# JUDICIAL CONDUCT REPORTER

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Center for Judicial Ethics

JUDICIAL CONDUCT REPORTER

FALL 2017

# Abuse of the prestige of office: Attempting to obtain a favor

by Cynthia Gray

A judge's appeal for a favor from police, prosecutors, or other judges is a classic example of "abus[ing] the prestige of judicial office to advance the personal or economic interests of the judge or others" in violation of Rule 1.3 of the American Bar Association 2007 *Model Code of Judicial Conduct*. The crux of the misconduct is taking advantage of access not available to non-judges and/or expecting special consideration not accorded to the general public. As several recent cases illustrate, an explicit request, an express reference to the judicial office, or acquiescence by the other person are not necessary to prove a violation.

## "But for his judicial status"

The Michigan Supreme Court suspended a judge for nine months without pay for interfering with a police investigation at the scene of an accident involving his intern, interfering with the prosecution of the intern, and making an intentional misrepresentation to the Commission. *In re Simpson*, 902 N.W. 2d 383 (Michigan 2017).

In July 2013, Crystal Vargas accepted an internship with the judge. Within days, they began frequently calling and texting each other, exchanging several thousand communications in four months, at all times of the day and night and on weekends.

On September 8, the judge and Vargas exchanged six text messages between 1:25 a.m. and 2:29 a.m. and six text messages between 4:20 a.m. and 4:23 a.m. At about the time of the latter messages, Vargas was involved in a motor vehicle accident less than two miles from the judge's home. Vargas called the judge at 4:24 a.m., shortly after the accident.

While Vargas was still on the phone with the judge, Officer Robert Cole arrived at the scene. As the officer was administering field sobriety tests to Vargas, the judge arrived.

Noting that the judge "began his interaction with Officer Cole by introducing himself as 'Judge Simpson,'" the Court concluded that, "he appears at best to have failed to prudently guard against influencing the investigation and at worst to have used his judicial office in a not-so-subtle effort to interfere with the investigation." The Court also noted that, but for his judicial status, Officer Cole would not have spoken to the judge until he completed his investigation, that the judge spoke to Vargas without Officer Cole's permission, which was "another action an ordinary citizen would not have been permitted to take," and that the judge's "question—'Well, does she just need a ride or something?'—was a transparent suggestion to Officer Cole to end his investigation and allow respondent to drive Ms.

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Vargas away from the scene." Concluding that the judge's "behavior at the accident scene constitutes judicial misconduct," the Court found that the judge "used his position as a judge in an effort to scuttle a criminal investigation of his intern."

Subsequently, the judge twice contacted the township prosecutor, telling him that Vargas was a "good kid" who was in a "pretty bad relationship," noting that the prosecutor had met Vargas and would be working with her in the future, raising an evidentiary issue, and discussing potential defense attorneys. The Court concluded that the judge "improperly acted as a legal advocate for Ms. Vargas and used his position as a judge to thwart the township's criminal prosecution" of her, delaying the charges.

## Gaining access

The New York Court of Appeals removed a judge for multiple efforts to influence the disposition of a traffic ticket received by his daughter and being discourteous to the prosecutor, in addition to other misconduct. *In the Matter of Ayres* (New York Court of Appeals October 17, 2017) (http://tinyurl.com/yak53fqw). (For a discussion of the other misconduct, *see* Communications with appellate court in this issue.)

When his adult daughter received a traffic ticket, the judge personally requested that a court clerk and the assigned town justice transfer her case. (Judge Ayres believed the assigned justice could not handle the case fairly because Judge Ayres had fired his wife when she was a court clerk.) Both the clerk and the other judge refused the transfer request and "further rebuffed" Judge Ayres's attempts to discuss the merits of his daughter's case.

The judge then attended his daughter's pre-trial conference with the prosecutor where he made inappropriate references to his judicial office. He told the prosecutor that, "if this ticket was in my courtroom, I'd dismiss it," and that other judges he had spoken with shared his view "that this should be dismissed." The judge also threw a packet of papers on the table in the prosecutor's direction, "slamm[ing] it down," and, in a "very condescending" and "controlling" tone, said, "Don't you know the law?" The prosecutor testified that she felt "extreme pressure" to dismiss the ticket.

The Court concluded that the judge had done "more than act as would any concerned parent, as he now maintains."

> Instead, he used his status to gain access to court personnel under circumstances not available to the general public, and, in his effort to persuade the prosecutor to drop the matter, gave his unsolicited judicial opinion. Furthermore, petitioner's imperious and discourteous manner towards the prosecutor on the case undermined "the integrity ... of the judiciary."

Rejecting the judge's argument that "he acted as a father in his daughter's case, not as a judge," the Court reiterated its holding in other cases that "[j]udges are held to 'standards of conduct more stringent than those acceptable for others'" and "'paternal instincts' do not justify a departure from the standards expected of the judiciary."

**"The crux of the misconduct is taking advantage of special access not available to non-judges and/or expecting special consideration not accorded to the general public."**

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## Appropriate response

In *In the Matter of Dixon*, Determination (New York State Commission on Judicial Conduct May 26, 2016) (http://tinyurl.com/gotdsjm), the New York State Commission on Judicial Conduct emphasized that "even absent a specific request for special consideration," the judge's communications with another judge about a pending tort action in which she was the plaintiff constituted misconduct.

Judge's Dixon's tort case was pending before Judge Scott Odorisi, whom she knew personally, professionally, and on a first-name basis. The judge telephoned Judge Odorisi's chambers. When his secretary answered, the judge identified herself as "Judge Dixon" and asked to speak with Judge Odorisi; her call was promptly transferred to him. The Commission rejected the judge's argument that "her use of her judicial title had no significance," stating "she certainly would have known that without her title, the likelihood that she would be able to bypass the judge's secretary without having to explain the purpose of her call would be greatly diminished."

Judge Dixon told Judge Odorisi, in sum and substance, "I need to talk to you," and he responded, "Well, it can't be, it's not about this, your case, is it?" Judge Dixon replied, "Well, actually, it is." Judge Odorisi immediately told Judge Dixon that he could not talk to her about her case. Over Judge Odorisi's repeated objections and his efforts to terminate the conversation, Judge Dixon told Judge Odorisi that she was unhappy with her attorney, that she wanted to avoid publicity, that she wanted to have the case transferred, and that she wanted a conference at which she, the attorneys, and the insurance adjuster would be present.

Stating the judge should have known that her call to Judge Dixon would place him "in a compromising position," the Commission concluded that "it should not inure to respondent's benefit that Judge Odorisi was unswayed by her personal plea and responded appropriately to her breach of judicial ethics — indeed, by doing the only thing a judge in his position could ethically do: attempting to terminate respondent's call, promptly disclosing the call to counsel, and offering to disqualify himself."

