

JUDICIAL CONDUCT REPORTER



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Cynthia Gray
Director
Center for Judicial Ethics
cgray@ncsc.org

National Center for State Courts
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Williamsburg, VA 23185

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Habitual tardiness

by Cynthia Gray

Judges arriving late at the courthouse is a favorite subject of television investigations, with time-stamped visuals well-suited for broadcast. For example, in November 2012, a Detroit-area television station reported what time a judge arrived at and left the courthouse every day for a week. Each day, the videos showed, the judge drove into the courthouse parking lot no earlier than 10:05 and as late at 10:58, taking the bench at approximately 11:00 a.m. even though she had 15 to 22 matters scheduled and litigants, attorneys, and witnesses in the courtroom as early as 9:00 a.m. The TV station also reported that the judge left the courthouse between 4:00 p.m. and 4:30 p.m. four days that week. Based on the judge's agreement, the Michigan Supreme Court censured the judge and suspended her for 30 days without pay. *In re Gibson*, 852 N.W.2d 891 (Michigan 2014).

In a recent advisory opinion, the North Carolina Judicial Standards Commission emphasized that a judge's repeated or unjustified tardiness in opening court sessions violates ethical rules and can lead to judicial discipline. *North Carolina Formal Advisory Opinion 2017-2* (<https://tinyurl.com/ydfbl7gg>). The opinion explained that delays are "one of the most common complaints" about judges and "raise the costs of litigation, increase frustration with the judicial system and diminish public confidence in the courts." The Committee noted that, "[p]oor communication about when the judge will arrive and the reasons for the delay heightens frustration among individuals present in the courtroom," many of whom "have taken time away from work or traveled long distances to appear at the required time under threat of sanction if late."

The lack of courtesy inherent in a judge's chronic tardiness has been emphasized in judicial discipline cases. For example, the Pennsylvania Court of Judicial Discipline stated:

Respondent's custom of arriving 15, 20 minutes, or a half hour or an hour or more late for scheduled court sessions is the quintessential discourtesy to litigants, jurors, witnesses, and lawyers. When it is commonplace, as here, it takes on the character of arrogance and disrespect for the judicial system itself, as well, of course, disrespect for those who, bidden by the court to be in court at a time chosen by the court, wait, sometimes in a "packed courtroom," for the arrival of the judge.

In re Lokuta, 964 A.2d 988 (Pennsylvania Court of Judicial Discipline 2008), *aff'd*, 11 A.3d 427 (Pennsylvania 2011) (removal for this and other misconduct). The judge in that case was late a number of times a week, some weeks more often than not. The judge also kept people waiting while she talked to staff in chambers or worked on personal matters, instructing her law clerk to tell those in the courtroom that she was engaged in legal research or had been delayed by traffic.

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Thus, even if a judge arrives to the courthouse on time, failure to start court when scheduled can be misconduct. In *Doan v. Commission on Judicial Performance*, 902 P.2d 272 (California 1995), the judge had not only arrived at the courthouse late on some occasions, but on others had arrived on time only to attend to separate matters or decline to take the bench until all parties in all actions were ready to proceed. Thus, she habitually started court sessions 60 to 90 minutes late, inconveniencing attorneys, parties, and witnesses, including law enforcement personnel, and leading them to express impatience and anger. Although the judge almost always completed her calendar before the close of the day, her late starts caused court staff to make mistakes as they tried to keep pace with her rapid disposition of matters.

Communicating about recess

Furthermore, even if a judge starts court on time, lengthy, indeterminate breaks in court proceedings can constitute misconduct. In its advisory opinion, the North Carolina committee urged that, “if a recess is required to attend to other official business that must be considered before the court session continues, the judge should as a best practice . . . communicate either personally or through court staff to those present in the courtroom when court will be reconvened and the reasons for the recess.”

Emphasizing that the “first principle of courtesy is consideration of others,” a special court of review appointed by the Texas Supreme Court sanctioned a judge who repeatedly left the bench “with matters still to be heard” and failed to communicate with counsel and defendants about when or whether she would return, leaving them unable to “discern whether to go (as waiting would be futile) or stay (because the judge might return, though no one could say when).” *In re Mullin*, Opinion (Texas Special Court of Review October 21, 2015) (<https://tinyurl.com/y83zpl6z>) (reprimand for this and other misconduct). Rejecting the judge’s argument, the Court concluded that the court’s backlog and the judge’s “hands-on approach” did not “excuse the lack of consideration for court-goers, who, as a matter of course, were subjected to lengthy wait times, delays in resolution of pending matters, and multiple court appearances because of the respondent’s failures.” It stated:

Lawyers need to be able to explain the legal process and proceedings to their clients and to advise them of the likely costs and timetables of the proceeding. Time estimates aid planning by helping court-goers to form realistic expectations about what is involved in a particular court appearance and about how long it should take so that they can make arrangements with employers, childcare providers, schools, and the like, and ensure transportation to and from the courthouse.

The Court noted that a judge is permitted to leave the bench for many reasons and “taking breaks is a matter within the judge’s discretion” but stated that “discretion does not extend to compromising the administration of justice with persistent and unwarranted delays and wait times that could be diminished or eliminated with basic communication. . . .” It explained:

“The ‘first principle of courtesy is consideration of others.’”

(continued)

Though a judge need not disclose why she is leaving the bench or what she will be doing while she is gone, common courtesy requires a judge to let those waiting to be heard know whether and when she anticipates returning. By persistently leaving the bench for extended periods of time without communicating this basic information to those in attendance, the respondent showed a lack of consideration for court-goers and thus failed to act with the courtesy expected of a judicial officer. . . .

It added, “[w]hen a judge persistently fails to communicate, either directly or through staff . . . , and the failure leads to uncertainty and confusion, the public tends to lose confidence in the administration of justice.” *See also Inquiry Concerning Albritton*, 940 So. 2d 1083 (Florida 2006) (public reprimand for, in addition to other misconduct, being repeatedly late for hearings and trials and taking purported 15 minute breaks but not returning for as long as two hours, often resulting in proceedings going beyond normal closing time).

