JUDICIAL CONDUCT REPORTER

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State judicial discipline in 2011

Between 1980 and 2010, approximately 378 state judges were removed from office as a result of judicial discipline proceedings. In 2011, eight judges or former judges were removed, and one judge was ordered to retire. Pursuant to agreements with judicial conduct commissions that were made public, 11 judges resigned or retired in lieu of discipline and agreed not to serve in judicial office again.

In addition, 105 judges (or former judges in approximately 18 cases) received other public sanctions. Approximately half of those sanctions were entered pursuant to the judge's agreement.

- 14 judges were suspended without pay ranging from 10 days to one year; two of the suspensions also included fines.
- Four former judges were barred from serving in judicial office; two of those former judges were also censured, and one was censured and suspended from the practice of law for two years.
- 13 judges were publicly censured; three censures included conditions such as supervised probation, a mentorship, additional training, or participation in a lawyers assistance program.
- 43 judges were publicly reprimanded; two reprimands included fines, and nine included corrective action such as training on domestic violence, a letter of apology, monitoring of the judge's docket, a mentorship, or a judicial ethics course at the National Judicial College.
- 16 judges were publicly admonished.
- One judge received a public warning.
- Four judges were privately reprimanded but agreed that the reprimand would be made public.

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Top judicial ethics stories of 2011 by Cynthia Gray

First enforcement

Since at least 1992, Canon 2C of the Code of Conduct for United States Judges, adopted for federal judges by the United States Judicial Conference, has provided: "A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." (The American Bar Association *Model Code of Judicial Conduct* has had a similar rule since 1984.) The Judicial Conference's Committee on Judicial Conduct and Disability noted that, to its knowledge, Canon 2C had never been enforced before its 2011 public reprimand of a bankruptcy judge for holding membership in a country club that had no African American or female resident members. *In re Complaint of Judicial Misconduct*, 664 F.3d 332 (Judicial Conference of the United States Committee on Judicial Conduct and Disability 2011).

Since 1978, the judge had been a resident member of the Belle Meade Country Club, a 110-year-old private social club in Nashville, Tennessee. The club has six membership categories, but only resident members can vote, hold office, and propose new members. Belle Meade has never had any female or African American resident members although there is no express prohibition in the by-laws. Membership proposals for two African American men to become resident members (one of whom the judge had sponsored) have been pending for at least four years.

The Committee explained that a judge's membership in a discriminatory organization "necessarily has 'a prejudicial

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• One judge was suspended for 90 days "without impairment of compensation."

• Two former judges were disbarred for conduct while in office.

• Seven judges were ordered to pay civil penalties for failing to file timely financial disclosure reports.

Affirming removals

In 2011, the supreme courts in Nevada and Pennsylvania affirmed decisions from 2008 that removed two judges from office for a wide variety of misconduct.

In November 2008, the Nevada Commission on Judicial Discipline had removed a judge based on its findings that she (1) had fallen asleep during three trials; (2) had ex parte contacts with deliberating juries in two cases; (3) had used obscene terms to refer to employees in the presence of her bailiff; given her bailiff $20 and told him to "go play with the other bailiffs;" and required him to massage her feet, neck, and shoulders; (4) had yelled at employees and used foul language in the presence of her assistant; (5) had given two unauthorized individuals access to the courthouse to serve as her bodyguards; and (6) had refused to communicate with the chief judge except through her attorney or to cooperate when the court administrator attempted to retrieve a rolodex from her office. *In the Matter of Halverson*, Imposition of Discipline (Nevada Commission on Judicial Discipline November 17, 2008) (www.judicial.state.nv.us/decisionsofncjd3new.htm).

Affirming that decision, the Nevada Supreme Court held:

> While this court does not agree with each and every finding and conclusion the Commission made, after our own review of the record, we hold that sufficient clear and convincing evidence was introduced to conclude that Judge Halverson committed willful misconduct in violation of multiple provisions of the Nevada Code of Judicial Conduct. These violations were serious and justify the discipline imposed.

What they said that got them in trouble

Do "whatever you can do." Judge asking police officer for help with tickets issued to a friend. *In the Matter of Hunt*, Determination (New York State Commission on Judicial Conduct November 9, 2011) (www.cjc.ny.gov/).

"Some parent you are." Judge to mother of 18-year-old who had damaged his son's car. *In the Matter of Baptista*, 15 A.3d 323 (New Jersey 2011) (adopting without opinion presentment at www.judiciary.state.nj.us/pressrel/Baptista%20Presentment%20ACJC%202009-063.pdf).

