequences than simply removing him.

Political Statements

Dismissing complaints against a federal judge, the Judicial Council for the U.S. Court of Appeals for the 2nd Circuit found that the judge’s remarks about President Bush’s election violated the code of judicial conduct but that the Council’s concurrence with the chief judge’s admonition and the judge’s apology were sufficient sanction and corrective action. *In re*

Charges of Judicial Misconduct, 404 F.3d 688 (2005). In remarks in 2004 to a conference of the American Constitution Society, the judge had called the Supreme Court’s decision in *Bush v. Gore* an “illegitimate act” and argued “when that has happened it is important to put that person out, regardless of policies, regardless of anything else, as a statement that the democracy reasserts its power over somebody who has come in and then has used the office to . . . build himself up.” (The Council does not identify the judge by name, but newspaper reports about the ACS conference indicate it was Judge Guido Calabresi of the 2nd Circuit.)

The judge had apologized for the remarks in a letter to the chief judge, who released the letter to the press with a memorandum stating, “partisan political comments, of course, are violations of the code of judicial conduct. As [the judge] has acknowledged, his remarks reasonably could be — and indeed have been — so understood, whatever his intent.”

The Council found that the judge violated Canon 7 when he made statements that could reasonably be understood as opposing the President’s reelection and concurred in the chief judge’s admonition. The Council concluded that no additional action was necessary, noting the judge conceded his remarks could reasonably be understood as violating Canon 7; the remarks were not planned; he apologized and gave assurance that there will be no recurrence; and the chief judge’s admonition and the judge’s apology were released to the public and widely covered in the media.

Rejecting a complaint that the judge should not have spoken at the convention because the ACS is “by definition, left-leaning and has a partisan mission and agenda,” the Council noted that the

ACS describes itself as a “non-partisan, non-profit 501(c)(3) educational organization” that does not, “as an organization, lobby, litigate, or take positions on specific issues, cases, legislation, or nominations.” The Council stated that the phrase “political organization” in Canon 7(A)(2) “likely refers to groups organized *primarily* for political purposes, such as political parties, rather than to groups organized primarily for other purposes, such as legal education or debate, even if there is sympathy between a particular group or its mission and partisan entities.” Noting that speakers at ACS events appear to be from across the political spectrum and that the judge’s “educational activities are by no means limited to groups generally aligned to the left,” the Council concluded that the “Judge’s presence at the ACS events, by itself, does not bespeak sympathy or support for the mission of the ACS, or for any of the speakers or groups represented at the event.”

Further, the Council stated:

To the extent that any of the complaints are based on the belief that a judge must be politically neutral or hold no strong political beliefs, they are without merit. To the extent that any of the complaints are based on the belief that the Judge’s alleged bias renders him unable to sit as a judge in a case involving the President or any particular issue, they are (at least) premature as any such claim would await an actual instance.

The judge had also compared the way Bush gained office to decisions installing Mussolini and Hitler and stated that like Mussolini, Bush had exercised “extraordinary power.” Although stating that those remarks “were inflammatory to a reasonable person of ordinary sensibilities,” the Council noted “there is no guidance in the Canons (which are advisory in any

event) — and little elsewhere — on when out-of-court remarks that may be intemperate or disrespectful transcend the merely distasteful or the inadvisable and amount to misconduct.” The Council concluded that no additional action was necessary based on the comparison remarks.

Friendships


Pursuant to a stipulation and agreement, the Washington State Commission on Judicial Conduct publicly reprimanded a court commissioner for accepting tickets to Seattle Mariners baseball games and a meal from an attorney who frequently appeared before the judge and failing to disqualify himself from matters involving an individual with whom he had a continu-

which the attorney was responsible. At a dinner scheduled for work-related purposes, the judge also allowed the attorney to purchase dinner for him and another person, the bill for which totaled \$287.27. The judge bought a meal for this attorney on at least one occasion.