Other examples

There is no set formula for how many times a judge must be late for the tardiness to be considered habitual and subject to a public sanction, but there are numerous examples. For example, the Michigan Supreme Court removed a judge for, in addition to other misconduct, late starts and untimely adjournments, finding her “lax work schedule inconvenienced parties, attorneys, court staff and other judges.” *In re Nettles-Nickerson*, 750 N.W.2d 560 (Michigan 2008). On different dates, the judge:

- Was 45 minutes late to hear a motion.
- Did not take the bench until 9:45 a.m.
- Did not take the bench until 10:00 a.m. although jurors had been ready at 8:30 a.m.
- Did not arrive for a trial until 10:30 a.m.
- Did not arrive until 10:45 a.m. although five criminal cases were scheduled for 8:30 a.m.
- Announced to a full courtroom while hearing motions that she was leaving to let a repairman into her house and did not return for two hours.
- Went to pick up a family member after adjourning a bench trial for a one-hour lunch break, was caught in traffic, and did not contact her staff to cancel the remainder of the day until 3:00 p.m.

The Minnesota Board on Judicial Standards concluded that a judge was chronically tardy based on findings that he was late:

- 18 and 40 minutes for calendars scheduled to start at 9:00 a.m. on two dates.
- 10 minutes for a motion hearing at the start of a jury trial.
- 40 minutes for a sentencing/dispositional hearing.
- 18 or more times during a five-week period.

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- In the morning, the afternoon, or both, 20 or more times one month and 18 or more times the next month.
- 20 or more times in December 2013, which was almost every court day that month.

In the Matter of Cahill, Public reprimand and conditions (Minnesota Board on Judicial Standards April 21, 2014) (<https://tinyurl.com/lwkvbzt>).

Approving a stipulation and based on the judge's agreement to resign, the California Commission on Judicial Performance publicly admonished a judge for, in addition to other misconduct, arriving at the courthouse after 9:00 a.m. on days she had calendars set to begin at 9:00 a.m. at least 42 times between January 1, 2013 and August 10, 2015. *In the Matter Concerning Johnson*, Decision and order (California Commission on Judicial Performance January 16, 2018) (<https://tinyurl.com/ybkd3t5z>). In most of these incidents, the judge arrived at the courthouse within 10 minutes of 9:00 a.m., but several involved longer periods, and typically there were additional delays between the time the judge entered the courthouse and the time she took the bench.

In addition, on different dates, the judge:

- Was approximately 30 minutes late taking the bench for her felony calendar.
- Had 26 matters on her calendar at 8:59 a.m. and 9 matters at 9:00 a.m. but arrived at the courthouse approximately 30 minutes late and took the bench thereafter.
- Had 15 matters on her calendar at 8:59 a.m. and 22 matters at 9:00 a.m. but arrived at the courthouse approximately 15 minutes late and took the bench thereafter.

On each of these occasions, the judge's tardiness caused numerous people who were at court on time, including parties, attorneys, and court personnel, to have to wait for her.

See also In re Braun, 883 P.2d 996 (Arizona 1994) (30-day suspension without pay for being habitually tardy, in addition to other misconduct); *In the Matter of McVay*, Judgment and Order (Arizona Supreme Court September 25, 2007) (<https://tinyurl.com/y72xtym6>) (60-day suspension without pay for arriving in the courtroom between five and 18 minutes after her calendar was scheduled to begin 20% of the time, in addition to other misconduct); *Inquiry Concerning Singbush*, 93 So. 3d 188 (Florida 2012) (public reprimand for being habitually tardy for hearings, first appearances, and trials, often for more than 15 minutes and usually without good cause); *Commission on Judicial Performance v. Clinkscapes*, 191 So. 3d 1211 (Mississippi 2016) (public reprimand for routinely starting court late, in addition to other misconduct); *In re Merlo*, 34 A.3d 932 (Pennsylvania Court of Judicial Discipline 2011), *aff'd*, 58 A.3d 1 (Pennsylvania 2012) (removal for repeatedly failing to appear or appearing late for scheduled court proceedings, in addition to other misconduct); *Letter to Little* (Tennessee Board

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of Judicial Conduct October 31, 2017) (<https://tinyurl.com/y9z9byc7>) (public reprimand for unexplained tardiness for dockets over a substantial period and, on a number of occasions, for significant lengths of time).

Leaving early

Just as starting late can be sanctionable, leaving early can be misconduct. For example, accepting a stipulation in which the judge agreed to resign, the California Commission on Judicial Performance publicly censured a judge for routinely leaving the courthouse for the day before noon at the conclusion of the juvenile dependency calendar to which he was assigned. *Inquiry Concerning Sheldon*, Decision and Order (California Commission on Judicial Performance April 15, 2009) (<https://tinyurl.com/y8dfdnxr>). The judge did not inform his supervising judges, seek or receive authorization for his half-day absences, or make himself available for other judicial work after his calendar was completed. On occasion, another judge had to handle ex parte dependency matters in the afternoon because Judge Sheldon was absent.

The Commission concluded that the judge had “demonstrated a flagrant disregard for his obligations to his fellow judges, the public, and the reputation of the judiciary.”

A judge’s responsibilities are not limited to the completion of the daily calendar. Judges who conclude their calendars early in the day may be assigned other duties, including presiding over cases other courts are unable to handle due to time limitations or disqualification and handling ex parte motions. Unapproved absences can have a significant impact on the operation of the court, especially in a court . . . with a longstanding and well-publicized backlog of court cases. . . .

Public confidence in the integrity of the judiciary is seriously undermined when a judge routinely leaves the courthouse early without approval. Taxpayers of the State of California have a right to expect that judges are available to provide the services for which they are paid. . . . Judge Sheldon’s routine of working part-time while being paid a full-time salary is utterly unacceptable and casts disrepute upon the judicial office.

The Commission noted that the judge’s misconduct was even more egregious because he had previously been publicly admonished for one day leaving the courthouse for personal matters prior to completion of his calendar when no other judge was available to cover, in addition to other misconduct. *Inquiry Concerning Sheldon* (California Commission on Judicial Performance October 23, 1998) (<https://tinyurl.com/y93rpx6t>).