Similarly, in *In the Matter of Aluzzi*, Determination (New York State Commission on Judicial Conduct June 26, 2017) (http://tinyurl.com/ybvenjkp), the Commission stated that court personnel's recognition of the impropriety of the judge's request for favoritism and their refusal to "effectuate the requested 'fix'" did not absolve the judge. Censuring the judge, the Commission also emphasized that the judge's failure to "explicitly invoke his judicial office," was irrelevant because the court personnel knew of his position so that "his request was implicitly supported by his judicial status."

The judge had taken a traffic ticket received by a friend to the window of the Fulton City Court clerk's office and spoke to a court office assistant, who knew him as the justice for the adjoining town. When the clerk opened the security door, the judge attempted to hand her the ticket, saying, "Give this to Judge Hawthorne and have him dismiss it for me." The clerk raised her hands in a "stop" motion and said to the judge, "We don't do that here. If you want that ticket reduced or dismissed, you have to go through the DA's

"The Commission also emphasized that the judge's failure to 'explicitly invoke his judicial office,' was irrelevant . . . ."

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office." The judge continued holding out the ticket and stated, "Just take it, and just give it to him." The clerk did not take the ticket because she understood that "[t]he court is not allowed to do that." The judge put the ticket on the counter and told the clerk to write his name and telephone number on it and have Judge Hawthorne call him. Later that day, the chief clerk took the ticket to Judge Hawthorne, and they agreed that they should contact the district administrative office about Judge Aluzzi's actions.

## Communications with appellate court

### by Cynthia Gray

The neutrality required of judges precludes advocacy even when it takes the form of defending the judge's own decision on appeal.

For example, the New York Court of Appeals held that a town court justice's communications to the county court extolling the correctness of his decisions under review were "highly improper." *In the Matter of Ayres* (New York Court of Appeals October 17, 2017) (http://tinyurl.com/yak53fqw) (removal for this and other misconduct; *see* Abuse of the prestige of office: Attempting to obtain a favor in this issue).

The judge had ordered a defendant to pay restitution, and the defendant appealed to the county court. The judge then mailed eight letters to the county court; five of the letters were ex parte. In the letters, the judge "asserted that the appeal was meritless and that defense counsel's arguments were 'ludicrous' and 'totally beyond any rational thought process.'" The judge also "made biased, discourteous, and undignified statements about the defendant and defense counsel, including suggesting that defense counsel was attempting to 'pad [his] bill' at taxpayer expense." The judge conceded that at least one of the letters addressed the county court with "snarky" language.

In the disciplinary proceeding, the judge claimed that his comments were taken "out of context and that judges must be allowed 'to express their individuality.'" The Court concluded, however, that the judge "misses the essential point: that, as a judge, his conduct had to both be and appear to be impartial. This is a particularly high standard . . . . The conduct with which he is charged — and which he does not deny—fails to meet it."

### Impermissible advocacy

In a previous case, the New York State Commission on Judicial Conduct had admonished a different town court justice for sending a letter to the county court judge hearing a defendant's appeal from his conviction for disorderly conduct. *In the Matter of Gumo*, Determination (New York State Commission on Judicial Conduct December 30, 2014) (http://tinyurl.com/qabxxsb).

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The judge had presided over the bench trial of a defendant charged with disorderly conduct based on allegations she directed abusive or obscene language at the county fairgrounds to the woman who was in charge of a horse show. One of five witnesses for the prosecution was the 14-year-old daughter of the clerk of the judge's court. The judge did not disclose the relationship before or during the trial and permitted the clerk to perform clerical and administrative duties in the matter. Although the clerk usually stayed in her office during trials, she sat in the back of the courtroom for her daughter's testimony and remained there for the rest of the trial.

The judge convicted the defendant of disorderly conduct and sentenced her to 15 days in jail, a $250 fine, and mandatory surcharges of $125, the maximum sentence for disorderly conduct. The defendant's attorney immediately asked the county court for a stay of the sentence pending a post-conviction motion and appeal.

During a hearing, County Court Judge Carl Becker granted an oral stay pending the appeal, stating "I'm particularly troubled by this allegation that one of the prosecution's witnesses was a daughter of the clerk... Had that been known, that would have been a no-brainer for a change of venue... Under the circumstances, I've got to stay this pending appeal . . . ." Judge Gumo "was offended and embarrassed by Judge Becker's 'no-brainer' comment, which he thought made him 'look like a complete dunce' and 'impugned the integrity' of his court."

The judge mailed, faxed, and hand-delivered to Judge Becker a two-page letter containing legal argument and facts not in the record. The letter stated that the county court had not been provided with certain information, for example, that the defendant "NEVER RAISED" the issue of the relationship between the court clerk and a witness until after the conviction and that the defendant had presented "not one scintilla of evidence" at the post-trial hearing to prove her "alleged claims of wrong doing." The judge's letter also argued that the defendant's appeal "was time barred."

In addition, the letter addressed Judge Becker's "no-brainer" comment, stating:

> [I] understand your ruling to mean that anytime a Village employee or relative thereof, is a witness in a criminal proceeding, (i.e., Village Police officer, Village dog warden, Village Code enforcement officer and their relatives) is an eye witness to a criminal proceeding and will testify at trial, the Village/ Town Court is obligated on it's [sic] own motion, must automatically request you to transfer jurisdiction based upon such employment relationship.

Judge Becker sent Judge Gumo's letter to the Commission and disqualified himself from the case. Another judge dismissed the appeal, rejecting the defendant's argument that Judge Gumo should have changed the venue sua sponte because the witness's mother was the court clerk.

In the disciplinary proceeding, the Commission found that the judge "showed insensitivity to his ethical obligations by failing to disclose that a material witness in a case over which he presided was the daughter of the court clerk, by failing to insulate the court clerk from the case, and by sending an inappropriate letter about the case after the conviction to the

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County Court Judge before whom the matter was then pending." The letter to the county court was the "most troubling," it explained, noting the judge "in apparent chagrin," mailed, faxed, and hand-delivered it, "underscoring his insistence to be heard on those issues."

> Instead of allowing the attorneys to address the merits of those matters, respondent — at a time when his proper role in the case had concluded — abandoned his role as a neutral arbiter and became an advocate. Advising the County Court Judge of numerous facts relating to the disqualification issue that the defendant's attorney had "not provided" (and that respondent has admitted were outside the record) was impermissible advocacy before the court that would consider the matter. Respondent's argument that the appeal was "time barred" and that he knew of no "good cause" for extending the defendant's time to perfect the appeal was also that of an advocate. Such conduct is inconsistent with well-established ethical principles. . . .

The Commission emphasized that "the letter was ethically and procedurally improper" even though the judge had copied it to the attorneys in the case.