"$150 'Sustained;' $250 'Affirmed;' $500 'So Ordered;' $1000 'Favorable Ruling.'" Below "suggested contributions" in campaign flyer authorized by judge. *Public Admonition of Pierson-Treacy* (Indiana Commission on Judicial Qualifications November 29, 2011) (www.in.gov/judiciary/jud-qual/admonitions.html).

"Stop telling lies about my brother." Judge to man putting up signs opposing the judge's brother's gubernatorial candidacy. *Stephen*, Reprimand (New Hampshire Judicial Conduct Committee August 25, 2011) (www.courts.state.nh.us/committees/judconductcomm/news.htm).

Bill White is "well deserving of our vote" and "the only qualified candidate for sheriff." Judge in a letter to the editor. *In the Matter of Votendahl*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct April 22, 2011) (www.cjc.state.wa.us/CJC_Activity/public_actions_2011.htm).

"You have no clue what it is to be a parent. . . . Ma'am, keep your mouth quiet. When I talk, you listen. Don't you dare talk back to me. I don't know who you think you're talking to, but you do not dare talk back to me. You understand that? . . . I'm not some friend of yours out on the street. I'm a Superior Court judge that demands the respect of my position, and you will give it to me. And you will not convince me that it's okay for your daughter to go spend time with strangers, but can't with her own father, because you know what you forgot? Let me remind you. There's only one reason why he's her father, that's the decision you made." Judge to a mother who questioned a visitation schedule. *In the Matter of Baker*, 21 A.3d 1141 (New Jersey 2011) (accepting presentment at www.judiciary.state.nj.us/pressrel/pr110616a.htm).

"It's time for me to see my little peckerheads." Judge going into the courtroom for juvenile proceedings to state's attorneys and court services officer. *In the Matter of Fuller*, 798 N.W.2d 408 (South Dakota 2011).

"This is where I hang my Indians." Judge referring to artwork depicting Native Americans on his courtroom wall. *In the Matter of Fuller*, 798 N.W.2d 408 (South Dakota 2011).

> Moreover, we agree with the Commission that the evidence demonstrates that Judge Halverson's testimony lacks credibility. This lack of credibility and an apparent unwillingness to admit mistakes, combined with sufficient evidence of willful misconduct, lead us to conclude that Judge Halverson cannot serve as a judge.

In the Matter of Halverson, Order (Nevada Supreme Court January 31, 2011) (www.nevadajudiciary.us/index.php/viewdocumentsandforms/func-startdown/5766/).

* * *

In 2008, the Pennsylvania Court of Judicial Discipline had removed a judge based on its findings that she (1) had been habitually late for court and frequently absent; (2) had been discourteous to court staff and hindered the administrative responsibilities of other judges and court officials; (3) had repeatedly given lengthy recitations of her displeasure with the president judge on the record; (4) had caused a commotion outside of a courtroom and falsely blamed a deputy court administrator for the incident in a letter to the president judge; (5) had ignored the president judge's directives; (6) had handled fewer cases and disposed of cases more slowly than other judges; (7) had used a court employee to do personal work; and (8) had failed to disqualify from two cases in which she was biased, instructing her law clerk to "cut [the plaintiff's lawyer] a new asshole" in one case and to draft an opinion in favor of the plaintiffs because they had supported her politically in the second case. *In re Lokuta*, Opinion (October 30, 2008), Order (Pennsylvania Court of Judicial Discipline December 9, 2008) (www.cjdpa.org/decisions/jd06-03.html).

On appeal, the judge argued that the Judicial Conduct Board had failed to prove misconduct by clear and convincing evidence because four of the witnesses against her had been discredited and exposed as criminals in the Pennsylvania "Kids for Cash" scandal. The Pennsylvania Supreme

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"I am more like a marriage counselor than a judge." Judge to defendant in a domestic violence case. *Jones*, Reprimand (New Hampshire Judicial Conduct Committee July 9, 2011) (www.courts.state.nh.us/committees/judconductcomm/news.htm).

"The State doesn't get this but this is just all part of your culture, this stuff." Judge to a defendant born on the island of Dominique after he pled guilty to possession of marijuana. *Jones*, Reprimand (New Hampshire Judicial Conduct Committee July 9, 2011) (www.courts.state.nh.us/committees/judconductcomm/news.htm).

