JUDICIAL CONDUCT REPORTER

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NCSC
NATIONAL CENTER FOR STATE COURTS
Center for Judicial Ethics

New director of the Center for Judicial Ethics

David J. Sachar is the new director of the Center for Judicial Ethics of the National Center for State Courts. In addition to overseeing the work of the CJE, he will expand training and support for judicial conduct commissions, judges, and court systems in the U.S. and in other countries as part of NCSC's rule of law work. Sachar had been the executive director of the Arkansas Judicial Discipline & Disability Commission since 2013. Cynthia Gray continues to work for the CJE part-time as Director Emeritus.

Personal use of court resources

In a judicial discipline case, the Oregon Supreme Court explained that "taxpayers have a right to expect that the employees and the materials for which they pay will be used for public purposes," and, therefore, a judge who uses public resources to "obtain substantial personal and political benefits . . . runs afoul of the requirement to 'act * * * in a manner that promotes public confidence in the integrity * * * of the judiciary.'" The Court held that a judge's "extensive use of his judicial assistant's time, and of state property and equipment, for personal and campaign purposes" violated then-Canon 2 of the code of judicial conduct. *Inquiry Concerning Gallagher*, 951 P.2d 705 (Oregon 1998).

In 2007, specific provisions were added to the American Bar Association *Model Code of Judicial Conduct* to expressly prohibit judges from:

- Using "court premises, staff, stationery, equipment, or other resources" while engaging in extra-judicial activities (Rule 3.1(E)), and
- Using "court staff, facilities, or other court resources in a campaign for judicial office" (Rule 4.1(A)(10)).

Rule 3.1(E) creates exceptions for an "incidental use for activities that concern the law, the legal system, or the administration of justice" and a use "permitted by law."

Judges have been sanctioned for using court staff, court facilities such as the courtroom and chambers, court resources such as letterhead, mail, phone, voicemail, email, and Internet services, and court equipment such as photocopiers, fax machines, and computers to perform personal tasks for themselves and their families and to support their charitable pursuits, business and financial interests, and political activities.

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Examples of uses of court resources for personal tasks for which judges have been disciplined:

- A judge had his judicial secretary create documents related to his personal interests such as father-son competitive tennis and a cabin he owned and allowed others to use. ***In the Matter of Quall*, Decision and order** (California Commission on Judicial Performance June 2, 2008).
- A judge used court staff to perform personal errands for herself, her mother, and her son, for example, having her secretaries work on materials for her mother's church. *In re Alford*, 977 So. 2d 811 (Louisiana 2008).
- A judge required her court staff during work hours to, for example, take her car to the dealership, refuel her car, pay her bills, wait at her house for cable television to be installed, and stain her deck. *In re Brennan*, 929 N.W.2d 290 (Michigan 2019).
- While separated from his then-wife, a judge used a court cell phone to place 142 calls over five days to try to reach her. *In re Trudel*, 638 N.W.2d 405 (Michigan 2002).
- A judge directed court employees during normal court business hours to, for example, provide Spanish translating services at his mother's nursery business and to chauffeur him to and from his home for various purposes. *In the Matter of Davis*, 946 P.2d 1033 (Nevada 1997).
- A judge had court staff pick up her daughter from school and supervise her daughter while she was on the bench; drive the judge to the hair salon and to go shopping; type, print, and/or copy religious material; and accompany her to a Home Depot during business hours to purchase plants for a church function and then help her repot the plants. ***In the Matter of Brigantii-Hughes*, Determination** (New York State Commission on Judicial Conduct December 17, 2013).
- A judge repeatedly had her secretary babysit her children during court hours at the courthouse and had her secretary, for example, take her daughter to the doctor, the pharmacy, and her parents' home and transport her son to his day care provider. The judge also had her secretary perform personal typing for her husband during business hours, for example, typing revisions to his resumé, cover letters and a description of his teaching philosophy for his application for employment at a community college, an email and a summary of his career achievements for his application for a Marine Corps award, and forms with basic personal information related to his duties while a Marine. ***In the Matter of Ruhlmann*, Determination** (New York State Commission on Judicial Conduct February 9, 2009).
- A judge allowed her secretary to help plan her daughter's Bat Mitzvah and perform other personal tasks for her using the court email account. ***In the Matter of Polk*, Determination** (New York State Commission on Judicial Conduct January 24, 2022).

The Court held that a judge's "extensive use of his judicial assistant's time, and of state property and equipment, for personal and campaign purposes" violated then-Canon 2 of the code of judicial conduct.

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- On numerous occasions adding up to hundreds of hours, a judge used her law clerk for personal tasks such as providing companionship for an ill and elderly member of her family; shopping for groceries; doing yard work, home maintenance, and cleaning; and organizing, and packaging her antiques and collectibles. *In re Lokuta*, 11 A.3d 427 (Pennsylvania 2011), *affirming*, 964 A.2d 988 (Pennsylvania Court of Judicial Discipline 2008).
- A judge directed his judicial assistant, while being paid by the state, to obtain airfares and schedules for him, book a flight unrelated to his work, pick up his dry cleaning, and make haircut appointments. The judge directed his judicial assistant to use official letterhead and government computers to type personal documents for him, including jokes and limericks, the minutes of a neighborhood meeting, a pleading in his divorce, and letters to his lawyer and his ex-wife about his divorce, to the Consul General of France to secure a visa for his daughter, to the president of the electric company about service at his residence, to a computer publication and *Golf World* magazine threatening to report their practices to the state attorney general's office, and to acquaintances about his St. Patrick's Day party. *Inquiry Concerning Gallagher*, 951 P.2d 705 (Oregon 1998).
- While on duty at the magisterial offices, a judge used Internet facilities in a way that was contrary to county directives. *In the Matter of Abraham*, 583 S.E.2d 435 (South Carolina 2003).
- A judge used court computer equipment and Internet services to access adult-only sites, on-line auctions, personal financial sites, shopping sites, and travel sites. *In re Furman*, Stipulation, agreement, and order (Washington State Commission on Judicial Conduct June 2, 2000).

Examples of use of court resources for community activities for which judges have been disciplined:

- A judge used his title, court resources, and a report prepared for the court about its DUI program to promote a non-profit organization that he had created to provide education and training for repeat DUI offenders. *In the Matter of Vlavianos*, Decision and order (California Commission on Judicial Performance February 8, 2023).
- A judge had his court secretary spend approximately 24 workdays on tasks for a charity, including creating a 94-page mailing list, generating a fundraising letter, and typing labels, envelopes, by-laws, and personnel policies. *Inquiry Concerning Hyde*, Decision and order (California Commission on Judicial Performance May 10, 1996).
- A judge had court staff sell tickets to a fundraising auction for medical relief missions in Kenya and Tanzania and used his judicial secretary to create documents related to those missions. *In the Matter of Quall*, Decision and order (California Commission on Judicial Performance June 2, 2008).

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- A judge had his court staff accept donations from persons at whose weddings he had officiated and deliver the donations to charities. *In the Matter of Smoger*, 800 A.2d 840 (New Jersey 2002).
- A judge allowed his wife to use his chambers and telephone to solicit funds, including from lawyers who regularly appeared before him, for the non-profit organization for which she worked as executive director; the organization recruited, trained, and oversaw volunteer court-appointed special advocates for children in juvenile dependency proceedings and regularly appeared before the judge. *In the Matter of Castellano*, 889 P.2d 175 (New Mexico 1995).
- A judge permitted his office and courtroom to be used for organizational meetings for the area Halloween Parade. *In re Hartman*, 873 A.2d 867, 873 A.2d 875 (Pennsylvania Court of Judicial Discipline 2005).
- A judge permitted his chambers to be used for the sale of sweaters knit by a Russian immigrant nun for the benefit of an immigrant group. *In re Arrigan*, 678 A.2d 446 (Rhode Island 1996).