For approximately two years, the judge and his wife developed a personal, social relationship with the executive director and manager of a guardianship agency whose interests were frequently before the judge. They were guests at each others’ houses, treated each other to lunches and dinners, and exchanged birthday gifts; accompanied each other to sporting and cultural events; and contemplated vacationing together. In addition, the judge provided the executive director with guidance on how to advance her career, including helping her develop and draft a prospective business plan. The judge did not dis-

qualify himself from matters (including petitions for fees and approval of guardianship reports) involving this person or the agency for which she worked.

The Commission concluded:

while there is no evidence that either individual . . . expected or received preferential treatment from Respondent, by accepting gifts and favors, and privately socializing . . . with persons who appeared (and were likely to continue to appear) before him, the judge created at a minimum an appearance of impropriety: his conduct created a reasonable perception of partiality and legitimate concerns about whether these individuals were in a special position to influence the judge. 

The Center reports on developments in judicial ethics and discipline in weekly stories posted on its web-site at www.ajs.org/ethics/.

RECENT DECISIONS

ing, significant social relationship or involving the agency for which she worked. *In the Matter of Gaddis*, Stipulation, Agreement and Order of Reprimand (December 10, 2004) (www.cjc.state.wa.us).

The judge was assigned to the ex parte and probate department where, among other duties, he authorized the expenditure of funds from trusts maintained for the benefit of incompetent beneficiaries in guardianship proceedings and approved guardianship plans, sometimes among complex groups with interrelated interests. On two occasions, the judge accepted four Seattle Mariners baseball tickets from an attorney who regularly appeared before him. The total face value of the tickets was \$232, and the judge did not reimburse the attorney. The judge considered the tickets a form of compensation for working on a manual for

Misuse of Influence *(continued from page 1)*

After being refused reimbursement, the judge stated he would take the matter to small claims court and that he knew how “the system” worked. When he did file suit, he left his business card with the clerk of the court and introduced himself to a judge of the court where the case was pending. He also identified himself as a judge while making a complaint about the dealership to a state agency.

The New York Commission found that the judge’s statements “could well be perceived as intimidating, especially in the context of demanding reimbursement for the repairs, threatening a lawsuit and saying that he knew how ‘the system’ worked.”

Moreover, in the context of legal proceedings, an attempt to influence is inherent in even a simple inquiry about a case to an individual such as a police officer, prosecutor, or other judge who is aware of the judge’s status. Any communication from a judge about a case may be perceived as “backed by the power and prestige of judicial office” and constitute an implied request for a favor. *In the Matter of Lonschein*, 408 N.E.2d 901, 903 (New York 1980).

In *Inquiry Concerning Platt*, Decision and Order (California Commission on Judicial Performance August 5, 2002) (cjp.ca.gov/pubdisc.htm), after a judge’s godfather, Mr. A, informed him that he had an old speeding ticket that he had never gone to court on, the judge called a court commissioner to learn how Mr. A might go about getting his ticket on the calendar. During the conversation, the

judge mentioned Mr. A’s name and that he was active in the community.

The California Commission found that the judge “did not know, or attempt to find out, what commissioner would handle Mr. A’s ticket when it was calendared,” ‘did not talk with [the presiding commissioner] about the specific case pending before her,’ and ‘did not ask her to take any action on the ticket.’” However, the Commission stated those findings did not

Gratuitous references to the judicial office, for example, have been held to inappropriately invoke the prestige of the office even absent an express request for favorable treatment.

“compel a conclusion that Judge Platt did not intend to attempt to influence the commissioner.”

Judge Platt could have learned all about the procedures from [the commissioner] (or the clerk’s office) without revealing that he was calling on behalf of his godfather. Judge Platt does not offer any legitimate reason for telling the commissioner about Mr. A. Furthermore, the fact that [the commissioner] was not influenced does not mean that she did not perceive the telephone call as an attempt to influence.

The Commission concluded that “the attempt to influence is inherent in the unsolicited telephone call and the ex parte conveyance of positive information about the offender. The judge’s failure to explicitly ask the [commissioner] to do anything, does not change the nature of the communications.” (Judge Platt was removed for

this incident, two other attempts to influence other judges, and dismissing four tickets for friends.)