Rejecting the judge's argument that the letter was consistent with his professional responsibilities, the Commission stated that, "if respondent believed that the defendant's attorney had engaged in misconduct, filing a complaint with the disciplinary committee would have been far more appropriate than writing to the court with jurisdiction over the case, citing facts outside the record and addressing pending legal issues." The Commission concluded that, "the tenor of his letter, which ranges from self-serving advocacy to sarcasm (in addressing the County Court Judge's 'no-brainer" comment'), strongly suggests that respondent acted in a fit of pique, not in a principled exercise of his ethical and judicial duties."

"[The judge] abandoned his role as a neutral arbiter and became an advocate."

## Abandoning neutrality

Based on a stipulation and agreement, the Washington State Commission on Judicial Conduct publicly admonished a judge who contacted the court of appeals to defend his rulings in two cases, in addition to other misconduct. *In re Sperline*, Stipulation, agreement and order of admonishment (Washington State Commission on Judicial Conduct March 11, 2004) (http://tinyurl.com/y8kgrvho).

The court of appeals, in unpublished opinions, reversed and remanded sentences imposed by the judge in two cases. In a letter to the judges who participated in the appellate opinion in the first case, the judge described the opinion as "wrong, demeaning, and unsupported by law (especially the cases you purport to base it on), logic, common sense, morality or public policy." The judge also asked the court to publish its opinion. In a letter to the appellate judges in the second case, the judge objected to the court's conclusion that he abused his discretion, specified why the sentence should be affirmed, stressed that he was "frustrated and disheartened at [the court's] approach to these cases," and asserted that the appellate judges were "creating an atmosphere of terrorism for the trial judges in Division III."

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When the judge wrote each of the letters, the appellate court had not issued its mandate terminating review of the cases, and both decisions were still subject to a motion for reconsideration. Granting the state's motion based on the judge's letters, the court of appeals ordered the cases assigned to a different judge on remand.

In the disciplinary proceeding, the Commission concluded that the judge's defense of his sentencing decisions and criticism of the appellate judges for their contrary opinions compromised his impartiality or the appearance that he was impartial. The Commission noted that the judge wrote to express his sincere frustration with the court and to object to what he perceived as the court's misguided opinions and that he did not intend his letters to influence the decision of the court of appeals. However, it concluded, the judge's strong reaction to the appellate court's opinions and his insistence that his rulings were correct, even though reversed, evidenced personal involvement in the cases. The stipulation noted that a request from a trial judge to publish an appellate opinion would not, in and of itself, violate the code of judicial conduct, but would lead a reasonable observer to question the judge's ability, or apparent ability, to be objective, neutral and detached when presiding over those cases on remand.

The Commission also found that the judge's conduct constituted improper public comment on pending cases, noting that, although the judge's comments were not as broadly disseminated as if, for example, they were made in the media, his comments were made to other judges and attorneys and were preserved as part of the public records in the trial and appellate courts. Because the judge's comments were substantive and on the merits, the Commission stated, they might reasonably be expected to affect the outcome or impair the fairness of those proceedings.

**The Center for Judicial Ethics has links to judicial conduct commissions and judicial ethics advisory committees at www.ncsc.org/cje.**

## Becoming an advocate

In *In re White*, 651 N.W.2d 551 (Nebraska 2002), the Nebraska Supreme Court suspended a county court judge for 120 days without pay for ex parte communications with the deputy county attorney and the presiding judge of the district court after a sentence the judge had imposed was reversed by the district court.

The judge sentenced to one-year's probation a defendant who, pursuant to a plea agreement, pled guilty to a protection order violation. Subsequently, the defendant was charged with violating his probation and entered a second guilty plea before the judge. The judge revoked the defendant's probation and sentenced him to the maximum statutory penalty of 180 days' confinement and a $1,000 fine. The defendant appealed to the district court, alleging that the judge had exhibited bias toward him at the time of his conviction and sentencing.

Vacating the sentence, the district court found that a reasonable person could question the judge's impartiality and remanded the case for re-sentencing by another county judge.

Subsequently, in chambers, the judge engaged the deputy county attorney in a "lengthy, detailed, and largely one-sided conversation" during

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which the judge itemized specific arguments about why the district court order was erroneous and supplied cases to support her legal position.

The county attorney's office inadvertently failed to file a timely notice of appeal, and the defendant was re-sentenced by a different judge.

Judge White then asked the district court's presiding judge to appoint a special prosecutor to pursue an appeal. Neither the prosecution nor the defense was present at the first hearing on that motion, and the defense was not notified of the second hearing. The district court's disposition of the judge's motion was not apparent from the record.

In the disciplinary proceeding, the Court found that the county court judge's "quarrel with the district court's decision caused [her] to abandon the impartiality required of a judge no matter what accusations are made against those who appear before the court." Noting it was not concerned with whether the district court's decision was legally or factually correct, the Court explained:

> When a judge becomes embroiled in a controversy, the line between the judge and the controversy before the court becomes blurred, and the judge's impartiality or appearance of impartiality may become compromised. In this case, the respondent abandoned the judicial role to become an advocate for her own ruling. Such behavior by the respondent discloses an unhealthy and wholly improper concern with the protection of her own rulings from appellate reversal. Simply stated, the individual judge of the court whose order is being reviewed is not a proper party to the proceeding. The responsibility of a judge is to decide matters that have been submitted to the court by the parties. The judge may not, having decided a case, advocate for or, as in this case, materially assist one party at the expense of the other. Such advocacy creates the appearance, and perhaps the reality, of partiality on the part of the judge. This, in turn, erodes public confidence in the fairness of the judiciary and undermines the faith in the judicial process that is a necessary component of republican democracy.

"When a judge becomes embroiled in a controversy, the line between the judge and the controversy before the court becomes blurred . . . ."

## Amicus briefs

The Arizona Commission on Judicial Conduct reprimanded two justices of the peace for filing amicus briefs in two superior court cases reviewing decisions by one of the judges. *Frankel, Karp*, Order (Arizona Commission on Judicial Conduct August 21, 2012) (http://tinyurl.com/y8adgpta).

The Commission noted that the judges had filed the briefs to clarify the law, that they had no personal stake in either matter, and that they withdrew the second brief after they were advised it was improper. However, the Commission concluded, "although perhaps well-intentioned," the judges' assertion that they filed the briefs in part because the defendants were not taking part in the appeal "amplified the impression that [the judge whose decision was being appealed] was abandoning his impartiality and speaking on behalf of one of the litigants. Only in very limited circumstances are judges permitted to advocate the correctness of a contested ruling to a higher court. . . . This was not one of them." The Commission concluded that the judges failed to promote public confidence that judges are neutral and impartial and not advocates for particular legal results.