See also *Inquiry Concerning Hyde*, Decision and Order (California Commission on Judicial Performance May 10, 1996) (<https://tinyurl.com/y8ac5wyv>) (public censure for regularly leaving the courthouse when the Friday calendar was completed, sometimes as early as noon, in addition to other misconduct); *Inquiry Concerning Woodard*, 919 So. 2d 389 (Florida 2006) (public reprimand for leaving an arraignment to conduct a campaign interview and frequently starting first appearance hearings late, in addition to other misconduct); *In the Matter of Vega*, Findings of Fact, Conclusions of Law, and

“Just as starting late can be sanctionable, leaving early can be misconduct.”

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Order (Nevada Commission on Judicial Discipline August 29, 2013) (<https://tinyurl.com/lzccqgv>) (public reprimand for, during a murder trial, recessing court in the early afternoon on six days so that she could attend her daughter's soccer games, in addition to other misconduct); *In re Yashar*, 885 A.2d 152 (Rhode Island 2005) (censure for failing to appear for duties, arriving late, or departing early, in addition to other misconduct); *In re Lallo*, 768 A.2d 921 (Rhode Island 2001) (removal for being regularly absent from his courtroom during normal working hours to gamble in a public casino, in addition to other misconduct); *In the Matter of Harshbarger*, 314 S.E.2d 79 (West Virginia 1984) (censure for going home 90 minutes early when on duty as night court magistrate, making it impossible for medical center security to locate a magistrate to hear an emergency mental hygiene commitment).

Mixing family and politics at home

by Cynthia Gray

Comment 5 to Rule 4.1(A) of the 2007 American Bar Association *Model Code of Judicial Conduct* states:

Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no “family exception” to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member’s political activity or campaign for public office. To avoid public misunderstanding, judges and judicial candidates should take, and should urge members of their families to take, reasonable steps to avoid any implication that they endorse any family member’s candidacy or other political activity.

The challenge of allowing a family member to engage in independent political activity without tainting a judge’s political independence is most acute at home where the judge and the family member may share space and ownership. As discussed below, the issues arise both when the [family member is a candidate](#) and when the [family member supports a candidate](#) and involve holding political events at the home and displaying campaign signs in the yard or window.

(The circumstances in which a judge is most likely to live with and own property with a candidate or supporter involve a spouse, but the advice would apply as well to other family members sharing the judge’s home. In addition, the code defines “family member” to include “domestic partner,” which “means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married.”)

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Family member is a candidate

Campaign events

Some advisory opinions direct a judge to forbid a candidate/spouse from conducting any campaign activity (*Delaware Advisory Opinion 2008-1* (<https://tinyurl.com/y6w6ks6y>)) or holding any campaign events at property owned by the judge, even if it is jointly owned. *Michigan Advisory Opinion JI-30* (1990) (<https://tinyurl.com/yaqg4hag>). Although the Indiana committee did not believe that a blanket prohibition was necessary, it did state that a judge should consider whether the use of jointly-owned property for a campaign event would appear, to “the average bystander, to be an impermissible abuse of the judge’s prestige,” for example, if the property was “heavily decorated” with mementos of the judge’s career. *Indiana Advisory Opinion 2-2014* (<https://tinyurl.com/y6wjb9j3>).

Other opinions allow a candidate/spouse to use a home jointly owned with a judge in a campaign as long as the judge is not associated with the activity. Thus, a candidate/spouse may use their residence:

- For campaign headquarters (*Washington Advisory Opinion 1986-8* (<https://tinyurl.com/ybqkx5ru>));
- For campaign planning or strategy meetings (*Maine Advisory Opinion 1994-3* (<https://tinyurl.com/ydymet7d>); *New York Advisory Opinion 2006-147* (<https://tinyurl.com/yarvb5fk>); *U.S. Advisory Opinion 53* (2009) (<https://tinyurl.com/y7bmcsxv>)); and
- For fund-raising events (*New York Advisory Opinion 2006-147* (<https://tinyurl.com/yarvb5fk>); *Washington Advisory Opinion 1986-8* (<https://tinyurl.com/ybqkx5ru>); *U.S. Advisory Opinion 53* (2009) (<https://tinyurl.com/y7bmcsxv>)).

To distance herself from any political event held in her home, a judge:

- Should not be identified on invitations (*Washington Advisory Opinion 1986-8* (<https://tinyurl.com/ybqkx5ru>));
- Should not assist in preparations (*Washington Advisory Opinion 1986-8* (<https://tinyurl.com/ybqkx5ru>)) or at least publicly assist in preparations (*Indiana Advisory Opinion 2-2014* (<https://tinyurl.com/y6wjb9j3>));
- Should not serve as host by greeting guests, mingling with visitors, pouring coffee, or serving cake (*Florida Advisory Opinion 1987-22* (<https://tinyurl.com/y74xpuhg>); *Maine Advisory Opinion 1994-3* (<https://tinyurl.com/ydymet7d>)); and
- Should make reasonable efforts to avoid contact with attendees (*New York Advisory Opinion 2006-147* (<https://tinyurl.com/yarvb5fk>)).

Whether a judge may attend the event varies from state to state depending on the state's general rule regarding whether a judge may attend political events. In Maine, a judge is prohibited from attending an event for his spouse's campaign held in their home because judges are prohibited from attending all political gatherings. *Maine Advisory Opinion 1994-3* (<https://tinyurl.com/ydymet7d>). In New York, a judge may attend an event in her home for her spouse's campaign only during the judge's own election campaign when a judge is allowed to attend political gatherings in general. *New York Advisory Opinion 2006-147* (<https://tinyurl.com/yarvb5fk>). The general rule that California judges may attend political meetings allows a judge to attend a campaign event in her home if a family member is the candidate. *California Judges Association Advisory Opinion 49* (2000) (<https://tinyurl.com/ybtqzymo>).

The Maine committee advised that a judge is not required to leave the house when political gatherings related to her spouse's campaign for the state legislature are scheduled if the judge can withdraw to another part of the house. *Maine Advisory Opinion 1994-3* (<https://tinyurl.com/ydymet7d>). The New York committee stated that a judge must leave her residence during a campaign fund-raiser for a candidate/spouse but may stay during a strategy meeting as long she does not appear at the event and makes a reasonable effort to avoid contact with the attendees. *New York Advisory Opinion 2006-147* (<https://tinyurl.com/yarvb5fk>). Cf., *New York Advisory Opinion 2006-183* (<https://tinyurl.com/y9lhml72>) (a judge need not vacate their joint residence during a fund-raising event for her child who is a school board candidate when the event is being held in the child's "distinct living area").