Examples of use of court resources in business and financial interests for which judges have been disciplined:

- A judge used court staff, resources, and facilities for his personal real estate business; for example, he instructed tenants to call him at the courtroom number, used his court clerk as the contact person for tenants, made calls from his chambers to businesses and the city housing authority, sent and received faxes from the agents for one of the properties, had his clerk prepare letters and legal notices to quit, had his clerk and bailiff accept rental payments in his courtroom, and used chambers stationery for correspondence. ***Public Admonishment of Watson*** (California Commission on Judicial Performance February 21, 2006).
- A judge used his secretary to manage his 16 rental properties; she maintained files on each tenant at her workstation, collected rent in his chambers, met with prospective tenants to sign leases in his chambers, prepared and mailed correspondence about late rent, prepared and filed eviction complaints, appeared in eviction actions, deposited rental payments, and corresponded with agencies about violations, bills, and taxes. *In re Berry*, 979 A.2d 991 (Pennsylvania Court of Judicial Discipline 2009).
- From her chambers during official time and using her judicial assistant and court-issued computer, a judge facilitated the sale of the book she had written and promoted her services as a speaker. *Inquiry Concerning Hawkins*, 151 So.3d 1200 (Florida 2014).
- An appellate judge solicited law enforcement groups, hospitals, and medical societies for paid speaking engagements using his judicial letterhead, computer, and email address and dictated the solicitations for his secretary to transcribe. ***In re Steigman*** (Illinois Courts Commission August 13, 2018).

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- Registering a for-profit corporation and identifying herself as doing business under an assumed name, a judge produced and hosted the "Winning Ways" television program during court hours in her chambers, had court personnel perform tasks related to the program during court hours, used the court postage system to circulate correspondence and advertisements for the program, and used the court's phone service, voicemail system, fax machine, photocopy machine, and other court materials for the program. *In the Matter of Cooley*, 563 N.W.2d 645 (Michigan 1997).
- A judge conducted his antiques business from his chambers, stored antiques throughout the courthouse, sold the antiques to persons with whom he had contact at the courthouse, directed court employees to chauffeur him when he shopped for antiques, and directed city employees and jail trustees to move antiques in and out of the courthouse. *In the Matter of Davis*, 946 P.2d 1033 (Nevada 1997).
- A judge directed his judicial assistant, while she was being paid by the state, to type letters about his financial interests in Ireland, about the collection of a personal debt, to the commissary of a military base complaining about cash register errors, to the president of Nordstrom's about the price of a suit, to the president of United Airlines about bereavement rates, to his wife and siblings about his father's estate, and to a golf club disputing charges on his bill. *Inquiry Concerning Gallagher*, 951 P.2d 705 (Oregon 1998).
- A judge had judicial employees grade papers for classes she was teaching and copy handouts for the class on the court's copier. *In re Muth*, 220 A.3d 1220, 237 A.3d 635 (Pennsylvania Court of Judicial Discipline 2019).

Examples of use of court resources in campaign and political activities for which judges have been disciplined:

- A judge running for re-election sent approximately 15 emails from his official court account stating, "I'm canvassing your neighborhood and no one's home. Would you allow me to post a yard sign until the primary?" *In the Matter of Grodman*, Order (Arizona Supreme Court September 23, 2015).
- A judge distributed nail files that stated "Bruce Staggs – Justice of the Peace, Benson JP Court" during court hours and kept in his judicial office his nominating petitions and binders with political endorsements, campaign promotional materials, and voter registration lists that included his notes on his personal interactions with those on the lists and whether they assisted him with his campaign. *Staggs*, Order (Arizona Commission on Judicial Conduct November 17, 2020).
- During his re-election campaign, a judge used the court's inter-office mail system to ask court and county employees to collect signatures on a petition in lieu of filing fees, resulting in some employees soliciting

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signatures during working hours and/or in public facilities, and talked to court employees and staff about his campaign during working hours. *Inquiry Concerning McGraw*, Decision and Order (California Commission on Judicial Performance April 3, 2003).

- A judge allowed the drug court coordinator to engage in activities in support of his campaign during work hours and coordinated the distribution of a campaign yard sign with a drug court participant in the courtroom. *In the Matter of Miller*, 178 N.E.3d 1194 (Indiana 2022).
- A judge used his courtroom as the setting for campaign photos of himself and his dog. *Inquiry Concerning Hatfield* (Kansas Commission on Judicial Conduct July 16, 2021).
- A judge used court staff to work on her campaign during work hours, including having them place and deliver campaign signs, write thank-you notes, and hold a campaign sign on Election Day. *Gentry v. Judicial Conduct Commission*, 612 S.W.3d 832 (Kentucky 2020).
- A judge's administrative assistant collected contribution checks to the judge's campaign. *In re Alford*, 977 So. 2d 811 (Louisiana 2008).
- A judge's minute clerk organized a fundraising dinner in support of the judge's re-election campaign and solicited contributions for the event. *In re Cannizzaro*, 901 So. 2d 1035 (Louisiana 2005).
- A judge told the members of his court staff that they each had to sell 20 tickets to his campaign fundraising event or contribute to his campaign and instructed them to hand-deliver tickets for the fundraiser to lawyers and law firms on court time. *In re King*, 857 So. 2d 432 (Louisiana 2003).
- A judge used court equipment, supplies, and personnel for campaign purposes without reimbursing the court. *In re Trudel*, 638 N.W.2d 405 (Michigan 2002).
- A trial court judge used county resources for his campaign for the court of appeals; directed his staff to accept, handle, and deliver campaign contributions and funds; and allowed his staff to work on his campaign during work hours and at public expense, for example, having them pull cases in which the city was the party prior to a meeting to ask for the mayor's endorsement, compile for fundraising purposes a list of attorneys who had appeared before him in cases involving casinos, and respond to candidate-screening committees. *Disciplinary Counsel v. Horton*, 140 N.E.3d 561 (Ohio 2019).
- For an annual golf tournament held to raise funds for his re-election campaigns, a judge had his judicial assistant use state property and equipment to, for example, type the invitation to the event, answer telephone inquiries, prepare the lists of pairings and tee times, take prizes to the site, collect money and perform other administrative functions, and ride around the course in a golf cart with the videographer recording the tournament. *Inquiry Concerning Gallagher*, 951 P.2d 705 (Oregon 1998).

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- A judge asked court employees to engage in activity in support of his re-election campaign during court time. *In re Allan*, Order of reprimand and closure (Washington State Commission on Judicial Conduct June 3, 1994).
- A volunteer delivered letters soliciting contributions to a judge's re-election campaign to the courthouse mailroom for distribution to 30 to 40 individuals with courthouse addresses. *In re Paja*, Stipulation, agreement, and order (Washington Commission on Judicial Conduct December 4, 1998).
- A judge used his public email account during work hours "to express political views that are not allowed by members of the judiciary." *In re Swingley*, Stipulation for public reprimand (Montana Judicial Standards Commission November 12, 2019).
- A magistrate used a court copier to copy an announcement of a Democratic party picnic. *In the Matter of Hull*, Public admonishment (West Virginia Judicial Investigation Commission September 3, 1996).