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## Advisory opinions

Judicial ethics committees have also advised trial judges to refrain from weighing in on an appeal. Opinions state that judges may not:

- Communicate ex parte with an appellate judge regarding an appeal pending from the trial judge's court (*Texas Advisory Opinion 263* (2000) (http://tinyurl.com/o3ftxos));
- Furnish authorities to the appellate court concerning a case (*Florida Advisory Opinion 1982-9* (http://tinyurl.com/yb6xbkdz));
- Ask the appellate division for reconsideration of a decision that reversed the judge's ruling (*New York Advisory Opinion 1998-77* (http://tinyurl.com/y77q6ny9)); or
- Communicate with the appellate court concerning misstatements made by counsel before the appellate court (*Utah Informal Advisory Opinion 1998-9* (http://tinyurl.com/ydy6rzlp)).

The New York committee explained why a trial judge should not ask the appellate court to reconsider a decision reversing the judge's ruling.

> First, a judge should not adopt the role of an advocate. Here, the judge is advancing arguments on behalf of a party to the proceeding whose interests were adversely affected by the appellate ruling. Seeking reconsideration of that decision is a matter for the aggrieved party to pursue, and not the judge. . . . Second, the letter amounts to an ex parte communication . . . . Third, the letter could be regarded as public comment about a pending proceeding . . . .

*New York Advisory Opinion 1998-77* (http://tinyurl.com/y77q6ny9).

A judge asked the Utah advisory committee "whether a trial court judge has an ethical right or obligation to communicate with an appellate court concerning alleged misstatements made by counsel before the appellate court." *Utah Informal Advisory Opinion 1998-9* (http://tinyurl.com/ydy6rzlp).

> As an example, the judge describes a situation in which a petition for rehearing was filed with an appellate court. The petition for rehearing claims that the trial court took judicial notice of certain facts during the trial proceedings. The trial court judge did not take judicial notice of those facts. The judge wonders whether there would be a right or an obligation to inform the appellate court of the misstatement. As another example, a question arises as to a trial judge's responsibility when a party on appeal claims that off-the-record discussions were had and the judge does not recall such discussions or does not believe that the discussions were as represented by counsel.

The committee stated that, "a communication with an appellate court may not, on its face, exhibit partiality," but emphasized that "the effect and perception of any such communication must be considered."

> Any communication with an appellate court could be considered favorable to one side and in opposition to another, even if that is not the intention. Disclosure to the parties, as required by [the code of judicial conduct], provides an opportunity for scrutiny and response, but does not obviate the problem.



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> The adversarial system relies on the attorneys and parties to clarify the record on appeal. Unsolicited communication from a trial judge is not ordinarily necessary and undermines the neutrality of the bench.

The committee acknowledged that, "[t]here may be circumstances when an appellate court requires additional information from the trial judge" and noted that Canon 3B(7) of the Utah code of judicial conduct provided at the time that, "[i]f communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties." The committee concluded that a trial court judge should "not communicate with an appellate court concerning a pending or impending proceeding unless requested by the appellate court, with the requirements of Canon 3B(7) being followed."

> Such communication should be formal rather than casual. For example, the appellate court should not telephone or even write a letter asking for additional information. Rather, the appellate court should, by order, remand for the entry of additional findings, entry of a supplemental order, or resolution of an outstanding motion. The trial court's response should likewise be in the form of an order, memorandum of decision, or other appropriate document.

Similarly, the Texas committee stated that the consultations between judges that are an exception to the prohibition on ex parte communications "are conversations between judges regarding the law and its application where neither judge has an interest in the outcome of the litigation being discussed." *Texas Advisory Opinion 263* (2000) (http://tinyurl.com/o3ftxos). Absent those circumstances, the committee stated, the code of judicial conduct clearly does not permit an ex parte communication between an appellate judge and a trial judge regarding a pending appeal from the trial judge's court.

"Absent those circumstances, the committee stated, the code of judicial conduct clearly does not permit an ex parte communication between an appellate judge and a trial judge regarding a pending appeal from the trial judge's court."

## Recent cases



### Interview about a pending case

Based on a stipulation and consent, the Nevada Commission on Judicial Discipline publicly reprimanded a judge for giving an interview about a pending case on which he had served as prosecutor. *In the Matter of Kephart*,

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Stipulation and order of consent to public reprimand (Nevada Commission on Judicial Discipline August 31, 2017) (http://tinyurl.com/y9rpnfqz).

In 2002, the judge was one of two prosecutors who tried a case in which Kristen Lobato was convicted of murder and sexual penetration of a dead body in the death and mutilation of a homeless man in Las Vegas. After the conviction was reversed, the judge was one of two prosecutors in the 2006 retrial when Lobato was convicted of manslaughter and sexual penetration of a dead body. Her sentence of 13-45 years was upheld on appeal in 2009.

In February 2016, Lobato was serving her sentence, and her appeal from the denial of her petition for a writ of habeas corpus was pending before the Nevada Supreme Court. The case had gained notoriety through the media and the work of advocacy groups.

In February 2016, the judge gave a reporter an on-camera interview about the case in his chambers. The interview appeared in a story presented on television and in electronic print by KSNV News 3. The judge's comments and appearance were less than 30 seconds of an approximately three minute and 40 second story.

After a brief introduction stating that a homeless man had been brutally killed, the report showed the judge stating, "That was the first thought, is oh my god, what happened here?" After the reporter introduced the judge as a district court judge and said this was his only post-conviction interview, the judge stated, "I'm given a task to present evidence that we have, there's certainly no evidence that was, you know, manufactured or anything like that. We just present what we have to the jury and give the jury an opportunity to decide." At the end of the story, after the reporter indicated that there were questions about Lobato's guilt, the judge said, "I stand behind what we did. I have no qualms about what happened and how we prosecuted the matter. I believe it was completely justice done."

In the discipline proceeding, the Commission found that the judge's statement in the interview that justice was done attested to his belief that Lobato was guilty and directly contradicted Lobato's claim of actual innocence in the appeal. Therefore, the Commission found, there was a reasonable expectation that the judge's statement could affect the outcome or impair the fairness of Lobato's case.

## Three interviews about a pending case

Accepting an agreed statement of facts and joint recommendation, the New York State Commission on Judicial Conduct publicly censured a judge for making public comments about a pending murder case in three interviews and being discourteous to the prosecutor in a post-trial proceeding. *In the Matter of Piampiano*, Determination (New York State Commission on Judicial Conduct March 13, 2017) (http://tinyurl.com/yc5wm2eo).

In September 2015, the judge, then a county court judge, was nominated to run for the supreme court (the highest trial level court in the county). Also in September, he began presiding over a jury trial in which Charlie Tan was charged with second degree murder for allegedly shooting his father. According to news accounts, the case was "polarizing" for the community.

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On October 8, after approximately eight days of jury deliberations, the judge granted a mistrial, to which both the county assistant district attorney and defense counsel consented. The defense moved for a trial order of dismissal, which would preclude a retrial; the assistant district attorney opposed the motion. The judge ordered the parties to appear again on November 5.