Campaign signs

Opinions are split on whether a judge may allow a candidate/spouse to put up a campaign sign on jointly owned property.

In *New York Advisory Opinion 2006-94* (<https://tinyurl.com/ycgg2ttr>), the New York committee balanced the spouse's entitlement "to exercise his/her rights in support of his/her own candidacy, and at the location where he/she resides" with the code of judicial conduct. The committee emphasized that the code restrictions "should not and need not distort or ignore the realities of normal familial relations, and especially the public perception of those relationships" and that "the political rights of a candidate for public office who happens to be married to a judge cannot be ignored." Thus, the committee concluded, a judge whose spouse is running in a contested election for school board is not required "to discourage the spouse from displaying a campaign sign supporting the spouse's election on the lawn of the marital residence." See also *Maryland Advisory Opinion Request 2015-47* (<https://tinyurl.com/y7bbggpd>) (a candidate/spouse may post a campaign sign in the yard of their home even if the judge is the co-owner or co-tenant); *Ohio Advisory Opinion 2001-1* (<https://tinyurl.com/y6ut6fnm>) (a campaign sign for a candidate/spouse may be placed on property co-owned by the judge).

In contrast, the Colorado advisory committee stated that a judge may not allow signs promoting a spouse's candidacy on jointly owned real estate. *Colorado Advisory Opinion 2005-5* (<https://tinyurl.com/ybu8q72f>). The Indiana committee advised that "yard signs for a judicial candidate/spouse

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are best avoided,” noting that “as a practical matter, it is unclear how a judge would convey that a yard sign was placed at the behest of the judge’s spouse and not the judge,” *Indiana Advisory Opinion 2-2014* (<https://tinyurl.com/y6wj9j3>).

If the property is not jointly owned, the sole owner determines whether a campaign sign may be displayed. Thus, the Connecticut committee advised that, if a house is held solely in the name of a judge’s spouse, the spouse may post signs in support of her candidacy on the property (*Connecticut Informal Opinion 2018-6* (<https://tinyurl.com/y9sf57r8>)), but the Maryland committee stated that a judge may not allow a candidate/spouse to post signs on property owned solely by the judge. *Maryland Advisory Opinion Request 2015-47* (<https://tinyurl.com/y7bbggpd>).

Family member supports a candidate

Campaign events

Several judicial ethics opinions advise a judge to prohibit his spouse from holding gatherings in support of a political candidate in their home or at least to “adamantly and genuinely encourage” her to host the event somewhere else. *Florida Advisory Opinion 2011-10* (<https://tinyurl.com/y7d8957z>).

- A judge may not permit his spouse to host a “Come over and meet the Governor” party in their home, owned in joint tenancy, in an election year when the governor was a candidate for re-election even if there would be no fund-raising and the judge would not take part. *Kansas Advisory Opinion JE-33* (1990) (<https://tinyurl.com/yapwb4ju>).
- A judge’s spouse may not host a fund-raiser for a judicial candidate in the judge’s home. *Texas Advisory Opinion 284* (2001) (<https://tinyurl.com/o3ftxos>).

Other committees, however, permit a judge’s spouse to host political events in their home but direct the judge to review the ethical constraints with his spouse to avoid the appearance that the judge is engaging in fund-raising or endorsing the candidate. *California Judges Association Advisory Opinion 49* (2000) (<https://tinyurl.com/ybtqzymo>); *Wisconsin Advisory Opinion 1997-2* (<https://tinyurl.com/ybcskl25>). For example, those committees advise, the judge’s name should not be used in any invitation or other announcement. Other opinions give similar advice.

- A judge’s spouse may host a party for a political candidate at their home as long as the judge does not attend and his name is not used. *South Carolina Advisory Opinion 14-2006* (<https://tinyurl.com/yct6kvan>).
- A judge’s spouse may use their home for a political fund-raiser as long as judge is not involved in soliciting funds and does not endorse

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any candidate. *West Virginia Advisory Opinion* (May 7, 2002) (<https://tinyurl.com/y8o4slus>); *West Virginia Advisory Opinion* (August 28, 1995) (<https://tinyurl.com/y8o4slus>).

See also *In the Matter of Troy*, 306 N.E.2d 203 (Massachusetts 1973) (no misconduct when a judge attended meetings his wife held in their home with a gubernatorial candidate and supporters because the judge did not take any active part in the campaign or fund-raising).

Although allowing the spouse-hosted events, the California committee did advise that a judge should discourage a spouse from hosting an event in support of a candidate for district attorney or other office closely associated with the courts. *California Judges Association Advisory Opinion 49* (2000) (<https://tinyurl.com/ybtqzymo>). If the event is still held, the committee stated, the judge should disclose the event in cases in which the candidate appears.

The Wisconsin committee explained that a judge could help his spouse both before and after she holds a political fund-raiser at their home by cleaning the house, preparing food, and providing child care as long as those activities took place out of view of the participants. *Wisconsin Advisory Opinion 1997-2* (<https://tinyurl.com/ybcskl25>). However, distinguishing based on whether the activity is public, the committee stated that the judge could not replenish food and beverages during the event or listen to the speakers. Although the judge could not attend the event, the committee advised, he was not required to leave the house unless its layout meant he would probably be seen by those attending.

Because Illinois judges may attend any political gathering at any time, the Illinois committee stated that a judge may attend an event hosted by her spouse for a political candidate in their home but should not act as a sponsor or lend her name or office to the event. *Illinois Advisory Opinion 2001-9* (<https://tinyurl.com/yc37dner>). However, the California committee stated that a judge should not attend political gatherings hosted at his home even though California judges usually can attend political gatherings because the judge's presence at an event held in "the intimacy of his/her home" would create the appearance of an endorsement. *California Judges Association Advisory Opinion 49* (2000) (<https://tinyurl.com/ybtqzymo>).