The judge in *In the Matter of Pennington*, Determination (New York State Commission on Judicial Conduct November 3, 2003) (www.scjc.state.ny.us), had asked to meet with the prosecutor about his son’s criminal case. At the meeting, he said he was there as the defendant’s father and not to ask for any favors or to use his position as a judge. The district attorney assured the judge that he would review the case, and the charge against the judge’s son was subsequently dismissed for lack of prosecution, which, the New York Commission noted, suggested that the judge’s advocacy was successful.

The Commission concluded that, although the judge told the district attorney that he was not seeking any special treatment, the judge acknowledged that “the mere fact of his judicial status increased the likelihood that he could not only obtain such a meeting, but get the District Attorney’s ‘heightened attention’ to his concerns about his son’s treatment.” (The judge was censured pursuant to an agreement for this and other misconduct). *See also Inquiry Concerning Simpson*, Decision and Order (California Commission on Judicial Performance December 9, 2002) (cjp.ca.gov/pubdisc.htm) (censure pursuant to an agreement for, in addition to other misconduct, contacting a court commissioner and asking question about tickets issued to friends or relatives of friends; calling a commissioner about a ticket received by a friend; asking a

police officer about a ticket issued to someone the judge knew); *Inquiry Concerning Block*, Decision and Order (California Commission on Judicial Performance December 9, 2002) (cjp.ca.gov/pubdisc.htm) (private reprimand disclosed pursuant to agreement for, in addition to other misconduct, expressing concern to managing judge about the way a ticket for a friend's daughter had been handled); *In the Inquiry Relating to Alvord*, 847 P.2d 1310 (Kansas 1993) (censure for, in addition to other misconduct, making two unsolicited phone calls on behalf of a clerk to a prosecutor asking if anything could be done about a ticket); *In the Matter of Looper*, 548 S.E.2d 219 (South Carolina 2001) (reprimand for, in addition to other misconduct, communicating with another judge in order to make that judge aware of his personal interest in a pending case).

Judicial letterhead

The use of judicial letterhead inevitably creates the appearance of a misuse of the prestige of office. In fact, Commentary to Canon 2B states that "judicial letterhead must not be used for conducting a judge's personal business." The judge in *In the Matter of Mosley* 102 P.3d 555 (Nevada 2004), sent two letters on court letterhead to his son's school asking that the school prohibit his ex-girlfriend from visiting the boy at school. The judge argued that he did not misuse the prestige of office because the school principals already knew that he was a judge before he sent the letters and did not provide special treatment to him.

Rejecting that argument, the Nevada Supreme Court concluded that an objective reasonable person could conclude that the judge used judicial

letterhead to write to his son's school in an attempt to gain a personal advantage. (Judge Mosley was censured and fined \$5,000 for this and other misconduct.) See also *Public Reprimand of Simon* (Arizona Commission on Judicial Conduct March 30, 2005) (www.supreme.state.az.us/ethics/Press_Releases/press.htm) (public reprimand for using court stationery to write letter to an insurance company on behalf of a relative even though the insurance company was not influenced, either directly or indirectly); *In the Matter of Sharlow*, Determination

Any communication from a judge about a case may be perceived as "backed by the power and prestige of judicial office" and constitute an implied request for a favor.


(New York State Commission on Judicial Conduct March 22, 2005) (www.scjc.state.ny.us) (admonishment, pursuant to agreement, for writing letter on judicial stationery to judge presiding in son's case); *In the Matter of Nesbitt*, Determination (New York State Commission on Judicial Conduct June 21, 2002) (www.scjc.state.ny.us/) (admonition for letter on judicial stationery to school official challenging administrative determination concerning judge's son).

Conveying information

Conveying information to another judge is a particularly deleterious attempt to influence a proceeding because it may require the other judge to disqualify. Judge Horowitz called the family court judge hearing emergency

applications and ex parte proceedings to advise the other judge that her friends would be coming to court seeking an order of protection. When the case was assigned to a third judge, Judge Horowitz told that judge's clerk that the petitioners were her friends and were really nice people and asked the clerk to look out for them. Subsequently, Judge Horowitz told the other judge and the other judge's court attorney that the petitioners were her friends and were good people and good parents. The other judge recused herself from the matter because of Judge

Horowitz's unauthorized ex parte communications. When the supervising judge told her that the matter was transferred out of the county because of her intervention, Judge Horowitz said the supervising judge was "being ridiculous" and that "everybody does it."