Leaving the bench

A judge who is retiring or resigning or who has not been re-elected or re-appointed can seek post-judicial employment while still serving as a judge. As the New Jersey Supreme Court explained, although requiring a judge to wait until after leaving the bench to look for a new job would be the safest way to avoid the judge "overstepping any boundaries or raising an appearance of impropriety," the code of judicial conduct does not require such an "impractical" approach. *DeNike v. Cupo*, 958 A.2d 446 (New Jersey 2008). Similarly, the Florida judicial ethics committee advised that "no judicial canon prohibits a judge from seeking employment elsewhere while remaining in office," and a judge who is contemplating resigning is not required to leave before beginning the search for a new job. *Florida Advisory Opinion 2022-7*. The New York advisory committee stated that "a judge planning for retirement may seek future employment with law firms, governmental agencies or educational institutions" and mention their "current position and experience." *New York Joint Advisory 2005-35/Opinion 2010-78*. However, the committee warned judges not to use "official stationery or resources in soliciting potential future employers." The advisory committee for federal judges concluded that "a judge contemplating retirement or resignation appropriately may explore a professional relationship with law firms or other potential employers . . . in a dignified manner." *U.S. Advisory Opinion 84* (2009). *See also South Carolina Advisory Opinion 6-1998* (prior to retirement, a judge may enter into an employment contract that will take effect after the date of their retirement).

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Disqualification

However, looking for a new job may raise issues about a judge's impartiality in some circumstances, as can all extra-judicial activities. A comment to Rule 3E of the 1990 American Bar Association *Model Code of Judicial Conduct* identified a judge's negotiations for post-judicial employment with a law firm as an example of circumstances in which a judge's impartiality might reasonably be questioned, and, therefore, disqualification would be required when the firm appears in a matter before the judge. That comment was not included in the 2007 ABA model code, but the rationale for disqualification in cases involving potential employers remains valid.

Rule 3.17(B)(5) of the New Jersey code does have an express disqualification requirement for judges conducting job searches:

> Judges shall disqualify themselves if the judge has initiated contact about or discussed or negotiated his or her post-retirement employment with any party, attorney or law firm involved in any matter pending before the judge in which the judge is participating personally and substantially . . . .

The New Jersey Supreme Court adopted that rule after having to reverse a judgment entered in a civil case because the judge in the case had begun preliminary negotiations with a lawyer appearing in the matter and the Court found that a reasonable, fully informed person would have had doubts about the judge's impartiality. *DeNike v. Cupo*, 958 A.2d 446 (New Jersey 2008). *See also In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Circuit 1990) (when a judge received an offer of employment the day after he awarded $700,000 in legal fees to the firm making the offer, the judge should "have rejected the offer outright" or, if he wanted to consider it, should have recused and vacated the ruling); *Pepsico v. McMillen*, 764 F.2d 458 (7th Circuit 1985) (a judge's disqualification was required after a headhunter he had retained had, without his knowledge, asked both firms appearing in a case on trial before him if they were interested in discussing future employment, even though the contact was "preliminary, tentative, indirect and unauthorized," one firm did not return the headhunter's call, and the other firm replied that it was not interested); *Scott v. United States*, 559 A.2d 745 (D.C. Circuit 1989) (a judge who was actively negotiating for a position with the executive office of the U.S. Department of Justice should have disqualified himself from a prosecution by the U.S. Attorney for the District of Columbia, a division of the DOJ); *Voeltz v. John Morrell & Co.*, 564 N.W.2d 315 (South Dakota 1997) (there was an unacceptable risk of actual bias requiring disqualification when an administrative law judge was negotiating employment with the employer in a workers' compensation benefits case pending before her).

Judicial ethics committees have also advised judges to recuse themselves from cases involving prospective employers. For example, the Michigan committee stated, "To avoid accusations that the judgment or the judge's position has been maneuvered for personal gain of the judge or the prospective employer," a judge should "automatically" recuse when the judge has begun negotiations for employment and a matter involving

Looking for a new job may raise issues about a judge's impartiality in some circumstances as can all extra-judicial activities.

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the prospective employer is assigned to the judge. *Michigan Advisory Opinion JI-35* (1991). *Cf.,* *Alaska Advisory Opinion 1999-1* (a judge should disclose and offer to recuse when they are discussing employment with any party, witness, attorney, government entity, or law firm directly involved in litigation pending before the judge); *Florida Advisory Opinion 2022-7* (if a judge applies for employment with a party or a law firm appearing before them, recusal "will likely" be necessary).

The Illinois committee emphasized that a judge is disqualified when they are negotiating future employment with a law firm "even if the employment discussions are in an initial or early stage." *Illinois Advisory Opinion 2007-1*. Preliminary inquiries to firms about the possibility of future employment, the committee concluded, raise reasonable questions about a judge's impartiality even if "serious negotiations and a final employment decision" are postponed until after the judge's last day in office.

Similarly, emphasizing that the appearance of partiality "attaches at the initial stages of negotiating post-judicial employment," the Arizona committee advised that a judge who "approaches or engages with a prospective employer and begins negotiation for future employment" should disqualify from any matter in which the prospective employer appears and that disqualification cannot be waived. *Arizona Advisory Opinion 2022-1*. The advisory committee for federal judges stated that, after initiating discussions with a law firm—no matter how preliminary or tentative—a judge should recuse from any matter in which the firm appears, subject to remittal. *U.S. Advisory Opinion 84* (2009).

In contrast, the New York judicial ethics committee suggested that whether disqualification was necessary depended "in part on the impetus for and purpose" of a judge's initial contact with a potential employer. *New York Joint Advisory Opinion 2005-35/2010-78*. The inquiring judge had met with members of a law firm about possible employment, but they had not discussed compensation, and no offer had been made. If the meeting was primarily informational, disqualification was not required, the committee stated, for example, if the purpose was for the judge to determine if the "firm is interested in adding a new member and, if so, whether the judge could be a viable candidate" or for the firm "to learn whether the judge would consider post-retirement employment with the firm." The committee concluded that the judge's impartiality could not reasonably be questioned after such a preliminary conversation.

However, the opinion stated, "once a judge affirmatively seeks employment with a law firm" by applying, lobbying, "or otherwise actively pursuing employment, the judge must disqualify him/herself when that law firm subsequently appears in the judge's court as long as there is any possibility that the firm may offer the judge employment," although the disqualification is subject to remittal. *See also* *New York Advisory Opinion 2017-27* (post-judicial employment discussions with law firms, governmental agencies, television networks, or educational institutions do not require disclosure or disqualification, but, if the judge affirmatively seeks employment by applying, lobbying, or otherwise actively pursuing employment opportunities with a

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law firm or entity that appears before them, they must disqualify themself when it appears, subject to remittal if appropriate); *New York Advisory Opinion 2014-6* (a judge who had applied and interviewed for town attorney "may" be disqualified from cases involving the town during the process); *New York Joint Advisory Opinion 2011-18/2011-42* (a judge may apply for a position as a school superintendent, school district administrator, or private arbitrator but must disqualify themself if their prospective employer appears as a party).

A judge is disqualified from any matters involving a law firm, agency, company, or other employer after accepting its offer for a post-retirement position. *See Alaska Advisory Opinion 1999-1* (after accepting a post-bench job, a judge should recuse from litigation in which their future employer is involved and disclose the basis for the recusal); *South Carolina Advisory Opinion 6-1998* (after entering into an employment contract prior to retiring, a judge should disqualify themself from matters involving the firm or company that will employ them on their retirement).

Past negotiations

If after applying for a particular position, a judge eventually does not accept the job, the Michigan committee advised that the judge should, for a reasonable time, continue to disclose the negotiations to all parties in a case involving the prospective employer and disqualify unless the disqualification is waived. *Michigan Advisory Opinion JI-35* (1991). The committee stated that what constitutes a "reasonable time" depends on "factors such as the length of time the negotiations have been in progress, the notoriety of the negotiations, and whether the break in negotiations was amicable." *Accord Arizona Advisory Opinion 2022-1*.