"You drafted it up copying something or somebody giving it to you. You did not write that. You're getting legal assistance, and that's improper if you're pro per. . . . Nope. You're lying to the court. I'm revoking your pro per status." Judge to pro per defendant in criminal case about motions presented by the defendant. *Public Admonishment of Comparet-Cassani* (California Commission on Judicial Performance August 16, 2011) (http://cjp.ca.gov/pub_discipline_and_decisions.htm).

"I am not scared. Are you all scared?" Judge to colleague in courthouse while pointing a gun at himself. *Inquiry Concerning Peters*, 715 S.E.2d 56 (Georgia 2011).

"If I read a declaration where they say, 'He spit on me, he threw rocks at me,' almost always it's a Middle Eastern client. If the declaration says, 'He drags me around the house by the hair,' it's almost always a Hispanic client." Judge in domestic violence case. *Public Admonishment of Pollard* (California Commission on Judicial Performance July 13, 2011) (http://cjp.ca.gov/pub_discipline_and_decisions.htm).

"I'm a great listener but sometimes I'm very expensive." Judge trying to discourage traffic infraction defendants from going to trial. *In the Matter of Young*, 943 N.E.2d 1276 (Indiana 2011).

"I earlier today sentenced you to life -- marriage to her." Judge to defendant in a domestic violence case after officiating at his marriage to the complaining witness. *In the Matter of Russell*, Private Reprimand (Maryland Commission on Judicial Disabilities January 10, 2011) (www.mdcourts.gov/cjd/publicactions.html).

"I would like for everyone in this court to know that had I had this to do over again we would never had went to a grand jury, that we would have taken care of this . . . down on the farm like things should have been taken care of." Judge in courtroom during sentencing of defendant charged in crime against a member of his family. *Commission on Judicial Performance v. McGee*, 71 So. 3d 578 (Mississippi 2011).

"You might want to think about going [to school] somewhere else considering the nature of your criminal activity." Judge to defendant charged with stealing "Aggie ring," before showing defendant his own Aggie ring. *Public Reprimand and Order of Additional Education of Boyett* (Texas State Commission on Judicial Conduct July 11, 2011) (www.scjc.state.tx.us/pdf/actions/FY2011-PUBSANC.pdf).

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Court concluded that the judge overstated the importance of the four witnesses and that her argument that the other 26 witnesses had been manipulated and coerced into testifying against her was speculation that did not prove there was insufficient evidence. *In re Lokuta*, 11 A.3d 427 (Pennsylvania 2011).

Affirming the judge's removal, the Court rejected her equal protection argument that other judges had engaged in more egregious misconduct but had not been removed.

> Similarity of misconduct does not require identicality of sanction, for there are other factors that bear on that decision, including mitigating and aggravating considerations and how a particular jurist's misconduct undermines public confidence in the judiciary. In focusing only on her misconduct and nothing more, appellant ignores these other factors, including, for example, her lack of remorse at her misconduct.

Drug problems

The Georgia Supreme Court removed a judge for (1) obtaining and consuming marijuana at least once a week for three months in 2010; (2) identifying himself as a magistrate judge at the house of his sister-in-law's estranged husband and kicking in interior doors; (3) pointing a firearm at himself and stating to another magistrate judge, "I am not scared. Are you all scared?"; (4) while on a local cable show, making derogatory remarks about and disclosing that he had filed a complaint against the chief magistrate judge and exposing the identity of a confidential informant; (5) in a phone call to the TV show while the sheriff was being interviewed, trying to disguise his voice with multiple foreign accents and stating the sheriff had "crapped himself' and was a "spineless jelly spine;" and (6) refusing to work the hours assigned to him. *Inquiry Concerning Peters*, 715 S.E.2d 56 (Georgia 2011). The Court stated:

> The record reveals that Judge Peters has not sought treatment for his admitted drug problems and has done nothing to show that he has any ability to live up to the high standard of conduct expected of members of the judiciary in Georgia. Indeed, after using illegal drugs, forcibly kicking in doors at a man's home at the request of a relative, pulling out a gun in front of at least one of his colleagues, and being suspended from his job for refusing to work hours properly assigned to him, Judge Peters consistently refused to take responsibility for his actions.