Also on October 8, the judge gave one-on-one interviews about the case in his chambers with reporters from two television stations and a newspaper. Portions of the interviews were broadcast or published and made available on the media outlets' web-sites. For example, one of the TV stations broadcast the following report:

**THE JUDGE:** They probably got close to a verdict but, in the end, it just wasn't to be.

**REPORTER:** Judge Piampiano says both sides agreed to throw in the towel, and for that matter, dismiss the jury.

**THE JUDGE:** But after eight days, how far do you go? Do you go another two days, a week, a month?

**REPORTER:** Prosecutors already say they plan to retry Charlie Tan, but Piampiano is in "wait-and-see" mode.

**THE JUDGE:** I've asked the prosecutor to think through it, advise me on the 5th, and if there's to be a retrial, it would likely be in February or March of next year, not before.

* * * *

**REPORTER:** The judge says the jury worked longer than any jury he's seen, but added the evidence presented left them with more questions than answers.

**THE JUDGE:** Jurors don't get the evidence they want, they get the evidence they get. And then they have to sort through that and figure it out. (Unintelligible) ...

**REPORTER:** This jury didn't quite figure it out, but a new jury might get that chance. And the judge is optimistic that finding one without too much bias will be easy.

**THE JUDGE:** Sometimes journalists, and judges, and lawyers think that the whole world revolves around this courthouse. I've met many people in the jury selection process, who are not "news junkies," if you will, and who have only peripherally heard about this matter, or other matters.

**REPORTER:** As for Charlie Tan, Piampiano did not rule out the possible impact of his supporters or his side of the story.

**THE JUDGE:** I'm not sure, Cody, that I can recall, in recent times, somebody being that sympathetic a figure.

On November 3, the judge won the election.

**Samples of recent judicial ethics advisory opinions are summarized on bi-monthly on the Center for Judicial Ethics blog**

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During the post-trial hearing on November 5, the assistant district attorney confirmed that his office intended to retry Tan for murder. The judge commented on the jury's inability to reach a verdict, and the assistant district attorney asked if he could speak briefly. The judge replied, "No, you may not. If you speak I'm going to put you in handcuffs and put you in jail." The judge then granted the defendant's motion to dismiss.

The Commission concluded that the judge's comments during the interviews violated the New York rule that "[a] judge shall not make any public comment about a pending or impending proceeding in any court within the United States or its territories." The Commission found "[e]specially troubling" the judge's description of the defendant as a "sympathetic" figure," stating that could convey an appearance that the judge "viewed the defendant sympathetically, raising doubts about his impartiality and thus undermining public confidence in the impartial administration of justice."

The Commission emphasized that the prohibition on public comments on pending cases applies to "'any public comment, no matter how minor, to a newspaper reporter or to anyone else, about a case pending before him" and that there is "no exception … for explanations of a judge's 'decision-making' process.'" The Commission noted that the judge's comments had gone "well beyond general explanations of the law," to a discussion of legal issues in the case and descriptions of "his interactions with the jury and his sense of the jury's deliberations." Finally, the Commission stated, the judge should have recognized that, in the context of an interview about the Tan case, any general statements about procedures and the legal system "would be understood as pertaining to Tan and therefore were problematic."

## Support relationship

With the judge's consent and conditioned on his agreement that the letter be public, the Pennsylvania Judicial Conduct Board issued a letter of counsel to a judge for being involved in a "support relationship" with the district attorney without disclosing the relationship when she and attorneys from her office presented matters in his court. *Letter to Grine* (Pennsylvania Judicial Conduct Board August 20, 2017) (http://tinyurl.com/ybk9kvyj). The press release for the letter notes the investigation was initiated by a referral from the Disciplinary Board.

When the judge's second marriage was dissolving, the judge became involved in a "support relationship" with District Attorney Stacy Parks Miller. They exchanged text messages and telephone calls about the personal issues the judge faced. They had been friends since Parks Miller represented the judge in his first divorce when they were both private attorneys. During the relationship, Parks Miller and attorneys from the district attorney's office presented matters to the judge, but the judge, Parks Miller, and other attorneys who may have been aware of the relationship did not disclose it.

The Board found that "to a reasonable person, the emotional and personal nature of the relationship" between the judge and the district attorney could raise reasonable questions about his impartiality in criminal

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matters and whether he was subject to improper influence. The Board stated that the relationship was "simply unacceptable and inappropriate," but, in light of his expression of contrition and agreement, it dismissed the complaint with the letter of counsel, noting "judges suffering from emotional and personal difficulties should seek support from those who are willing and able to provide such support."

## No "semblance of patience, dignity, or courtesy"

The Michigan Supreme Court publicly censured a judge for directing insulting, demeaning, and humiliating comments and gestures to three children during a contempt proceeding in a custody case. *In re Gorcyca* (Michigan Supreme Court July 28, 2017) (http://tinyurl.com/yddrv4l2).

The judge presided over a protracted and highly contentious divorce and custody case. Three children were involved: the oldest son (LT) was born in July 2001, the middle son (RT) was born in August 2004, and the only daughter (NT) was born in December 2005.

On June 24, 2015, the judge held a hearing to address the children's refusal to have parenting time with their father. LT admitted that he did not want to talk to his father, telling the judge that he believed that his father was violent and that he had observed his father hit his mother. The judge responded, "All right. Well, the court finds you in direct contempt. I ordered you to have a healthy relationship with your father." The judge expressed her disapproval of LT with the following statements:

- "You are a defiant, contemptuous young man and I'm ordering you to spend the rest of the Summer — and we'll review it — we'll review it when school starts, and you may be going to school there. So you're going to be — I'm ordering you to Children's Village."
- "[Y]ou're supposed to have a high IQ, which I'm doubting right now because of the way you act, you're very defiant, you have no manners . . . ."
- The judge told LT that he needed "to do a research program on Charlie Manson and the cult that he has. Your behavior in the hall with me months ago, your behavior in this courtroom, your behavior back there, is unlike any I've ever seen in any 46,000 cases. You, young man, are the worst one. So you have bought yourself living in Children's Village, going to the bathroom in public, and maybe Summer school, I don't know . . . ."
- "You had very simple choices and you're clearly — clearly very messed up."
- "So, I'm sentencing you to Children's Village . . . pending you following the court's direct order. When you can follow the court's direct order and have a normal, healthy relationship with your father I would review this."
- "[Y]ou are so mentally messed up right now and it's not because of your father."

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Addressing the father, the judge said, "Dad, if you ever think that he has changed and therapy has helped him and he's no longer like Charlie Manson's cult, then you let us know and we can do it." As the judge said that, she was making a circular gesture with her finger near her temple.