Campaign signs

The Illinois judicial ethics committee advised that a judge's spouse may display a campaign sign in support of a political candidate in the yard of the home they jointly own. *Illinois Advisory Opinion 2006-2* (<https://tinyurl.com/ycmfldb5>). The committee explained that "the likelihood of a sign being misinterpreted as the judge's act is . . . reduced by the accepted view that married individuals remain individuals with separate property rights and beliefs," noting the community is less likely today to automatically consider a joint residence the "judge's house." Emphasizing that "a judge does not possess a superior right in joint property or a right to dictate permitted and non-permitted uses," the committee noted that, if spouses cannot agree,

"The issues arise both when the family member is a candidate and when the family member supports a candidate and involve holding political events at the home and displaying campaign signs in the yard or window."

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the judge/spouse cannot use “fiat or self-help” to “bar his or her spouse’s independent act.” The committee concluded that the possibility that “some people will misinterpret the campaign sign as a prohibited political endorsement by the judge” does “not justify curtailment of a spouse’s right to political expression.” See also *Florida Advisory Opinion 2006-11* (<https://tinyurl.com/yc4njokt>) (a judge should not authorize or encourage her spouse to place a political sign in the yard of a residence they jointly owned, but “the judge’s spouse has autonomy in the political arena, and the spouse is free to engage in political activities as the spouse deems appropriate”).

Other committees have advised that a judge should explain the “public perception issues” created by such signs and discourage her spouse from putting a yard or window sign on their property, but that the judge is not required to take further action if that attempt fails. *Arizona Advisory Opinion 2016-3* (<https://tinyurl.com/jlhduxn>). Accord *Nevada Advisory Opinion JE2010-9* (<https://tinyurl.com/ycchk9vu>); *New York Advisory Opinion 2007-169* (<https://tinyurl.com/y6ut6fnm>). Several committees accept that a judge’s spouse may place a sign at their home but caution that it should be displayed in a way that does not imply that the judge endorses that candidate and that makes clear the decision to display the sign was not the judge’s, although the opinions do not explain how that can be accomplished as a practical matter. *California Advisory Opinion 49* (2000) (<https://tinyurl.com/ya6y5lxo>); *Oklahoma Advisory Opinion 2000-7* (<https://tinyurl.com/ycs55xxh>).

In contrast, several judicial ethics committees have advised that, because a campaign sign implies an endorsement by both homeowners, a judge should not permit a spouse to place a candidate’s sign on jointly owned property. *Arkansas Advisory Opinion 2009-4* (<https://tinyurl.com/y8fmnvxx>); *Maine Advisory Opinion 1994-3* (<https://tinyurl.com/ydymet7d>); *South Carolina Advisory Opinion 33-2001* (<https://tinyurl.com/yaaxqhoc>).

Finally, the Arizona committee stated that a judge should not allow a spouse or other family member to place political signs on property solely owned by the judge. *Arizona Advisory Opinion 2016-3* (<https://tinyurl.com/jlhduxn>). Accord *Massachusetts Advisory Opinion 2005-8* (<https://tinyurl.com/y8xhky5g>) (a judge may not permit his adult daughter, who shares his home but lives independently, to display a campaign sign in front of the home in support of his son’s campaign, for which she is campaign manager).

Recent cases

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Banning clerk from the courthouse

In Indiana, two judges banned the clerk from the courthouse for six days, resulting in sanctions for both judges.

On August 3, 2015, the Blackford County Council announced its intent to cut funding for two positions in the county clerk's office. Derinda Shady, the elected county clerk, asked Circuit Court Judge Young to intervene with the council, but he and Superior Court Judge John Barry declined and instead decided to transfer open criminal case files to their own offices to lighten the county clerk's workload. Angered, Shady told Judge Young, "You can collect your own court costs, too," and she told Judge Barry that he'd "better bring a cop" if he came to retrieve the files. A few days later, she apologized and let the files be transferred without incident.

At a public hearing on August 19, the council rejected Shady's appeal of the defunding decision. Afterward, she was rude to council members, but did not specifically threaten to destroy court records. Judge Barry received reports about Shady's behavior and told Judge Young about them.

The next morning, Judge Young went to the clerk's office to demand that Shady meet with him and Judge Barry; Shady was on the phone. After her call, she phoned Judge Young and told him "if he had something to say that he could come down to her office." Judge Young replied, "Get up here! Now!" Shady went upstairs, bringing her daughter, a deputy clerk, but Judge Young was unwilling to have anyone else present at the meeting. Shady and her daughter went downstairs after a few minutes. Shady went home upset after the "abortive 'meeting'" and later went to the hospital with a panic attack and chest pains.

At 8:25 a.m., Judge Young presided over a hearing to enjoin Shady from the courthouse; Judge Barry attended and made remarks. There was no affidavit, verified complaint, or written application for an injunction. Shady was not present and had had no written notice of the date, time, or subject of the hearing. Two deputy clerks were present but had had no prior written notice of the allegations against them.

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The judges knew that Shady had left the courthouse but did not know that she had left for medical reasons. During the hearing, Judge Young stated that Shady had “stormed out” and “fled the courthouse grounds.” He also “made comments evincing bias against Shady—including that she was ‘totally poisoning this workplace’ and that if she’d made her ‘bring a cop’ comment to him instead of Judge Barry, ‘she would be here in hunter orange this morning, in chains, where she would stay and enjoy her Thanksgiving dinner, probably her Christmas dinner as well.’”

Judge Barry stated that they were barring Shady from the courthouse because they were concerned that her prior behavior showed there was a risk to the integrity of court records. However, no evidence was presented that Shady had interfered with the transfer or processing of files or that she would not comply with the court’s directives regarding the files.

Declaring an “emergency,” Judge Young found that Shady was “unfit to assume her duties” and stated that she would be “locked out of the entire courthouse square” and arrested if she appeared at the courthouse before the next hearing, which was six days later, August 26. That afternoon, Judge Young and Judge Barry issued a temporary restraining order to that effect.

On August 25, the restraining order was terminated, pursuant to an agreement between the clerk’s attorney and the judges.

In the disciplinary proceedings, the Indiana Supreme Court suspended Judge Young for six days without pay, accepting the parties’ agreement with the masters’ proposed findings, conclusions, and sanction. *In the Matter of Young*, 92 N.E.3d 628 (Indiana 2018).