"Unconscionable arrogance"

In the first decision to remove or retire a judge in the state's history, the South Dakota Supreme Court ordered the retirement of a judge who (1) had mistreated court employees, (2) had insulted lawyers, (3) had made insensitive racial and sexist jokes (*see* "What They Said that Got them in Trouble," page 2 *supra*.), (4) had conducted himself on the bench "with unconscionable arrogance," and (5) had referred to law enforcement from the bench as a "bunch of racists" with no evidentiary basis. *In the Matter of Fuller*, 798 N.W.2d 408 (South Dakota 2011). The Court noted that it took "significant courage" for counsel, law enforcement, and court employees to testify before the Judicial Qualifications Commission about the judge.

Rejecting the judge's argument that he should not be disciplined because he had already suffered humiliation as a result of the proceedings, the Court explained "the Constitution charges this Court and not the media, public comment, or any third party with fashioning an appropriate sanction." The Court also disregarded the arguments made in letters of support that Judge Fuller "is no worse than the supposed bottom of the barrel," stating there is "no 'lowest common denominator' standard of judicial conduct or defense."

Acknowledging that "all judges are human and are capable of making a misstatement or mistake especially in the heat of a court proceeding," the Court concluded, "such is not the case here. Judge Fuller's misconduct was continual throughout his tenure on the bench."

> Judge Fuller has not only damaged his judicial office but those of every judge in this state. Each judge's decisions, judgments, and decrees are not enforced by armies or by force. They are chiefly enforced by the voluntary compliance of our citizens through their respect for the rule of law. Judge Fuller's misconduct makes it more difficult for every judge in this state to maintain that respect for our courts and thus our ability to effectively resolve society's legal disputes.

"Misconduct both before and upon being elevated to the bench"

The Florida Supreme Court removed a judge for (1) attempting to force himself into a court employee's private life; (2) accepting a $30,000 campaign contribution from his mother, when the statutory limit was $500; (3) representing his mother in foreclosure proceedings; and (4) offsetting a juvenile's court costs in exchange for the juvenile's earring. *Inquiry Concerning Turner*, 76 So.3d 898 (Florida 2011).

The Court found that the judge's "intrusion into [Heather] Shelby's personal life was uninvited and pervasive." He had, for example, invited her to lunch; repeatedly asked to visit her son in the hospital or at their home; called her constantly at work, including from the bench; and showed up at her desk several times a day. Although noting that the judge's conduct did not have a sexual component, the Court emphasized that he "refused to take no for an answer," and his "interest in Ms. Shelby was well known throughout the

court, causing Ms. Shelby extreme embarrassment and requiring changes to her professional life."

The Court concluded:

> Judge Turner engaged in a broad variety of serious misconduct both before and upon being elevated to the bench. Because Judge Turner gained his office partially through illegal means and committed serious violations of the judicial canons upon assuming his role as a judge, we determine that he has engaged in conduct unbecoming a member of Florida's judiciary and is unfit to perform the duties of his office.

The Judicial Qualifications Commission had also found that the judge violated the code of judicial conduct by soliciting campaign contributions, which the judge challenged on First Amendment grounds. The Court stated that, because the judge's misconduct apart from that charge required his removal, it would not decide the constitutional issue.

Administrative failures, personal conduct

The New York State Commission on Judicial Conduct removed a non-lawyer judge who (1) had failed to timely deposit and remit court funds; (2) had filed false or inaccurate reports with the comptroller; and (3) had asserted the prestige of the court when charged with several traffic violations, failed to appear or pay fines and surcharges, failed to maintain vehicle liability insurance coverage, and operated a motor vehicle when her license had been suspended. *In the Matter of Halstead*, Determination (New York State Commission on Judicial Conduct January 27, 2011) (www.cjc.ny.gov/Determinations/H/Halstead.pdf).

Criminal conduct

The Pennsylvania Court of Judicial Discipline removed three former judges who had pled guilty to or been convicted of crimes committed while in office. *In re Murphy*, Opinion (November 23, 2010), Order (Pennsylvania Court of Judicial Discipline January 11, 2011) (www.cjdpa.org/decisions/jd10-01.html) (retired judge pled guilty to several crimes related to his forging of signatures on the nominating petition for his re-election campaign); *In re Joyce*, Opinion (June 24, 2011), Order (Pennsylvania Court of Judicial Discipline July 26, 2011) (www.cjdpa.org/decisions/jd11-03.html) (former judge convicted on eight federal counts of mail fraud and monetary transactions in property derived from specific unlawful conduct); *In re Toole*, Opinion (June 24, 2011), Order (Pennsylvania Court of Judicial Discipline July 26, 2011) (www.cjdpa.org/decisions/jd11-05.html) (former judge pled guilty to federal felonies of corrupt receipt of reward for official action concerning programs receiving federal funds and filing a false individual tax return). ★