The New York Commission stated, "When a judge seeks to privately impart favorable information about a litigant to the judge presiding over a matter, the entire system of justice in Family Court is subverted." (Judge Horowitz was censured for this and other misconduct.) *In the Matter of Horowitz*, Determination (New York State Commission on Judicial Conduct March 25, 2005) (www.scjc.state.ny.us). See also *In the Matter of Young*, Determination (New York State Commission on Judicial Conduct December 29, 2000) (www.scjc.state.ny.us) (censure pursuant to agreement for calling hearing examiner at the request of a friend and stating that his friend's ex-husband was a "hard ass" and was being "unreasonable" by not contributing to the college expenses of one of their children). 

Conduct Challenges With *Pro Se* Litigants (continued from page 1)

judge may not publicly comment.

The Supreme Court of Florida removed a judge from office in 2000 who engaged in a pattern of acting with hostility toward others, including limiting the rights of *pro se* petitioners with domestic violence complaints by requiring employees of the local domestic abuse shelter to submit affidavits that they had not furnished any assistance to the petitioners, which chilled the willingness of victims and staff to come forward with legitimate claims. *Inquiry Concerning Shea*, 759 So. 2d 631 (Florida 2000).

The code of judicial conduct requires judges to be patient, dignified, and courteous to all litigants, whether or not they are represented by counsel, and to require similar conduct of their staff and of lawyers appearing before them (Canon 3A(3)). *Pro se* litigants are entitled to the same courteous, prompt, and fair service as those represented by counsel. Judges and their staff must accord them respect and must not treat them as though they are a nuisance or a waste of time. A judge was publicly reprimanded in 2000 for conduct that included telling a woman who appeared before her *pro se* that “she’d better be prepared, because she was not going to get by on her good looks.” *Inquiry Concerning Newton*, 758 So.2d 107 (Florida 2000).

Based on a stipulation and agreement, the Washington State Commission on Judicial Conduct reprimanded a judge for a pattern of rude, impatient, and undignified treatment of *pro se* litigants in the courtroom. On several occasions, the judge had warned self-represented parties before her that if they

“want to lose, annoy me” or “if you annoy me, that would be a bad thing” or words to that effect. The judge chastised, belittled, and berated certain *pro se* litigants and prevented some litigants from fully presenting their case by interrupting them without justification. Fear of the judge’s temper or sarcasm intimidated other litigants and discouraged some of them from presenting their testimony or their posi-

A judge should not create an appearance that a represented party is in a special position to influence the judge.


tions in court. (To illustrate the judge’s injudicious manner, an audio recording of portions of one hearing was made part of the record and is on the Commission web-site.) *In re Eiler*, Stipulation, Agreement, and Order of Reprimand (Washington State Commission on Judicial Conduct February 4, 2005) (www.cjc.state.wa.us)

A judge should not create an appearance that a represented party is in a special position to influence the judge (Canon 2C). Calling a represented party’s attorney by his or first name, or granting the attorney casual access to judicial chambers, may give an improper impression to an unrepresented opponent.

The canons also require judges to maintain order and decorum in proceedings before them (Canon 3A(2)), while at the same time according to every litigant “full right to be heard according to law” (Canon 3A(4)), avoiding delay, and achieving the expeditious resolution of cases (Canon

3A(5) and Commentary to Canon 3A(3)). Issues may arise in reconciling the duty to accord every litigant “full right to be heard according to law” (Canon 3A(4)) with the duty to remain impartial in fact and in appearance (Canons 2, 2A and 3). May a judge assist an unrepresented litigant and, if so, to what extent? On the other side of the coin, how far may a judge go in attempting to dissuade a litigant from proceeding without representation?

In some instances, explanations may go a long way in maintaining the *pro se* litigant’s trust in the court system. The judge may point out that the rules must be the same for both sides. Staff can explain that the judge may not talk to either side without both present so that both parties are assured they are treated the same and each has the opportunity to present their position on every issue. An explanation of why evidence is not admissible may prevent a perception that the judge is being unfair, arbitrary, or wrongly hindering presentation of the litigant’s case.