Similarly, the New York committee stated that, if a judge is offered employment by a law firm, but no employment results, whether disqualification is warranted and whether remittal is available "will depend on the specific circumstances of the negotiations." *New York Joint Advisory Opinion 2005-35/2010-78*. For example, the committee explained, if the judge developed a personal bias or prejudice about the firm during the negotiations, the judge must disqualify themself when the law firm appears in a case. *Cf., New York Advisory Opinion 2017-93* (a judge is disqualified from matters involving the district attorney's office after applying for a job in that office but, if no employment results, the judge is no longer disqualified at the end of the application process); *New York Advisory Opinion 2013-30* (unless they cannot be impartial or their impartiality might reasonably be questioned in a particular case, a judge who formally interviewed for the position of executive director of the housing authority is not disqualified from cases involving the agency when, a few days after the interview, they notified it that they no longer want to be considered for the position).

Finally, the federal advisory committee recommended that, if a judge decides not to leave the bench after beginning negotiations for future employment, "the judge should continue to recuse from cases involving the firms or entities with which the judge negotiated, subject to remittal" for "at least one year from the conclusion of the negotiations." *U.S. Advisory Opinion*

Because of the disqualification ramifications, some states prohibit a judge from applying to prospective employers that are currently appearing in cases before them.

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84 (2009). The "appropriate interval" for recusal might be longer, the committee stated, depending "on the circumstances, including the nature and scope of the negotiations . . . ."

Applying

Because of the disqualification ramifications, some states prohibit a judge from applying to prospective employers that are currently appearing in cases before them. Such a prohibition reflects the professional conduct rule for attorneys that states: "A lawyer shall not negotiate for employment with any person who is involved . . . in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer . . . ." Rule 1.12(b), American Bar Association *Rules of Professional Responsibility*.

Comment 8 to Rule 3.17(B)(5) of the New Jersey code of judicial conduct has a corresponding rule:

> A judge may not initiate contact about or discuss or negotiate his or her post-retirement employment with any party, attorney or law firm involved in any matter pending before the judge in which the judge is participating personally and substantially.

The comment notes that this ban lasts as long as a matter before the judge "has not been completed, even if only the performance of a ministerial act remains outstanding, such as signing a consent order or a similar order." Further, the comment explains that, if the subject of future employment with any party, attorney, or law firm involved in any matter pending before the judge "is raised in any fashion," the judge must halt "the discussion or negotiation at once, rebuff any offer, and disclose what occurred on the record" to allow the judge, the parties, and the attorneys to "evaluate objectively whether any further relief is needed," an apparent reference to possible disqualification of the judge. *Cf., Illinois Advisory Opinion 2007-1* (if a judge "unequivocally and immediately" terminates discussion of employment when approached by a firm or lawyer involved in a case and that contact was not solicited by the judge or the judge's agent, disqualification is not required).

Similarly, the Michigan judicial ethics committee advised that "a judge shall not negotiate for employment with any person who is involved as a party or as a lawyer for a party in a matter in which the judge is participating personally and substantially." *Michigan Advisory Opinion JI-35* (1991). The committee acknowledged that "rules governing employment negotiation should not be so restrictive as to inhibit transfer of employment from the bench," but concluded that a judge seeking private employment should avoid "'pressure' situations" in which they may feel tempted to impress a prospective employer or "to bend over backwards to avoid the impression of favoritism." The Connecticut committee cautioned that a judicial official looking for a new job should only contact law firms that are not currently appearing before them. *Connecticut Informal Advisory Opinion 2008-8*.

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Past and future appearances

Judicial ethics committees have advised that past appearances before a judge may make a prospective employer off-limits when the judge begins searching for a new job. The Michigan committee acknowledged that a long-serving judge would be effectively unemployable if they were prohibited from negotiating with any prospective employer that had ever been involved in any matter in which the judge had ever been involved. *Michigan Advisory Opinion JI-35* (1991). However, the committee warned the inquiring judge, who had lost their re-election campaign, to carefully consider whether it was advisable to begin employment discussions with a lawyer or firm that had recently appeared before them.

The Connecticut committee stated that a judicial official should not contact law firms that were recently before them. *Connecticut Informal Advisory Opinion 2008-8.* The federal committee advised that a judge should not explore employment opportunities with a law firm for a reasonable time after the firm had appeared before the judge, with "the appropriate interval of time" depending on "all the particular facts and circumstances." *U.S. Advisory Opinion 84* (2009). The committee noted that, although its opinion was specifically about exploring "employment opportunities with a law firm," the advice also applied to other types of potential employers.

A comment to New Jersey Rule 3.17(B)(5) states:

> A judge should not initiate contact about or discuss or negotiate his or her post-retirement employment with a party, attorney or law firm that has in the past appeared before the judge until the passage of a reasonable interval of time, so that the judge's impartiality in the handling of the case cannot reasonably be questioned.

How long is reasonable, the comment explains, "depends on the circumstances." If the past matter was uncontested and "resolved swiftly" with a default judgment, the judge could apply to an entity or person in the matter before a lengthy interval had passed, but if the past matter was "prolonged or particularly acrimonious" or "likely to result in continuing post-judgment matters," a lengthier delay before applying would be warranted.

Judges have also been cautioned not to apply for jobs with prospective employers who are frequently involved in cases before them to avoid having to disqualify themselves frequently during their job search. For example, the Arizona committee advised, "if a judge is assigned to a criminal calendar, negotiations with the local prosecuting agency would clearly lead to frequent disqualifications and, therefore, the judge should not negotiate for a job with that agency." *Arizona Advisory Opinion 2022-1*. *See In the Matter of Otis*, Order of admonition and costs (Arizona Supreme Court Attorney Discipline Probable Cause Committee October 20, 2022) (agreed public admonishment of former judge for contacting the county attorney's office regarding potential employment while still a judge, in addition to other judicial misconduct).

The Connecticut committee stated that a judicial official looking for post-judicial employment should "be selective in the firms" that they contact so that they do not have to recuse themself from so many cases that

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it will interfere with the performance of their judicial duties. *Connecticut Informal Advisory Opinion 2008-8.* The committee also cautioned a retiring judge not to make it generally known that they are seeking a post-judicial position "to avoid being solicited by a number of law firms or other entities that may appear before the judicial official prior to his/her leaving the Judicial Branch."

The federal advisory committee stated that a judge should not negotiate with a firm "if the firm's cases before the court are so frequent and so numerous that the judge's recusal in those cases would adversely affect the litigants or would have an impact on the court's ability to handle its docket . . . ." *U.S. Advisory Opinion 84* (2009). According to that opinion, a judge "may negotiate with a law firm that appears before the court on which the judge serves, but only if the judge's recusal in such cases would not unduly affect the litigants or the court's docket" because, for example, the cases could be transferred "to other judges on the court without undue burden." On the other hand, it stated, "a judge should not negotiate for future employment with a firm, if transferring the cases would unduly burden the court by causing undue delays to these and other pending cases, or unduly prejudice litigants by causing repetition and delays of proceedings."

Comment 8 to Rule 3.17(B)(5) of the New Jersey code cautions that a judge must explore potential employment "in a way that minimizes the need for disqualification, does not interfere with the proper performance of the judge's judicial duties, and upholds the integrity of the courts." Thus, it states that a judge:

- Should delay starting any negotiations or discussions until shortly before their planned retirement,
- Should "discuss post-retirement employment opportunities with the fewest possible number of prospective employers," and
- Should inform their presiding judge if their post-retirement employment search will interfere with their regular assignment.