LT was handcuffed and led out of the courtroom by sheriff's deputies. The judge set a review date of September 8.

After extensive exchanges between the judge and the two younger children, the children refused to go to lunch with their father and said they wanted to go with LT. The judge then found them in contempt, stating,

> I've never seen anything like it. You're a defiant, contemptuous young man and the court finds both of you in direct contempt. You both are going to live in Children's Village. Your mother is not allowed to visit, no one on your mom's side is allowed to visit. Only your father and therapist and [the guardian ad litem]. When you are ready to have lunch with your dad, to have dinner with your dad, to be normal human beings, I will review this when your dad tells me you are ready. Otherwise, you are living in Children's Village [un]til you graduate from high school. That's the order of the court. Good bye.

Sheriff's deputies then placed both children in handcuffs and took them away.

More than two weeks later, following numerous media reports about the case, the judge held an emergency hearing, after which she vacated the contempt orders, sent the children to summer camp by stipulation of the parties, and ordered intensive reunification therapy for the family.

In the discipline proceeding, the Court acknowledged that, "[t]he unfortunate facts of this case would challenge the temperament and objectivity of any judge committed to his or her statutory and constitutional duties," but concluded those circumstances do not "provide a judge with a free pass to breach the high standards of conduct." It explained:

> Respondent did not observe high standards of conduct and did not preserve the integrity of the judiciary when she mocked the children, threatened them, called them "crazy" and "brainwashed," exaggerated or lied about the conditions at Children's Village, and generally expressed hostility to the children and their mother.
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> * * *
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> Respondent had every right to insist that the children, like all persons before the court, respect the rule of law and the orders of the court. But respondent could have contrasted her expectations with the defiant actions of the children. Similarly, she could have calmly yet sternly explained the consequences associated with defiance of a court order, and she could have clearly articulated her disappointment in the actions of the children. Instead, she referred to the children in a demeaning, disrespectful, and inappropriate way and allowed her understandable frustrations to impede her management of the proceedings. Respondent's behavior and demeanor toward the children completely lacked any semblance of patience, dignity, or courtesy.

The Court, however, disagreed with the Judicial Tenure Commission's additional finding that the judge had committed misconduct by holding

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the three children in contempt. The Court agreed that the judge's orders were erroneous but concluded that the judge acted with due diligence and her legal errors could not be fairly characterized as "willful failure[s] to observe the law."

## Holiday gifts and parties

### Gifts

Judicial ethics committees are split on whether judges and their staffs may accept holiday gifts from lawyers or vendors under the code of judicial conduct. (State and/or local regulations may also apply.)

Several committees advise that such gifts are unacceptable. The Kentucky committee, for example, advised that a judge may not accept even nominal Christmas gifts such as boxes of candy and poinsettias from persons whose interests are likely to come before the judge, and the prohibition extends to the judge's staff. *Kentucky Advisory Opinion JE-86* (1995) (http://tinyurl.com/yccvtb88).

Similarly, the Florida committee concluded that a judge may not accept gifts from lawyers or law firms if they have come or are likely to come before the judge and should direct court personnel not to accept such donations. *Florida Advisory Opinion 2000-8* (http://tinyurl.com/y72vchxa). The judge who sent the inquiry described "what seems to be a frequent occurrence in some Florida jurisdictions."

> During the winter holiday season, attorneys, vendors, and others, offer gifts to judges, judicial assistants, bailiffs and other court employees. In the past, the gifts normally consisted of candy, fruit, nuts, stuffed animals and liquor. That tradition is no longer followed and gifts of money, and certificates redeemable for cash, goods, or services are presented to court personnel. The inquiring judge notes that the proliferation of "gift certificates has reached epidemic proportion[s]."

*See also Texas Advisory Opinion 194* (1996) (http://tinyurl.com/o3ftxos) (a judge, court coordinator, court reporter, clerk, or bailiff may not accept seasonal gifts from a lawyer or law firm); *West Virginia Advisory Opinion* (September 19, 2006) (http://tinyurl.com/y8o4slus) (a judge or court staff should not accept Christmas gifts such as cakes, cookies, candy, fruit baskets, or gift certificates from attorneys who regularly appear in family court or from a court interpreter who provides services to the court).

Those opinions are based on a code of judicial conduct provision stating that a judge may only accept a gift if "the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge," which was Canon 4D(5)(h) of the 1990 *American Bar Association Model Code of Judicial Conduct*.

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In contrast, several advisory committees have concluded that inexpensive gifts at holiday time fall within the ordinary social hospitality exception to the gift rule and may be accepted by a judge and court staff even from lawyers who appear before the judge. The Wisconsin committee, for example, advised that a gift of candy or fruit from a law firm would "come within the ambit of 'ordinary social hospitality' as long as it is of de minimis value." *Wisconsin Advisory Opinion 1998-10R* (http://tinyurl.com/yb6h4pjt).

Similarly, the Oklahoma committee stated that a judge may accept a gift during the Christmas season from an attorney who makes a comparable gift to all judges when the gift is inexpensive, for example, food, a tie, a book, or similar gift, although it added that "in each case, the judge must consider the appearance of impropriety and exercise caution and good judgment." *Oklahoma Advisory Opinion 2001-3* (http://tinyurl.com/ybyfu976). The committee explained:

> A judge, like other members of society, must be permitted to be involved in ordinary social amenities. "Ordinary social hospitality" . . . would suggest a gift that would not cause reasonable people in the community to believe the donor was obtaining or intending to obtain any special advantage, nor that the donee would have cause to give the donor any unfair advantages.
>
> It is impossible to set specific parameters regarding such gifts. A gift package of homemade cookies at Christmas surely would not be perceived as an impropriety. Larger gifts – season tickets to sporting events, free use of a vacation home, free vacation on a cruise ship – would be more than the perception of impropriety. If a gift is given where gifts are traditional, such as special occasions or holidays, or if the gift is given to all of the judges in the Courthouse, there would seem to be no impropriety.

*See also Oklahoma Advisory Opinion 2001-4* (http://tinyurl.com/yalstvae) (a judge may allow her staff to accept inexpensive gifts from attorneys on special occasions, for example, Christmas); *Washington Advisory Opinion 1993-17* (http://tinyurl.com/y9n8zn8m) (a judicial officer may allow a court employee to accept gifts of nominal value, such as food trays or candy, from local attorneys and court vendors during the holiday season, but should ensure that practice does not create an appearance of partiality or impropriety).

That interpretation of "ordinary social hospitality" is similar to the gift rule from the 2007 ABA model code. The 2007 amendments eliminated the prohibition on gifts from anyone whose interests are likely to appear before the court and substituted a prohibition (Rule 3.13(A)) on gifts that "would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."

## Parties

In general, judges and court staff have been permitted to attend law firm holiday parties, although the approval is not unconditional and each invitation requires a fact-specific inquiry.