A judge has no obligation to cater to a disrespectful or unprepared litigant, or to make any effort which might put another party at a disadvantage. However, a judge should take care that a litigant is never penalized merely because he or she is appearing *pro se*. 

Margaret Childers is executive director of the Alabama Judicial Inquiry Commission. An earlier version of this article was first published in the summer 2004 issue of the Commission’s Judicial Conduct Letter.

Private Sanctions and Informal Dispositions *(continued from page 3)*

early stage but may be used to elevate discipline in subsequent proceedings particularly where the judge repeats the conduct. In 2004, the Commission issued eight private admonitions. For example, the Commission privately admonished a judge who used a court computer extensively during court hours for a purpose specifically prohibited by court policy and a second judge who failed to disqualify in collection matters involving financial institutions that had pending lawsuits against the judge for unpaid debts although the rulings did not evidence bias.

The California Commission issued 13 advisory letters in 2004; an advisory letter cautions or expresses disapproval of a judge's conduct and "is especially useful when there is an appearance of impropriety" or actionable misconduct is "offset by substantial mitigation." Letters were sent, for example, to two judges who did not take action on petitions for writs of habeas corpus within time limits and to a judge who participated in a public meeting where a case pending before the judge was discussed.

Letters

In 2003, the New York State Commission on Judicial Conduct issued 30 letters of dismissal and caution and four letters of caution noted in its annual report (available at www.scjc.state.ny.us). A letter of dismissal and caution contains confidential suggestions and recommendations to a judge issued upon conclusion of an investigation in lieu of commencing formal disciplinary proceedings. A letter of caution is a

similar communication issued upon conclusion of a formal disciplinary proceeding and a finding that the judge's misconduct is established.

For example, the Commission cautioned one judge for visiting a scene at issue in a pending case without the knowledge or consent of the parties, one judge for isolated discourteous, intemperate, or offensive demeanor toward a litigant, and three judges for

and a second judge for losing his temper and using intemperate language while attending a public meeting in an official capacity.

The New Mexico Judicial Standards Commission annual report for 2004 includes summaries of private letters of caution. For example, the Commission sent private letters of caution to a judge who allegedly engaged in an ex parte communication

with a plaintiff in a landlord-tenant action about the refund of a rental deposit and to a second judge who allegedly failed to comply with the law concerning contempt and bail and did not place a witness under oath prior to testifying.

Although these actions are confidential, some commissions include redacted versions in their annual reports.

inordinate delays in scheduling or deciding cases typically because of poor records and case management. Letters were also sent to one judge for using judicial letterhead in a private dispute and to two judges for invoking their judicial office in connection with fund-raising events.

In fiscal year 2004, according to its annual report (available at www.scjc.state.tx.us), the Texas State Commission on Judicial Conduct issued six private orders of additional education, five private warnings, three private reprimands, and eight private admonishments. For example, the Commission privately admonished a judge who sent an e-mail to various individuals, including judges and attorneys, soliciting donations for the Multiple Sclerosis Society, with the judge's name and title in the heading of the e-mail. The Commission also privately admonished a judge for comparing plaintiffs in a case and their legal claims to "Scrooge and Marley"

Details omitted

Its 2004 annual report notes that the Minnesota Board on Judicial Standards privately warned 10 judges. The report gives samples of conduct found to be improper "to educate the public and to assist judicial officers in the avoidance of improper conduct" although to maintain confidentiality, certain details were eliminated. Some of the examples were delaying decisions in submitted cases for an unreasonable time or failing to issue an order in a submitted case within the statutory 90-day period; providing legal advice to the judge's ex-spouse; appearing before a city council to promote and raise funds for a charitable or civic project unrelated to the law, the legal system, or the administration of justice; and ordering a criminal defendant to pay a fine to a specific charitable organization as a condition of sentence.