The Commission on Judicial Qualifications publicly admonished Judge Barry, with his consent in lieu of formal disciplinary proceedings. *Public Admonition of Barry* (Indiana Commission on Judicial Qualifications June 28, 2017) (<https://tinyurl.com/yaecty3u>). The Commission noted that the matter should have been handled as an indirect contempt proceeding, with all of the appropriate procedural safeguards, and stated that, “[b]y sua sponte issuing a restraining order which directly benefitted/impacted the courts, the judge essentially made himself a witness (and party) to the action and denied the Clerk and her employees a neutral arbiter over the dispute.”

Stalking and harassing

Based on the recommendation of the Judiciary Commission, the Louisiana Supreme Court suspended a judge for six months without pay for a pattern of stalking and harassing his ex-wife, in violation of court orders. *In re Sachse*, 2018 WL 1310093 (Louisiana Supreme Court March 13, 2018) (<https://tinyurl.com/yboadeuh>).

On August 10, 2012, as the judge’s wife, Lisa Rabalais, was moving out of the matrimonial domicile, the judge grabbed her by the shirt to prevent her from leaving, and the police went to the home in response to her complaints. On August 17, Rabalais filed a petition for protection from domestic abuse, citing the August 10th incident and alleging that the judge had

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repeatedly contacted her afterwards by phone, e-mail, and third parties and made “threats” through her places of employment trying to get her to talk to him. A temporary restraining order was issued directing the judge not to abuse, harass, stalk, follow, threaten, or contact Rabalais, not to go within 100 yards of her residence or her personally, and to stay away from where she worked.

The judge admitted that he subsequently violated the TRO in three incidents: installing a GPS tracking device on their community-owned vehicle; taking the vehicle one day without Rabalais’ knowledge or consent; and pulling in front of her vehicle, getting out of his vehicle, and telling her that “they needed to talk.” The Commission also charged the judge with violating the TRO in three additional instances that he did not admit. The TRO expired in November 2012.

A no-contact order was entered against the judge in June 2013, and Rabalais reported six subsequent incidents to the police. For example, the judge blew his horn and was near Rabalais when she was driving a client home (she was a bus driver for a facility for handicapped adults), he approached her in a Wal-Mart and said, “I promise I didn’t know you were here and I am leaving now,” and he followed her for approximately two miles while she was driving her regular bus route.

The Court stated:

As the Commission duly noted, it is troublesome and particularly damaging to the judiciary when a member of the judiciary ignores the law and duly issued court orders. Furthermore, notwithstanding the emotional turmoil of a divorce, his cumulative behavior over approximately 18 months is inexcusable and unbecoming of the judiciary.

Noting the judge was never convicted but only arrested, the Court held that the plain language of Canon 2A “does not require the prosecution or conviction of a crime” to find misconduct and “imposes an affirmative duty upon judicial officers to ‘respect and comply with the law,’ which respondent failed to do.” Further, the Court explained, the judge’s conduct at a minimum “violates Canon 1, since his harassing behavior fails to uphold ‘high standards of conduct’ and ‘fails to promote public confidence in the integrity ... of the judiciary.’”

In mitigation, the Court noted that the judge had expressed remorse and has had no contact with his ex-wife since 2014.

Independent investigation in a harassment case

Based on a stipulation and the judge’s consent, the Nevada Commission on Judicial Discipline publicly reprimanded a judge for, after an independent investigation, denying an application for a temporary protection order against a sheriff’s deputy. *In the Matter of Sullivan*, Stipulation and order of consent (Nevada Commission on Judicial Discipline February 23, 2018) (<https://tinyurl.com/ybvbkar9>).

“[T]he plain language of Canon 2A ‘does not require the prosecution or conviction of a crime’ to find misconduct”

On December 28, 2016, at about 4:01 p.m., a woman filed an application for a temporary protection order against a county deputy sheriff; the application stated that the applicant was or had been in a voluntary sexual relationship with the deputy, but he was now harassing her. Noting that the application indicated that the deputy had been involved in the applicant's last four arrests, the judge was concerned about her credibility and motives. The judge, a former county sheriff's deputy, believed that a protection order could have an adverse impact on the deputy's career.

The judge contacted the sheriff's office and was told that the office was aware of the allegations, was conducting an internal affairs investigation, and had ordered the deputy to stay away from the applicant, on and off duty, pending the investigation.

On January 3, the judge denied the application without a hearing based on his review of the application and his call to the sheriff's office.

Ex parte information in a domestic violence case

Based on an agreed statement of facts, the New York State Commission on Judicial Conduct publicly admonished a judge for receiving unsolicited ex parte information regarding an order of protection, failing to disclose the communications, and repeating the information as fact during court proceedings. *In the Matter of Curran*, Determination (New York State Commission on Judicial Conduct November 14, 2017) (<https://tinyurl.com/y97o9puy>).

On February 25, 2015, the judge arraigned Michael Eastman and issued a temporary order of protection directing him to stay away from S.M., with whom he had a personal relationship. Eastman was charged with criminal obstruction of breathing, assault, and criminal mischief.

On July 11, a man approached the judge at a gas station, said he was S.M.'s husband and the father of her children, and claimed that Eastman and S.M. had been traveling to Vermont for trysts, accompanied by the children. On July 17, an anonymous female caller repeated the same allegations in a voicemail message left on the judge's cellphone.

The judge did not disclose the conversation or the voicemail to defense counsel or the prosecutor.

On July 20, during a pre-trial conference, the judge accused Eastman of violating the order of protection by impregnating S.M. When Eastman's attorney, John Oswald, attempted to refute the accusation, the judge asked whether the pregnancy was the result of "the immaculate conception" and asserted that "someone perjured themselves." Both attorneys and Eastman corrected him about the date of the order of protection, and the judge acknowledged his error but stated, "I'm aware there's been multiple violations of the order of protection. Multiple." The judge told Oswald, "I don't trust your client and I don't trust [S.M.], that's the problem, and I'm not letting them off the hook."

After the pre-trial conference, the judge accepted Eastman's guilty plea to the charge of criminal obstruction of breathing in satisfaction of all

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charges, sentenced him, and issued a six-month stay-away order in favor of S.M., with leave for Eastman to apply for a non-violent order of protection when their child was born. After pronouncing the sentence, the judge said to Eastman, “Let me tell you this, all right? And we’re still on the record. I’m aware that you violated that order of protection on multiple occasions since it was issued.” He continued, “And I don’t want you to say anything, but I’m aware that you violated it and I’m aware that [S.M.] knowingly violated it with you, so you can’t — just because you go to Vermont and you’re not in New York when you do the violation, that doesn’t mean it doesn’t count. All right? So, don’t violate it again, because if you come back here and you violated it again and you’re found guilty after a hearing, you’re going to get the maximum.”