The New York committee, for example, stated that "[a] judge may attend an ordinary holiday-type party or similar function given by a lawyer, law

"Judicial ethics committees are split on whether judges and their staffs may accept holiday gifts from lawyers or vendors under the code of judicial conduct."

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firm, or legal agency." *New York Advisory Opinion 1987-15(a)* (http://tinyurl.com/y9tlx3kt). The committee emphasized "the word 'ordinary'; this would not include, for example, a party that provides guests with a complete dinner at an expensive restaurant, a cruise, or like affair that is more expensive or lavish than an ordinary party."

Whether an "event is a traditional occasion for social hospitality such as a holiday party or the opening of an office" is one of the factors the California advisory committee identified as relevant to a judge's determination whether a social event hosted by an attorney constituted ordinary social hospitality. *California Advisory Opinion 43* (1994) (http://tinyurl.com/y7fmjejf). The committee developed the following, non-exhaustive list of relevant factors:

1. The cost of the event in the context of community standards for similar events. What may seem excessive in one part of the State or county may be within ordinary hospitality in other places depending on what is customary and reasonable in the community in question.
2. Whether the benefits conferred are greater in value than that traditionally furnished at similar events sponsored by bar associations or similar groups.
3. Whether the benefits are greater in value than that which the judge customarily provides his/her own guests. The events which a judge hosts tend to reveal the judge's view of ordinary social hospitality.
4. Whether the benefits conferred are usually exchanged only between friends or relatives such as transportation, housing or free admission to events which require a paid admission.
5. Whether there is a history or expectation of reciprocal social hospitality. If a judge is invited to a social event by an attorney who the judge has invited in the past or is likely to invite in the future to similar events; this is suggestive of ordinary hospitality.
6. Whether the event is a traditional occasion for social hospitality such as a holiday party or the opening of an office.
7. Whether the benefits received are reportable to any governmental entity.

Approving those factors as "good common sense considerations," the Oklahoma committee stated that, "[t]here is no 'one size fits all' answer." *Oklahoma Advisory Opinion 2005-1* (http://tinyurl.com/y7lnztlo). The committee explained that a judge should ask, "Could my acceptance of this invitation give rise to the perception by reasonable persons that it might cause me to act in a manner not keeping with my obligation to avoid impropriety and to maintain the impartiality and independence required of the judiciary?" The committee noted that "a judge should be cautious about accepting invitations from one group, but declining invitations from its counterpart, i.e., those identified as plaintiffs or defendants advocates." The committee also emphasized that "the appearance of impropriety would be high should the

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judge accept such invitations from a firm involved in a 'high profile case' currently assigned to the judge."

Similarly, the Connecticut committee advised that a judicial official may attend a large holiday party hosted by a law firm only if the firm is not actively engaged in litigation or proceedings before the judge and the party constitutes "ordinary social hospitality." *Connecticut Emergency Staff Opinion 2015-23* (http://tinyurl.com/ycfudjsq). If the judge does attend, the committee stated, the judge must not permit the host firm to announce his attendance, may not engage in any action that may be perceived as advancing the private interests of the firm, and may not discuss any pending matters with the hosts or guests. After the party, the committee stated, the judge must, for a reasonable time, recuse himself or disclose and seek remittal should the firm appear in a case.

The Wisconsin committee also advised that a judge or the judge's staff may only attend a holiday party given by a law firm if the firm is not involved in a current trial or one about to begin before the judge. *Wisconsin Advisory Opinion 1998-10R* (http://tinyurl.com/yb6h4pjt). The committee conditioned the judge's attendance on no clients being at the party and the hospitality being limited to ordinary social hospitality.

*See California Advisory Opinion 47* (1997) (http://tinyurl.com/y8eg59ut) (a judge may attend events such as a law firm's holiday party); *New York Advisory Opinion 1987-12(a)(b)* (http://tinyurl.com/y9tlx3kt) (a judge may attend an ordinary holiday-type party given by a law firm or legal agency)*; New York Advisory Opinion 2010-195* (http://tinyurl.com/ydaxao8e) (a judge may attend a holiday celebration hosted by the prosecutor's office where he worked just prior to assuming the bench); *Texas Advisory Opinion 194* (1996) (http://tinyurl.com/o3ftxos) (a judge, the judge's staff, court officials, and others subject to the judge's direction and control may attend holiday or seasonal law firm parties if the party is open to people other than judges and court personnel); *Washington Advisory Opinion 1991-27* (http://tinyurl.com/yadwwuqw) (a judge may attend a law firm holiday open house at which snacks and/or beverages may be offered).

*But see New Jersey Advisory Opinion 46-2000* (http://tinyurl.com/yawapqhn) (judges may not attend the county Hispanic Bar Association's holiday reception if it is held at a law office); *New Jersey Advisory Opinion* 62-1992 (http://tinyurl.com/yawapqhn) (municipal court judges and court employees may not attend a holiday party hosted by a law firm); *New Jersey Advisory Opinion* 57-1995 (http://tinyurl.com/yawapqhn) (judges may not attend a holiday party hosted by the county prosecutor's office).

*See also Connecticut Informal Opinion 2013-47* (http://tinyurl.com/y8qmxpp5) (a judicial official may attend a holiday party at a restaurant hosted by a municipality's governing body if the municipality does not have any matters pending before her and does not regularly appear before her, if she will pay the full cost to attend, and if the party is not a fund-raiser or a lavish event); *Delaware Advisory Opinion 2004-6* (http://tinyurl.com/yajphrdx) (a judge may attend a holiday reception given by an organization whose executive director is the sister of a father in a custody dispute over

"In general, judges and court staff have been permitted to attend law firm holiday parties, although the approval is not unconditional and each invitation requires a fact-specific inquiry."

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which the judge presided that is currently on appeal); *Delaware Advisory Opinion 2005-4* (http://tinyurl.com/y9gso2jd) (a judge may attend a holiday party hosted by the governor that benefits Toys for Tots); *New Jersey Advisory Opinion 73-1994* (http://tinyurl.com/yawapqhn) (municipal court judges may not attend a holiday open house at the home of a township trustee); *New Jersey Advisory Opinion 47-2000* (http://tinyurl.com/yawapqhn) (a judge may not attend a holiday party given by and for township employees, even though attendees pay their own way); *New York Advisory Opinion 2013-192* (http://tinyurl.com/y8lq3bll) (a judge who has retained a firm to promote and lobby for a proposed law relating to the courts may briefly attend the firm's holiday party); *New York Advisory Opinion 2006-170* (http://tinyurl.com/ydyzcxnc) (a judge may attend a holiday party sponsored by law enforcement agencies if the judge avoids any actions that may be perceived as advancing the private interests of the organization or of individuals attending or that may otherwise create an appearance of impropriety); *New York Advisory Opinion 2007-211* (http://tinyurl.com/ya3xn5sa) (a judge may not attend a holiday party hosted by a member of Congress and paid for by campaign funds even if the host is a friend); *Pennsylvania Informal Advisory Opinion 12/1/2009* (http://tinyurl.com/jgqecme) (a judge may not attend a holiday reception that is a fund-raiser held by a judge's-elect's campaign committee); *South Carolina Advisory Opinion 4-1999* (http://tinyurl.com/ydb2u55d) (a judge may attend a Christmas party sponsored by an entity that occasionally appears before the judge).