(continued on page 10)


Private Sanctions and Informal Dispositions *(continued from page 9)*

The 2003 annual report of the Michigan Judicial Tenure Commission (available on-line at jtc.courts.mi.gov/) describes 22 letters of explanation, caution, or admonishment sent to judges. Judges were, for example, cautioned and admonished for taking more than two years to resolve a matter involving minor children in a divorce action and keeping matters under advisement for extended periods with no system to “tickle” them back to the judge’s attention. Other examples included engaging in sarcastic, insolent conduct in dealing with the city council and making unprofessional, vulgar remarks when appearing there and having occasional ex parte contact with state family services agency employees. Finally,

judges were cautioned about allowing the judge’s name to be used in support of a golf fund-raising event and notifying friends of a luncheon to benefit a charity.

In its annual report, the Kansas Commission on Judicial Qualifications lists examples of conduct found to be improper. In 2004, the Commission cautioned a judge, for example, for sending or forwarding inappropriate jokes or photographs via e-mail, privately ordered a judge to cease and desist from holding contempt hearings without preserving a record of the proceedings, cautioned a judge about participating in an event to raise funds for a legal organization, and cautioned a judge who allowed

counsel several continuances on the importance of taking a leadership role in managing litigation to avoid delay.

The Kansas Commission annual report also gives examples of conduct it found to be proper or outside the Commission’s jurisdiction. For example, the report notes that the Commission dismissed allegations that a judge tampered with the jury of another judge when its investigation indicated that the judge was out of town on the day alleged. The Commission also found no violation based on allegations that a judge ordered a family member to leave the court room because the family member was a witness in the proceeding and witnesses had been sequestered. 

Charity Image Campaigns *(continued from page 3)*

to promote the university’s visibility, enhance its name-recognition, and generate good-will and was not specifically focused on fund-raising or directed specifically at potential donors or contributors.

In its advice, the committee relied on the prohibition on a judge using the prestige of office to advance private interests. The committee interpreted the phrase “private interest” to include “virtually all interests other than interests possessed by the judiciary or by the public at large.” The committee concluded:

The advertisement . . . clearly is designed to enlist the prestige of your office in advancing the University’s interests. Indeed, without in any way diminishing the importance and value to the University of the personal reputation you have developed, it is safe to say that the advertisement’s primary impact on readers unfamiliar with you personally is likely to flow from the position the advertisement says that you hold.

The Massachusetts committee distinguished an earlier opinion in which

it had stated that a law school may use a judge’s photo and biographical sketch in a booklet about judges who attended the school that would be distributed to prospective students. *Massachusetts Advisory Opinion 98-1*. In that opinion, the committee had concluded that the use of the judge’s name, likeness, and biographical information in a brochure would simply allow the school to “enjoy the benefit any educational institution reaps from the success of its graduates — a benefit which, in our view, is not significant enough to implicate the Canons.”

Stating the promotional activity at issue in the earlier opinion “lies near the outer boundary” of permitted activity, the committee stated that the proposed advertisement at issue in *Massachusetts Advisory Opinion 00-6* “represents something very different.”

[I]t appears to be a ringing personal endorsement of the University’s educational value and an energized exhortation to give the University an opportunity to perform individualized work of transcending

value. . . . [T]he proposed advertisement does not simply place facts before the public in a context that invites inferences favorable to the University. Instead, it presents to the public an endorsement deriving much of its considerable impact from the judicial office you hold.

In contrast, the Florida advisory committee stated that a judge may authorize the judge’s college alma mater to feature the judge in an advertising campaign that profiles successful alumni in order to inspire others to consider higher education where the ad will not be used to generate funding. *Florida Advisory Opinion 97-28*. The college was planning a marketing campaign designed to heighten the public’s awareness of the accessibility and value of higher education. Part of the campaign would feature high profile and successful alumni whose experience at the college may inspire others to consider higher education. The ad would include the judge’s picture with a brief biographical narrative of the judge’s experiences at the college.


Similarly, the New York judicial ethics committee advised that a judge may allow his or her name, photograph, and biography to be used by the university from which the judge graduated in an advertising campaign to recruit students to its colleges and law school. *New York Advisory Opinion 02-21*. The advertisement would include the judge's picture in judicial robes and outline the judge's "colleges and law school pathways . . . degrees and . . . position as a judge." The advertisements would appear in the subway, newspaper educational sections, the university's television channel, its website, college newspapers, and high schools. The judge would be one of six graduates highlighted.