The Commission found that the judge’s “unsubstantiated accusations conveyed the appearance that respondent had received and was influenced by undisclosed, unauthorized information that the defendant, unaware of its source, was unable to refute.”

Comment to reporter, discourteous remark in a domestic violence case

The California Commission on Judicial Performance publicly admonished a judge for making comments to a reporter about a domestic violence case and, later in the same case, making a discourteous remark about the victim in court. *In the Matter Concerning Lord*, Decision and order (California Commission on Judicial Performance April 11, 2018) (<https://tinyurl.com/y7dc8zbu>).

In February 2015, defendant Melvin Roberts filed a motion for a new trial after being found guilty of misdemeanor domestic violence by a jury in a trial over which the judge had presided. Prior to the hearing on the motion for a new trial, the judge told a reporter that he had denied the prosecution’s request for a protective order during sentencing because “I wanted everything to remain the status quo until we had a chance to review the issue at the motion for a new trial.” The reporter asked about the perception that the judge was giving the defense an argument for a retrial, and the judge responded, “No, I wasn’t quite doing that. I was expecting a motion for a new trial. It is not that unusual to make that motion, no matter what the circumstances of the case. This one had at least an arguable issue for appeal, and I thought it would be brought up.” The judge’s comments were published in an article entitled, “Domestic Violence Judge Questioned” in the local paper.

The Commission found that the judge’s comments “at a minimum, created the impression that he was defending his statements and rulings in *Roberts* and may have also created the appearance that he was embroiled in the *Roberts* case.”

During the hearing on the motion for a new trial, the prosecution stated that they were renewing their request for a protective order, “just like is

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typically issued in virtually every domestic violence case.” In response, the judge, referring to a separate case, *People v. Ernesto Sarres*, said, “So I don’t understand why there is such a huge difference between Ms. Sarres, who is roughly the same age as Mrs. Roberts — Ms. Sarres has as her perpetrator a convicted felon, long history of violence, Ms. Sarres gets almost no protection from the City Prosecutor’s office whereas Mrs. Roberts, who’s as white as a piece of wonder bread, gets all kinds of protection and attention from the prosecution office.”

The Commission found that, when addressing his concerns about the disparate treatment he perceived for the victims in the two cases, the judge was obligated to act consistent with the code of judicial ethics and that his “flippant remark about the victim in the *Roberts* case being ‘as white as a piece of wonder bread’ was inconsistent” with the requirement that judges be patient, dignified, and courteous and “may have furthered the appearance that the judge was embroiled in the *Roberts* case.”

\$4 billion bond

The Texas State Commission on Judicial Conduct publicly reprimanded a judge for (1) setting a \$4 billion bond for a murder suspect and (2) magistrating her own son. *Public Reprimand of Brown and Order of Additional Education* (Texas State Commission on Judicial Conduct December 19, 2017) (<https://tinyurl.com/y7u9deux>). The Commission also ordered that the judge receive two hours of instruction with a mentor.

To reporters and on Facebook, the judge explained that the \$4 billion bond was “an intended grave and bold error.” For example, she stated:

- “I set [the bond] as high as I could to illustrate the fact that it’s ridiculous how we are railroading people without them even having their constitutional rights to a fair trial to determine if they are guilty or innocent.”
- “Of course it was unconstitutional. I don’t care what happens to me as long as everyone who comes through this system gets a fair shot at getting out of jail until . . . they are proven guilty or innocent.”
- “Enough is enough . . . so you use a number sooooo big that a broken system cannot even compute it. I will be a fool alllll day long if it shakes up a broken system to the point where it begins to become more humane. Prevention and rehabilitation are not just buzz words.”

In response to the Commission’s letter of inquiry, the judge explained that she had originally set the bond at \$100,000, but that “detectives and jailers” were harassing her so she changed the one to a four and asked them to stop when she “had added enough zeroes to satisfy them.”

Ethical guidelines for members of judicial conduct commissions

The code of ethics for members of the California Commission on Judicial Performance (<https://tinyurl.com/y7djf7sa>) explains:

As the agency charged with enforcing standards of judicial conduct in order to maintain the integrity and independence of the judiciary, the California Commission on Judicial Performance . . . recognizes the importance of observing high standards of ethical conduct in the performance of its responsibilities. The Code of Ethics . . . set forth in these policy declarations describes ethical standards expected of a commission member.

The code notes that it “does not confer any substantive or procedural due process rights other than those provided by law, or create a separate basis for civil liability or criminal prosecution.”

Several other judicial conduct commissions have also adopted extensive ethical guidelines for commission members. *See Arkansas Judicial Discipline And Disability Commission Guidelines and Operating Policies for Commission Members, Alternates, and Staff* (<https://tinyurl.com/ybu3gs29>); *Minnesota Board on Judicial Standards Board Policies* (<https://tinyurl.com/yvujf589>); *New York State Commission on Judicial Conduct Code of Ethics for Members* (<https://tinyurl.com/y84fjuov>); *Washington State Commission on Judicial Conduct Members’ Policies* (<https://tinyurl.com/y9rf7c8l>).

Many other commissions have several provisions in their rules regarding member conduct, particularly on disqualification, ex parte communications, and political activities.

Below is an edited composite of guidelines commissions across the country have adopted. Not every rule or every version is included, and it is not intended as prescriptive or as a model. However, it illustrates the subject and the content of guidelines some commissions have found helpful for their members.