Judicial discipline proceedings involving state supreme court justices

In most states, the final decision regarding whether a judicial officer will be publicly disciplined, at least absent their consent, is made by the supreme court, which, depending on the state, either considers a recommendation by the judicial conduct commission or reviews a commission decision at the judicial officer's request. Thus, discipline cases in which a supreme court justice is the respondent may raise disqualification issues for the court.

The respondent-justice would be disqualified from the supreme court's review by the general rule prohibiting participation by a judicial officer

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who is "a party to the proceeding." Rule 2.11A(2)(a), *Model Code of Judicial Conduct* (ABA 2007). Further, in some states, specific provisions governing judicial conduct proceedings prohibit a justice from participating in their own discipline case.

- In Connecticut, the statute establishing the Judicial Review Council provides that, if a recommendation from the Council or the Supreme Court's own motion to remove or suspend a judicial officer "involves the conduct of a member of the supreme court, such member shall be disqualified with regard to the investigation, hearing and decision on the recommendation or motion." § 51 51j(b), *Connecticut Statutes*.
- In Hawaii, the rules creating the Commission on Judicial Conduct provide: "Any charge filed against a member of the supreme court shall be heard and submitted to the court in the same manner as charges concerning other judges, except that the member being charged shall be automatically disqualified." Rule 8.11, *Hawaii Supreme Court Rules*.
- In Michigan, the rules governing the Judicial Tenure Commission provide: "A judge who is a member of the commission or of the Supreme Court is disqualified from participating in that capacity in proceedings involving his or her own discipline, suspension, retirement, or removal." Rule 9.212, *Michigan Court Rules*.
- In Nebraska, the relevant statute provides: "No Justice or judge of the Supreme Court or other judge shall participate, as a member of the Commission on Judicial Qualifications, or as a master, or as a member of the Supreme Court, in any proceedings involving his or her own reprimand, discipline, censure, suspension, removal, or retirement." Chapter 24-728, *Nebraska Revised Statutes*.
- In North Carolina, the statute creating the Judicial Standards Commission provides: "A justice of the Supreme Court . . . is disqualified from acting in any case in which he is a respondent." Article 30, § 7A-377(a5), *North Carolina General Statutes*.
- In Pennsylvania, the constitutional provision on the suspension, removal, and discipline of judges provides: "No justice, judge or justice of the peace may participate as a member of the [judicial conduct] board, the court [of judicial discipline], a special tribunal or the Supreme Court in any proceeding in which the justice, judge or justice of the peace is a complainant, the subject of a complaint, a party or a witness." Article V, § 18(c), *Pennsylvania Constitution*.

Other justices

In some cases, a supreme court justice has been sanctioned by the other members of their court. *See In re Hughes*, 319 So. 3d 839 (Louisiana 2021) (accepting a joint petition for discipline by consent, the Louisiana Supreme Court publicly censured a justice for, during a highly contested run-off campaign for a seat on the Court other than his own, having a meeting with a campaign worker for one of the candidates that interfered with and/or

At least 15 states have rules, statutes, or constitutional provisions that require review of a discipline case involving a supreme court justice by judicial officers other than the respondent's colleagues on the court.

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had the potential to interfere with the relationship between the candidate and the campaign worker; the respondent-justice and the justice whose campaign worker the justice had met with recused from the review); *In the Matter of Rivera-Soto*, 927 A.2d 112 (New Jersey 2007) (adopting the recommendation of the Advisory Committee on Judicial Conduct, the New Jersey Supreme Court publicly censured a justice for communications with police, prosecutors, and judges that created an "unacceptable risk" that his judicial office could influence the handling of a private matter involving his son; the respondent-justice and one other justice did not participate); *In re Fadeley*, 802 P.2d 31 (Oregon 1990) (pursuant to the recommendation of the Commission on Judicial Fitness and Disability, the Oregon Supreme Court publicly censured a justice for soliciting contributions to his election campaign; the respondent-justice did not participate, and the other six justices sat with a senior judge sitting by designation as a pro tem justice); *In the Matter of Ziegler*, 750 N.W.2d 710 (Wisconsin 2008) (based on a stipulation and the recommendation of a judicial conduct panel, the Wisconsin Supreme Court publicly reprimanded a supreme court justice for presiding while a circuit court judge over 11 cases in which one of the parties was a bank for which her husband was a paid director; the respondent-justice did not participate). *See also In the Matter of Gableman*, 784 N.W.2d 605 & 784 N.W.2d 631 (Wisconsin 2010) (with the respondent-justice not participating, the remaining six justices of the Wisconsin Supreme Court were "deadlocked" and at "an impasse;" three justices voted to accept and three justices voted to reject a judicial conduct panel's findings that the respondent-justice had knowingly or with reckless disregard for the truth made a misrepresentation about his opponent in a campaign advertisement). *Cf.,* Rule 8.11, *Hawaii Supreme Court Rules* ("A panel of at least three justices shall hear . . . [a matter against a member of the supreme court]. In the event that there are less than three justices remaining on the court, the chief justice or the most senior associate justice remaining on the court shall appoint a judge of the intermediate court of appeals, a circuit court judge, a retired justice of the supreme court, or any combination thereof to sit in the matter.")

However, a comment to Rule 26 of the American Bar Association *Model Rules for Judicial Disciplinary Enforcement* states that: "the highest court is a collegial body. Granting it the authority to discipline its own members would create appearances of impropriety and of conflicts of interest." Commentary to that rule suggests that "the special supreme court may be composed of judges from trial courts, appellate courts or a mixture of the two. . . . Selection by lot . . . is a simple and quick method."

At least 15 states have rules, statutes, or constitutional provisions that require review of a discipline case involving a supreme court justice by judicial officers other than the respondent's colleagues on the court.

In 12 of those states, judicial discipline procedures provide for the creation of a substitute court chosen by seniority, randomly, or by position (chief or presiding judge), or specifically appointed from appellate court judges, trial court judges, or both.

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- In Alaska, if the Commission on Judicial Conduct recommends a sanction for a supreme court justice, "no justice may participate in the review," and the chief justice appoints '"a panel from among the court of appeals and superior court judges" "as justices pro tempore to review the proceedings." Rule 406, *Alaska Rules of Appellate Procedure*. If the proceedings involve the chief justice, "the justice having the longest tenure on the supreme court who has not participated in the proceedings" appoints the justices pro tempore. *See Inquiry Concerning a Judge*, 822 P.2d 1333 (Alaska 1991) (five pro tempore justices sitting by assignment privately reprimanded a supreme court justice for using chambers stationery for letters to opposing counsel in his private litigation and meeting with the governor about the justice's private business interests).
- In California, "a tribunal of 7 court of appeal judges selected by lot" reviews "a determination by the Commission on Judicial Performance to admonish or censure a judge or former judge of the Supreme Court or remove or retire a judge of the Supreme Court . . . ." Article VI, § 8, *California Constitution*. *See McComb v. Commission on Judicial Performance*, 564 P.2d 1 (California 1977) ("seven California Court of Appeal justices . . . selected by lot to constitute a tribunal of review" ordered the retirement of a supreme court justice based on findings that he was suffering from a disability that seriously interfered with the performance of his judicial duties).
- In Colorado, in any discipline proceeding involving a current or former supreme court justice, "the entire Supreme Court shall recuse itself," and "a special tribunal" composed of seven court of appeals judges is randomly selected by the State Court Administrator "for the limited purpose of exercising any authority conferred by law to the Supreme Court." Part F, Rule 41, *Colorado Rules of Judicial Discipline*. The rule also requires a special tribunal in discipline cases in which the complainant or a material witness is a current or former justice, is a staff member to a current justice, or is a family member of a current justice, or "when any other circumstances exist due to which more than two Supreme Court justices have recused themselves from the proceeding." The "active, non-senior-status" court of appeals judges chosen for the special tribunal cannot be "the subject of a current disciplinary investigation or proceeding pending before the Commission [on Judicial Discipline];" cannot have "received a disciplinary sanction from the Commission or Supreme Court;" and cannot otherwise be "required by law, court rule, or judicial canon to recuse themselves from the tribunal."
- In Florida, "if the person who is the subject of proceedings by the judicial qualifications commission" is a supreme court justice, all justices are automatically disqualified from the proceedings, and "the supreme court for such purposes shall be composed of a panel consisting of the seven chief judges of the judicial circuits of the state of Florida most senior in tenure of judicial office as circuit judge." Article V, § 12(e), *Florida Constitution*.