The committee concluded, "any rule that would have a judge seek to bar his/her alma mater from pointing to its graduates' achievements as reasons to consider enrolling would, we believe, contravene the common sense mandate that the [code of judicial conduct] be regarded as rules of reason." However, the committee cautioned that the judge should "endeavor to insure that his/her participation in the advertising program satisfies" concerns about

fund-raising and should "exercise oversight over the manner the institution communicates such materials to the public." See also *New York Advisory Opinion 96-75* (the law school from which a judge graduated may use the judge's photograph taken in the judge's courtroom on a promotional postcard that features the judge as a "high achieving alumna"); *New York Advisory Opinion 91-19* (a judge may write a letter to prospective college students that sets forth the judge's feeling about the judge's alma mater

her picture and title to be used in a national magazine advertising campaign to raise awareness of the American Indian College fund even though the program hopes that readers will donate to the fund. *Utah Informal Advisory Opinion 01-3*. The purpose of the campaign was not primarily to raise funds but to address stereotypes about Native Americans and to offer role models to young Native Americans. See also *Florida Advisory Opinion 95-44* (a judge may not write a positive letter about his or her education at

a local high school for a display that will inform potential purchasers that they need not fear purchasing homes in the school district where their children will be assigned to the school); *South Carolina Advisory Opinion 4-2002* (a judge may appear on a billboard for the Girl Scouts that is part of an image campaign, not a money-raising cam-

campaign); *Washington Advisory Opinion 02-1* (a judge may appear and be identified by name and title in a county bar foundation informational video to speak about receiving a minority law student scholarship from the foundation even if on occasion the video is used for fund-raising); *Washington Advisory Opinion 00-14* (a judge may make statements about past experiences as a member of a charitable organization to be used in newspaper advertisements educating the public about the positive impact of the organization on the lives of successful people if the judge's title is not used); *Washington Advisory Opinion 00-6* (a judge may be featured in an article about cancer survivors for the newsletter of a non-profit medical facility from which the judge received extensive treatment if the judge's title is not used). 

The committee interpreted the phrase "private interest" to include "virtually all interests other than interests possessed by the judiciary or by the public at large."

and personal information about the judge's legal career provided there is no fund-raising).

There are a number of judicial ethics advisory opinions that address participation by judges in image campaigns for organizations other than universities, colleges, or law schools. For example, the Utah committee stated that a judge may allow his or

Judicial Conduct Reporter
Spring 2005

Allan D. Sobel
Executive Vice President
and Director

Cynthia Gray
Director,
Center for Judicial Ethics
cgray@ajs.org

American Judicature Society
The Opperman Center
at Drake University
2700 University Avenue
Des Moines, IA 50311
Phone: 515-271-2281
Fax: 515-279-3090
www.ajs.org

Published quarterly,
\$32 per year; single copy \$9

© 2005
American Judicature Society
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/.



The Opperman Center
at Drake University
2700 University Ave.
Des Moines, Iowa 50311

Nonprofit Org.
U.S. POSTAGE
PAID
Chicago, Illinois
Permit No. 2482

JUDICIAL CONDUCT REPORTER

Focus on Judicial Conduct



August 5-6, 2005 • Chicago, Illinois
Le Meridien Hotel, 521 N. Rush Street

FRIDAY AFTERNOON, August 5, 2005

Evaluating the Model Code of Judicial Conduct

Representatives from the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct and the Society will discuss crucial issues in the current model code revision. Possible topics include the appearance of impropriety standard, charitable fund-raising, and gifts.

SATURDAY MORNING, August 6, 2005

The Harder They Fall: A Hand Up for Impaired Judges

What programs are available to assist judges suffering from alcoholism, depression, or other impairment? What is the best way for colleagues to help a judge with a problem while maintaining public confidence in the judiciary? *Co-sponsored by the American Bar Association Commission on Lawyer Assistance Programs.*

For further information and registration, visit www.ajs.org, or call Beth Tigges at 515-271-2283.