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**The Center for Judicial Ethics has links to judicial conduct commissions and judicial ethics advisory committees at www.ncsc.org/cje.**

## Former judge's use of judicial title

Ethics opinions advise that a former judge who returns to the practice of law may not use a title such as "Judge," "Honorable," or "Hon.," even modified by "Former," "Retired," or "Ret.," in conjunction with his practice, including mediation or arbitration.

The Ohio advisory committee explained:

> The typical justification provided when a former judge refers to himself or herself using a judicial title is the adage "once a judge, always a judge." This adage is referenced in social etiquette rules, usually on questions regarding the proper title to be used in correspondence or introductions. The reliance on "once a judge, always a judge," however, is misplaced in modern American legal and judicial ethics. The adage is actually a restatement of the long-standing convention that British judges are generally not permitted to return to the practice of law. . . .
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> "'Judicial titles are not portable. They stay with the position, not the individual. Former judges must gracefully relinquish the prestige of judicial

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> office when they step down to return to practice before the bench rather than behind it.'"

The committee concluded that a former judge should not refer to himself using a judicial title prior to his name when practicing law regardless whether the title is capitalized or modified by "former" or "retired." *Ohio Advisory Opinion 2013-3* (http://tinyurl.com/y7p9zbub).

However, approximately a year later, the Ohio Rules of Professional Responsibility were amended to add a provision (Rule 8.2(c)) that states: "[a] lawyer who is a retired or former judge or magistrate may use a title such as 'justice,' 'judge,' 'magistrate,' 'Honorable' or 'Hon.' when the title is preceded or followed by the word 'retired,' if the lawyer retired in good standing with the Supreme Court, or 'former,' if the lawyer, due to the loss of an election, left judicial office in good standing with the Supreme Court." A comment states that the rule controls if there is a conflict with *Ohio Advisory Opinion 2013-3*.

However, the American Bar Association Model Rules of Professional Conduct and most states' rules do not have such a provision. The ABA Committee on Ethics and Professional Responsibility concluded that a former judge who uses the title "Judge" or "The Honorable" when she returns to the practice of law violates several of the model rules. *ABA Formal Advisory Opinion 1995-391.* Thus, the committee advised, a former judge may not have her law office telephone answered "Judge X's office," may not sign correspondence and pleadings "Judge X," and may not have her name appear on a nameplate or firm letterhead as "Judge X" or "The Honorable."

The committee reasoned that the use of the title "Judge" by a former judge in the practice of law was "misleading insofar as it is likely to create an unjustified expectation about the results a lawyer can achieve," in violation of Rule 7.1, and stated or implied "an ability to influence improperly a government agency or official," in violation of Rule 8.4(e). The committee also advised that a former judge should not encourage others to refer to her as "Judge X" or "Your Honor" in the courtroom or in legal proceedings, stating the use of the title in that context may give the former judge's client an unfair advantage "particularly in the courtroom before a jury." In fact, the committee noted, there appears to be no reason for a former judge to use the judicial title in the practice of law other than to create an unjustified expectation or to gain an unfair advantage. (The committee did state that a former judge may inform potential clients about prior judicial experience, as long as the description is accurate and does not imply special influence.)

The advisory committee for federal judges concluded that sitting judges have the responsibility to ensure that a former judge appearing before them is not called "judge" in their courtrooms or in pleadings unless that designation is necessary to accurately describe a status at a time pertinent to the lawsuit. *U.S. Advisory Opinion 72* (2009) (http://tinyurl.com/y7bmcsxv). The committee explained:

> Historically, former judges have been addressed as "judge" as a matter of courtesy. Until recently there have been very few former federal judges. With federal judges returning to the practice of law in increasing numbers, ethical

**"Ethics opinions advise that a former judge who returns to the practice of law may not use a title . . . in conjunction with his practice, including mediation or arbitration."**

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> considerations arise. The prospect of former federal judges actively practicing in federal courts turns what otherwise might be an academic question into a matter of practical significance.
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> . . . A litigant whose lawyer is called "Mr.," and whose adversary's lawyer is called "Judge," may reasonably lose a degree of confidence in the integrity and impartiality of the judiciary. In addition, application of the same title to advocates and to the presiding judicial officer can tend to demean the court as an institution.

*See also Arizona Advisory Opinion 2016-2* (http://tinyurl.com/y9vkse45) (a retired judge may not in advertisements for her private arbitration and mediation services use "Judge," "Honorable" or "Hon.," even in conjunction with "former," "retired," or "ret.," or use a photograph of herself in judicial robes in connection with extra-judicial activities but may make accurate statements about her prior judicial experience in biographical information that a customer would be entitled to know about a prospective service provider); *Florida Bar Standing Committee on Advertising A-09-1* (http://tinyurl.com/yawd7mk7) (a retired judge engaged in the practice of law may not use "Judge" as a title on letterhead, business cards, or in advertising regardless whether the title is modified by "former" or "retired" but may accurately indicate that he is a "retired judge" or a "former judge"); *Maryland Advisory Opinion Request 2003-26* (http://tinyurl.com/y89o68ny) (a retired judge may not identify himself as a retired judge when signing off on decisions as a mediator or arbitrator or on letterhead used for related correspondence, but his past judicial service may be reflected on his résumé); *Michigan Advisory Opinion RI-327* (2001) (http://tinyurl.com/ydafpezg) (a former judge may not retain the title "Honorable" after entering private practice by, for example, naming his law practice "Honorable XXX Doe and Associates" and placing this on the letterhead); *South Carolina Advisory Opinion 21-1997* (http://tinyurl.com/y7kzvu5w) (a retired judge's name may be included in a law firm's Yellow Pages advertisement as long as it does not refer to her being a retired judge); *Texas Advisory Opinion 155* (1993) (http://tinyurl.com/o3ftxos) (a retired judge subject to assignment may not use the title "judge" or "justice" on letterhead, in directories, or in any other pubic way related to the practice of law). *Cf., Washington Advisory Opinion 2002-17* (http://tinyurl.com/y7m6xjvq) (in advertisements offering mediation and arbitration, a former judge or justice may use a title such as "judge" or "justice" accompanied by "retired," "ret.," or "former" but may not refer to herself as "The Honorable" or "Hon.").

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