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- In Indiana, when a notice of formal proceedings is filed against a member of the supreme court, "all Justices of the Supreme Court, except the Chief Justice, shall recuse themselves from the proceedings," and the vacancies created by those recusals "shall be filled for the limited purpose of the judicial disciplinary proceedings by . . . [s]ix Judges of the Court of Appeals . . . randomly selected by the Clerk of the Supreme Court and Court of Appeals." Rule 25, § VIIIF(4), *Indiana Rules for Admission to the Bar and the Discipline of Attorneys*. The Judicial Qualifications Commission and the respondent-justice each strike one judge from that selection, and the final panel consists of the chief justice and four appellate court judges. If the chief justice cannot participate, "the most senior member of the Supreme Court, not otherwise disqualified, shall continue to serve."
- In Massachusetts, "the chief justice and the six most senior justices of the appeals court . . . serve in the place of the supreme judicial court when charges are brought against a member of the supreme judicial court." Title 1, Chapter 211C, § 9, *Massachusetts General Law, Part III*.
- In Minnesota, review of a recommendation for the discipline or disability retirement of a member of the supreme court is "heard by a panel consisting of the Chief Judge of the Court of Appeals or designee and six others chosen at random from among the judges of the Court of Appeals by the Chief Judge or designee." Rule 14(g), *Rules of the Board on Judicial Standards*.
- In Mississippi, a recommendation by the Commission on Judicial Performance for the discipline of a supreme court justice is "determined by a tribunal of seven (7) judges selected by lot from a list consisting of all the circuit and chancery judges at a public drawing by the Secretary of State." § 177-A, *Mississippi Constitution*. *See Commission on Judicial Performance v. McRae*, 700 So. 2d 1331 (Mississippi 1997) (pursuant to the Commission's recommendation, a "Constitutional Tribunal" comprised of three chancellors and two circuit judges publicly censured a supreme court justice for unspecified "conduct prejudicial to the administration of justice which brings the judicial office into disrepute" that was not related to his official duties).
- In Ohio, proceedings against supreme court justices are handled differently beginning at the receipt of the grievance. Eventually, if, following a hearing, a three-judge panel determines that the justice committed misconduct and a disciplinary sanction is merited, a 13-member adjudicatory panel comprised of the chief justice of the court of appeals and the presiding judge of each appellate district holds a hearing on any objections to the hearing panel's report and issues a final order, with no review by the supreme court. Rule II § 4, *Ohio Supreme Court Rules for the Government of the Judiciary*. *See In re Complaint Against Resnick*, 842 N.E.2d 31 (Ohio 2005) (based on a stipulation and agreement, a temporary supreme court publicly reprimanded a justice for driving under the influence of alcohol).

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- In Pennsylvania, if a supreme court justice appeals a decision by the Court of Judicial Discipline, the appeal is heard by "a special tribunal composed of seven judges, other than senior judges, chosen by lot from the judges of the Superior Court and Commonwealth Court who do not sit on the Court of Judicial Discipline or the [judicial conduct] board, in a manner consistent with rules adopted by the Supreme Court." Article V, § 18(c), *Pennsylvania Constitution*.
- In Washington, if a supreme court justice "is the subject of commission [on judicial conduct] discipline or recommendation for retirement that is reviewed by the Supreme Court, a substitute panel of nine judges" serves as justices pro tempore; the presiding chief judge of the court of appeals is a member of the substitute panel, and the supreme court clerk selects "the balance of the justices pro tempore by lot from all remaining active Court of Appeals judges." Rule 13, *Washington State Court Rules: Discipline Rules for Judges*. *See In the Matter of Sanders*, 145 P.3d 1208 (Washington 2006) (the Washington Supreme Court, with nine appellate court judges sitting as justices pro tempore, upheld the Commission's public admonishment of a justice for, during a visit to a facility for sexual predators, meeting with and asking questions of inmates who were litigants or whom he should have recognized were potential litigants on issues currently pending before the Court). *See also In the Matter of Sanders*, 955 P.2d 369 (Washington 1998) (reversing the decision of the Commission, the Court, with nine appellate court judges sitting as justices pro tempore, concluded that a justice's appearance and statements at a March for Life rally did not rise to a level that permitted a sanction consistent with his legitimate expectations under the state and federal constitutions).
- In Wyoming, "in any case involving the discipline or disability of a justice of the supreme court," the court designates "five district judges who are not members of the Commission [on Judicial Conduct] to act in the place of the supreme court . . . ." Article 5, § 6(e)(iii), *Wyoming Constitution*; Rule 20(e), *Rules Governing the Commission on Judicial Conduct and Ethics*.

In three additional states, if a discipline case involves a supreme court justice, temporary justices are appointed to preside, not according to special rules for discipline proceedings, but according to general rules that apply in any type of case when a justice is disqualified, for example, if a family member is representing a party or a justice has an economic interest in a party.

- In Arkansas, Amendment 66 of the Constitution, which created the Judicial Discipline and Disability Commission, provides: "In any hearing involving a Supreme Court justice, all Supreme Court justices shall be disqualified from participation." The general constitutional provision on the judiciary provides: "If a Supreme Court Justice is disqualified or temporarily unable to serve, the Chief Justice shall certify the fact to the Governor, who within thirty (30) days thereafter shall commission a Special Justice . . . ." Amendment 80, § 13(A), *Arkansas Constitution*.

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- In Georgia, Rule 26 for the Judicial Qualifications Commission provides for the creation of "a special supreme court" "consist[ing] of nine judges selected from the list of judges maintained by the Supreme Court and routinely used to select replacement Justices when a Justice is disqualified from or not participating in a case," citing Georgia Supreme Court Rule 57. In turn, Rule 57 states: "A disqualified or nonparticipating Justice shall be replaced by a senior appellate justice or judge, a judge of the Court of Appeals, or a judge of a superior court whenever necessary to achieve a quorum . . . ."
- In Vermont, when there is an appeal from a decision of the hearing panel of the Judicial Conduct Board involving a complaint against a member of the supreme court, five pro tempore judges are appointed to a special supreme court "by the Administrative Judge for Trial Courts, or the next senior trial judge if the Administrative Judge is unavailable, under the process established by the Administrative Judge for the appointment of pro tempore judges to the Supreme Court in cases where a justice of the Court is disqualified." Rule 13(2), *Vermont Rules of Supreme Court for Disciplinary Control of Judges*.

Deemed disqualified

There have been cases in which all of the other supreme court justices have disqualified themselves from a discipline proceeding involving a colleague even without an express provision in the rules requiring a special tribunal. For example, when the West Virginia Judicial Hearing Board made a recommendation regarding a justice, "the Justices of the Supreme Court of Appeals . . . deemed themselves disqualified," and the Chief Justice designated five senior status judges as acting justices. *In the Matter of Starcher*, 501 S.E.2d 772 (West Virginia 1998). So comprised, the Court publicly admonished the respondent-justice for, while a circuit court judge, authoring, typing, signing, and sending a letter asking the recipients to endorse his candidacy for a seat on the Court.