Disqualification

All members

1. A commission member shall not participate in the consideration of a complaint against a judge if:
 - a. the member is the complainant;
 - b. the member is related to the complainant within the third degree;
 - c. the member is a material witness to the alleged misconduct;

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- d. the member has personal knowledge of disputed evidentiary facts;
- e. the member is related to the judge within the third degree;
- f. the member publicly supported or opposed the judge in a judicial campaign within the last five years;
- g. the member resides in the same judicial district as the judge;
- h. the judge is a member of the commission;
- i. the member believes that, for any reason, the member cannot make a fair and impartial decision;
- j. the member has a personal bias or prejudice concerning the complainant, the judge, or a lawyer involved in the matter;
- k. the member has a current or past professional, business, social, civic, or other interest or relationship with the judge or the complainant that would disqualify a judge in a judicial proceeding;
- l. the member has been represented by the judge's attorney in the recent past; or
- m. the member or a member of the member's immediate family, individually or as a fiduciary, has a financial interest in any events relating to the matter.

Judge members

2. A judge-member of the commission shall not participate in the consideration of a complaint against a judge if:
 - a. the member is the subject of the complaint;
 - b. the member is a judge serving within the same judicial district and on the same level of court as the accused judge; or
 - c. the member is a judge serving on the same appellate court as the accused judge.

Attorney members

3. An attorney-member of the commission shall not participate in the consideration of a complaint against a judge if:
 - a. the member practices as an attorney in the same district as the judge;
 - b. the member is representing a party in a case before the judge;
 - c. to the member's knowledge, the member's law firm is representing a party in a case before the judge;
 - d. the member or the member's law firm served as a lawyer in any proceedings that are the subject of the complaint;

- e. a lawyer with whom the member practices is the complainant or a material witness;
- f. the complainant is the member's client or former client; or
- g. the member previously practiced or currently practices with the judge, the complainant, the judge's attorney, or a witness in the matter.

Disqualification procedures

4. A member shall disqualify himself or herself promptly.
5. A member may, but is not required to, state the reason(s) the member is disqualifying herself or himself.
6. Each member shall disclose all facts that may lead to an inference of bias relating to a matter before the commission. After disclosure, the commission will determine whether the facts warrant disqualification.
7. The judge or counsel for the commission may request the disqualification of a member by filing a motion with an affidavit that states with particularity the grounds for disqualification.
8. If formal proceedings have been commenced, a motion to disqualify must be filed no later than:
 - 20 days after the mailing of the formal complaint,
 - 30 days before the date set for a hearing, or
 - 10 days before the date set for consideration of any pretrial matter
9. A motion for disqualification will be decided initially by the member who is the subject of the motion.
10. If the motion is denied by the member, the member shall proceed no further with the matter and file a written answer with the commission within five days, admitting or denying the allegations and setting forth any additional facts that bear on the question.
11. If the motion is denied by the member, the motion will be decided:
 - By the commission chair or, if the motion concerns the chair, by the longest-serving member, or
 - By a majority of the commission without participation by the member.
12. No later than 20 days prior to the commencement of a hearing upon a formal statement of charges, counsel for the commission or counsel for the judge may exercise a single peremptory challenge to a member.
13. A member shall leave the room when a matter from which the member is disqualified is discussed and shall not comment or otherwise participate in the commission's consideration of the matter.

14. A member shall not receive any confidential information on a matter from which the member is disqualified.
15. The minutes of commission meetings shall record the names of any member not voting on a matter by reason of disqualification.

Political activity

16. A member shall not hold office in any political party or organization.
17. A member shall not publicly support or oppose any candidate for judicial office. This restriction does not apply to a member who is seeking judicial office.
18. If a member belongs to a partnership or professional corporation that contributes funds to judicial candidates, the member shall not participate in those contribution decisions.
19. If a member is a leader of an organization that endorses or rates judicial candidates, the member shall not participate in that process.
20. A member involved in a campaign for a non-judicial candidate shall not refer to the member's affiliation with the commission in a way that may indicate that the commission supports the candidate.

Communications

21. A member shall not initiate, permit, or consider ex parte communications regarding a matter pending or impending before the commission, other than authorized communications with other members and staff.
22. When a formal hearing is underway, a member shall not discuss testimony or evidence with anyone, including other members, until deliberations begin.

Press and public contacts

23. If a member is contacted by the media or a member of the public about a new, pending, or closed matter that has not been the subject of a commission press release, the member shall not discuss the matter but may refer the inquirer to the executive director.
24. If a member is contacted by the media or a member of the public about a matter that has been the subject of a commission press release, the member may read the press release to the inquirer or refer the inquirer to the chair or executive director.

25. If a member is contacted by the media or a member of the public about general, non-confidential matters (for example, commission purpose, history, procedure, or composition), the member may respond to the extent of the member's knowledge or refer the inquirer to the chair or executive director.

Attendance

26. A member is expected to attend and adequately prepare for all commission meetings.
27. A member who cannot attend all or part of a meeting shall provide adequate notice so that a quorum can be maintained.
28. If a member frequently misses meetings without excuse, the chair:
- may discuss with the member whether continued service on the commission is warranted;
 - may notify the appointing authority; or
 - may remove the member for cause with the concurrence of a majority of the other members.

General provisions

29. A member shall not testify voluntarily as a character witness in a commission proceeding.
30. A member shall maintain the confidentiality of all new, pending, and closed matters and ensure that all confidential documents are secured.
31. A member shall not use or disclose for any purpose unrelated to commission duties non-public or confidential information acquired as a member.
32. A member shall not provide legal representation or counseling to a judge in a matter before the commission during the member's term or within two years after the member's term has expired.
33. A member shall refrain from publicly commenting on the judicial qualifications of any judge.
34. A member shall not use commission resources or staff for personal purposes.
35. In conducting commission business, a member shall refrain from manifesting by word or action bias or prejudice based on race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, or socio-economic status against parties, witnesses, counsel, or others.

36. A member shall refrain from financial and business dealings that directly or indirectly reflect adversely on the member's impartiality, interfere with the proper performance of commission duties, or exploit the member's position.
37. A member shall not lend the prestige of membership to advance private interests of the member or others. A member may include membership on the commission as part of a curriculum vitae or biographical information.
38. A member shall not convey or permit others to convey the impression that the member is in a special position to influence the commission.
39. A member shall not be swayed by partisan interests, public clamor, or fear of criticism with respect to commission business.
40. A member shall not allow family, social, professional, business, or other relationships to influence the member's conduct or judgment.
41. A member shall avoid impropriety and the appearance of impropriety in all of the member's commission activities.
42. A member shall refrain from conduct that would impair public confidence in the integrity and impartiality of the commission.

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