Similarly, "the members of the Alabama Supreme Court acknowledged that Canon 3 of the Alabama Canons of Judicial Ethics" required that they recuse from the Chief Justice's appeal of the decision of the Court of the Judiciary sanctioning him. *Moore v Judicial Inquiry Commission*, 234 So. 3d 458 (Alabama 2017). Then, pursuant to *Alabama Code § 12-2-14*, which applies not just in discipline cases, but in any case, "when by reason of disqualification no one of the judges is competent to sit," the Court authorized "the Acting Chief Justice to participate with the Governor in causing the names of 50 judges to be drawn at random from a pool of all retired appellate justices and judges, retired circuit court judges, and retired district court judges, who are members of the Alabama State Bar, capable of service, and residents of the State of Alabama" and ordered that "the first 7 judges shall constitute the special Supreme Court that will hear [the chief justice's] . . . appeal." The special court affirmed the decision suspending the Chief Justice without pay until the end of his term for entering an administrative

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order that directed all probate judges to disregard a federal court injunction regarding performing same-sex marriages. *See also Moore v. Judicial Inquiry Commission*, 891 So. 2d 848 (Alabama 2004) (a special Alabama Supreme Court affirmed the removal of the Chief Justice for failing to comply with a federal court order that he remove a monument displaying the Ten Commandments from the rotunda of the State Judicial Building).

See also J.C.J.D. v. R.J.C.R., 803 S.W.2d 953 (Kentucky 1991) (declaring a provision of the code of judicial conduct unconstitutional, the Kentucky Supreme Court, with seven special justices sitting, dismissed charges alleging that one of its members had violated the code by announcing his views on disputed legal and political issues during his campaign for the Court); *Petition of Thayer*, 761 A.2d 1052 (New Hampshire 2000) (the New Hampshire Supreme Court held that the Judicial Conduct Committee had jurisdiction to investigate a former justice's conduct before he resigned from the Court; the decision was made by five judicial officers sitting by special assignment pursuant to **§ 490:3, *New Hampshire Revised Statutes***, which provides that "whenever a justice of the supreme court shall be disqualified or otherwise unable to sit in any cause or matter pending before such court, the chief or senior associate justice of the supreme court may assign another justice to sit . . . ").

Recent cases

Gratuitous and inappropriate

Granting a petition to accept an agreement and consent to discipline, the New Mexico Supreme Court publicly censured a judge who failed to disqualify herself from a domestic matter even though she blamed the father's counsel for an unfavorable newspaper article and who responded to the article's allegations in an order. ***In the Matter of Rosner*, Public censure** (New Mexico Supreme Court January 30, 2023).

In a domestic matter involving the custody of a minor child, the judge had appointed Dr. Harold Smith as the parenting coordinator to reduce conflict between the parties and to assist the court with the parenting plan. Three years later, the father's new counsel filed a motion to remove Dr. Smith and to revoke his quasi-judicial immunity, alleging that Dr. Smith was not a qualified parenting coordinator. The father also filed a motion to recuse the judge, arguing that her recusal was required to compel her to testify about why she had appointed Dr. Smith.

A week later, the *Las Cruces Sun-News* published an article about the allegations in the motions. The article criticized the court's parenting program, the judge and her involvement in that program, and her appointment of Dr. Smith.

The judge admits that she "felt personally attacked" by the article and the motions and "considered them to be personal criticisms, factually

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inaccurate, and misleading." Nevertheless, she did not recuse herself from the case "because she believed then that she could be impartial, set aside her personal feelings, and continue with her duty to sit."

Following a hearing, the judge denied the two motions. In paragraph 17 of the order denying the motions, the judge stated:

> Rather than bring to [the c]ourt her claims of alleged misconduct by Harold Smith and this [c]ourt, [Father's counsel] took her motions to the *Las Cruces Sun News*, without input from anyone other than herself. . . . The article, which appeared on the front page of the *Las Cruces Sun News* on July 21, 2020, sought to damage Harold Smith and this [c]ourt by implying an inappropriate relationship between Harold Smith and the undersigned judge, and bias by this [c]ourt and Harold Smith against [Father].

The judge also wrote that it was "noteworthy" that the father's counsel had not "attacked Dr. Caplan's report which is the most damaging report against her client" and had been sealed at the request of father's counsel.

Counsel for the father renewed the motion to recuse. Three days later, the judge recused herself from the matter.

The Court acknowledged that "the precise time to recuse is not always clear and that a judge 'must exercise [her] judicial function.'" However, it concluded that "an objective, disinterested observer" would doubt that the judge would handle the case fairly when she felt personally attacked by father's counsel and had responded with gratuitous accusations.

The Court found that, "notwithstanding any artifices or gamesmanship on the part of Father or his counsel," "none of the facts the judge had included in paragraph 17 of her order "were necessary for the disposition of Father's motions, and their unnecessary inclusion . . . calls into question Judge Rosner's impartiality . . . ." Although it commended the judge for eventually recusing, the Court emphasized that it was inappropriate for her to respond to criticism in an order, "a tool used to carry out her official judicial duties . . . ." The Court stated that the judge's reference to a sealed doctor's report was also inappropriate "not only because it was sealed, but also because it had no bearing on the disposition of Father's motions."

The Court emphasized that, although "judges may respond to public or personal criticism, they may not do so in carrying out their official judicial duties." It explained:

> We recognize the challenges faced by district court judges, often presiding over emotionally charged cases involving litigants and lawyers who might challenge their authority, insult their integrity, impugn their good names, and even attempt to bait them into losing control. In those instances, district court judges, no matter how egregious the behavior by counsel or clients, must remain above the fray in order to carry out their official duties. Judges are equipped with tools to address inappropriate behavior on the part of the parties and counsel, in the form of sanctions and contempt powers, which should be used as needed. Judges must always remain cognizant that an essential function of their role in the judiciary is to be a neutral arbiter even in the throes of highly adversarial proceedings.

The Court concluded that "an objective, disinterested observer" would doubt that the judge would handle the case fairly when she felt personally attacked by father's counsel and had responded with gratuitous accusations.

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"Extraordinarily poor choice"

Based on stipulated facts, the Mississippi Supreme Court suspended a part-time judge without pay for 60 days, fined him $1,500, and publicly reprimanded him for summoning two police officers to his courtroom and publicly chastising and embarrassing them about a matter involving his private client. *Commission on Judicial Performance v. Moore*, 356 So. 3d 122 (Mississippi 2023).

One of the judge's clients was the victim of a shooting at the Satan's Sidekick Clubhouse in November 2020. On December 4, the client was interviewed in the judge's private office by Police Detective Sergeant Chris Brown and two other investigators. During the meeting, there was a disagreement about a search warrant that had been issued for the victim's telephone records. After stating that he would evaluate whether the warrant was valid before advising his client whether to comply, the judge "kicked all three law enforcement officers out of his office," as he stipulated. Detective Sergeant Brown said to the judge, "I've got your number," which the judge interpreted as a threat. The judge called Brown's superior, Police Chief George Douglas, to complain, but when he was told that the complaint had to be in writing, he chose not to file.

Four days later, the judge presided over a session of the municipal court, which is in the same building as the police headquarters. Before beginning the proceedings, the judge sent word to Police Chief Douglas and Detective Sergeant Brown to come to his courtroom.

When they arrived, the judge halted proceedings and had both officers stand before him at the bench. Despite Brown's request that they move to the judge's chambers, the judge, as he stipulated, "publicly chastised and embarrassed the two officers in the presence of the entire courtroom" about the meeting about his client.

The Court concluded that, "while a lawyer's zeal for his client's cause usually is commendable, in this instance, Lawyer Moore made the extraordinarily poor choice to use the judicial office with which he had been entrusted as a weapon to secure the presence of an investigating officer before his bench." It found that the judge had publicly disrupted "the regular work of the court to use the courtroom to address a matter related to the judge's private interest as a practicing attorney" and engaged in "irate criticism [that] . . . was devoid of the decorum judges are required to maintain, especially in court." The Court emphasized that, "rather than allowing his anger to subside, the incident at his law office continued to be on Judge Moore's mind over the next four days and became his first order of business when he convened" court. The Court noted that "rather than following the appropriate and prescribed procedure for lodging a complaint, Judge Moore contrived a means of doing so publicly, in a crowded courtroom, that was populated in large part by people who were there because of charges brought against them by the local police." The Court also stated that the judge's actions "risked interference with official duties of the police, as the exchange at the law office concerned their investigation of a violent crime. Police officers should not have to anticipate or be subjected

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to retaliation from judges they must deal with in both judicial and extrajudicial capacities."

Multiple reversals

The Nevada Commission on Judicial Discipline barred a retired judge from judicial office for a pattern of legal error that had resulted in the reversal of numerous convictions and for an ex parte communication in one of the cases. ***In the Matter of Smith*, Stipulation and order of consent** (Nevada Commission on Judicial Discipline November 14, 2022).

On April 19, 2019, in an unpublished disposition, the Nevada Supreme Court reversed a conviction and ordered a new trial for a defendant on charges of robbery and murder of a victim 60 years old or older, burglary, forgery, and conspiracy to commit robbery and/or murder. *Sitton v. State*, 135 Nev. 718 (Nevada 2019). The judge had presided over the jury trial, and the Court found that he had abused his discretion by denying the defendant's motion to sever his case from that of the other defendant and had erred by admitting into evidence a non-testifying co-defendant's statements.

In a concurring opinion, one justice called the judge's misconduct in the case "emblematic of a pattern of cases where the Nevada Supreme Court was compelled to '. . . [reverse] a judgment of conviction based on [Respondent's] failure to follow well-established law . . . .'" The concurrence listed 16 additional cases that were part of that pattern and described the nature of the judge's errors, noting that in seven of the cases, the judge had repeated errors after being informed of his mistake. For example, convictions were overturned because the judge refused to administer the statutorily mandated oath before jury selection in several cases; refused to allow a juror to ask a valid question; failed to administer a statutorily required admonishment before a break; failed to properly instruct the jury on the elements of felony coercion; used a "lottery" system to select alternate jurors; failed in several cases to comply with U.S. Supreme Court caselaw prohibiting prosecutors from using peremptory challenges to exclude jurors based solely on their race; and failed in several cases to comply with U.S. Supreme Court caselaw holding that criminal defendants have a constitutional right to represent themselves. The concurring justice stated:

> This pattern not only increases the burden on a criminal justice system that is already pushed to its limits, it delays justice and in many instances forces crime victims and their family members to sit through repeated trials during which they must relive the worst moments of their lives.

In the discipline case, the judge argued that his actions were not intentional and that the concurring justice did not like him because he is Mormon and the concurring justice dislikes Mormon judges. The judge did not otherwise explain or defend the pattern of errors described in the concurrence.

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Appointing brother-in-law

Accepting a joint agreement and proposed resolution, the Alabama Court of the Judiciary publicly censured a judge for a pattern and practice of appointing his brother-in-law as an attorney for indigent juveniles. *In the Matter of Naman*, Final judgment (Alabama Court of the Judiciary March 2, 2023).

For over ten years, the judge appointed the husband of his sister to represent indigent children on the daily arraignment docket for one week each month and on the disposition docket for one day each month. Beginning in 2014, the judge also appointed his brother-in-law to the "gun court" docket, the judge's post-adjudication monitoring of children who have been adjudicated as having committed a gun crime, which convened once a week for approximately one hour.

The parties stipulated that the judge could offer clear and convincing evidence that the Commission had not discovered any evidence of corruption or financial loss to the state or the judicial system as a result of the appointments and that the judge appointed his brother-in-law to ensure "quality representation" for indigent juveniles and their families. The Commission emphasized that the judge's failure to consider that what he was doing was wrong "is very troubling, when juxtaposed against the continuing condemnation of nepotism by the canons, and the Commission's advisory opinions."

"Anyone but a judge"

Adopting most of the findings of a three-judge panel, the New Jersey Supreme Court removed a former judge from office and permanently barred her from holding judicial office in the state for her "defiant trespass" at her children's school, her untruthful testimony at her criminal trial, and her failure to appear for a court-ordered deposition in her husband's lawsuit against the school. *In the Matter of Mullen*, Order (New Jersey Supreme Court March 8, 2023).

In December 2016, the judge's husband filed suit against St. Theresa School where their two daughters attended. On February 1, 2017, the school asked the family to withdraw their children because the lawsuit violated school policy. "In defiance of that request," the judge and her family arrived at the school the next morning.

The school deacon told the judge that she had to leave or she would be "considered trespassing." The judge's own videorecording confirms that she told the officials that they could "bring criminal charges against" her, but she was not going to leave. The officials repeatedly directed the judge to exit the property, and she consistently refused.

School officials called the police. When Office Sean Kaverick appeared, he asked the judge to leave. Instead of complying, the judge indicated that she wanted to be handcuffed. Officer Kaverick testified that the judge made no effort to leave for five minutes, but he persuaded her to go outside rather than be arrested and handcuffed in front of her children.

The panel also noted that "when a judge's credibility is publicly called into question, there is a patent and significant risk that the public's confidence in the judiciary will be eroded."

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The panel found that the judge "created a scene for nearly an hour" and her "interactions with police and school administrators took place on a busy morning, in offices, a reception area, and school hallways."

The judge was charged with defiant trespass. After a two-day bench trial, Judge Alberto Rivas concluded that the prosecution had proven "beyond a reasonable doubt . . . that [respondent] remained in the school knowing she was not licensed or privileged to do so after actual notice to leave was communicated to her several times." In addition, Judge Rivas found that Judge Mullen testified falsely when she "specifically testified that she had absolutely no contact with Officer Kaverick, in direct contravention with the Officer's unequivocal testimony."

The judge filed a motion for a new trial based on theories of vindictive prosecution, entrapment, and failure to establish the elements of defiant trespass. The appellate division affirmed her conviction, and the Court denied the judge's petition for certification.

During the discipline hearing, the judge again denied speaking with Officer Kaverick and denied giving false testimony at her trial. Instead, she maintained that Officer Kaverick "did not tell the truth" at her trial and to the Committee and had filed a false police report. The judge said that she did not believe that she "cause[d] a scene" at the school and denied refusing to leave the premises.

The panel concluded that the judge's "refusal to leave the school building, while in the presence of numerous school officials, law enforcement officers, and students and parents entering and leaving the school, could only erode public confidence in the judiciary." The panel noted that the judge's "emotional stress over the conflict with school administrators, which involved her children" did not excuse her violations and that she "knew she had better alternatives than an in-person confrontation." It emphasized: "Had anyone but a judge" acted as she had at the school that morning, "that person would have been swiftly and unceremoniously ejected from the building, and/or arrested and removed on the spot." The panel also noted that "when a judge's credibility is publicly called into question, there is a patent and significant risk that the public's confidence in the judiciary will be eroded."

The panel also found that the judge's failure to appear for a court-ordered deposition in her husband's lawsuit against the school was misconduct. Noting that there was no valid reason in the record for the judge's failure to appear, the panel explained: "Respondent is not entitled—by virtue of her judicial appointment—or for any other reason—to disregard court orders."

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