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effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.'" Noting it was not concerned "only with the sort of discrimination prohibited by the Civil Rights Act, Title VII, or the Constitution," the Committee stated that Canon 2C does not require evidence of purposeful discrimination, which "is expected to be rare," but also addresses appearances. The Committee concluded that "judges may not be members of organizations that would reasonably appear to the public to discriminate in their membership practices" on the basis of the grounds listed in Canon 2C.

> Typically, the inquiry is fact-specific and the answer depends on such factors as the organization's selection criteria, goals, size, and geographic location. A strong presumption of invidious discrimination arises where "reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of" such discrimination, . . . but the membership is not diverse.

Applying those standards, the Committee "easily" concluded that Belle Meade invidiously discriminates against women and African Americans.

> Nashville, Tennessee, is one of the major cosmopolitan cities of the Southern United States. In particular, it boasts a 27 percent African American population. Its female population is just over 50 percent. Although few organizations perfectly mirror the population trends of their surrounding locales, a member of the public would reasonably expect to see at least some women and African Americans among Belle Meade's Resident Membership barring (1) invidious discrimination or (2) something unique about the Club — "such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members," . . . — that would suggest otherwise. There is, however, nothing about Belle Meade's stated aims or activities that provides any such justification for the total absence of any female or African American Resident Members. The organization is a social club for prominent persons living in and around the Nashville area. Naturally, there is no shortage of women or — as [the judge] proclaimed in his 1990 letter to the Club's Board — African Americans fitting that description.

The Committee stated it was "difficult for us – and, we expect, the public – to conjure a benign explanation for the Club's failure to integrate" in the face of the judge's endeavors over two decades to diversify the membership. The Committee noted the "remediation period" provided by Canon 2C, which allows a judge to stay a member for two years as long as the judge makes "immediate and continuous efforts" to persuade the organization to discontinue its practices, "came and went long ago."

The Committee's decision also cautioned judges to "exercise vigilance" before joining an organization, including surveying a group's membership, constitution, and by-laws.

> If "reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination," but the membership nevertheless is not diverse, the judge should err on the side of caution and decline membership. Although such a restriction "might be viewed as burdensome by the ordinary citizen," it is one that judges should accept "freely and willingly."

Drug courts

Drug courts began to be established during the late 1980s when increasing drug prosecutions and the recidivism characteristic of drug offenders challenged traditional courts. Now there are many different kinds of courts under the general rubric of problem-solving or specialty courts, such as, veterans courts, homeless courts, domestic violence courts, and mental health courts. As a new comment added to the *Model Code of Judicial Conduct* by the American Bar Association in 2007 explains:

> In recent years many jurisdictions have created what are often called "problem solving" courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts' programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial role as independent decision makers on issues of fact and law.

As laudable as those goals may be, however, in 2011, several judicial discipline cases struck a cautionary note and illustrate the problems caused if judges exaggerate the differences between their role in problem-solving courts and their more traditional role.

* * *

In March 2011, the National Public Radio program "This American Life" broadcast an episode that concluded the way Chief Judge Amanda Williams ran her drug court violated "the basic philosophy of all drug courts." The Georgia Judicial Qualifications Commission was apparently already investigating Judge Williams. In November, the Commission filed a notice of formal proceedings that alleged Judge Williams, in addition to other misconduct, had a practice of holding drug court participants indefinitely without a hearing and a policy of delaying their placement into treatment; showed favoritism to certain drug court defendants; engaged in a pattern of improper ex parte communications

with regard to who would be admitted to drug court and acted as a "gatekeeper" for the drug court; expressed bias in criminal matters in the drug court; failed to be patient, dignified, and courteous; and made false representation to the Commission.

For example, the notice alleged that the judge had sanctioned Lindsey Dills to 28 days in custody for violating her drug court contract but, after Dills was transported to jail, sua sponte modified her sentence to confinement "until further order of the court." She also directed that Dills was "not to have any telephone privileges and no one is to contact or visit her except [the drug court counselor]! Nobody! Total restriction!" Dills remained in custody for approximately 73 days and attempted suicide while in solitary confinement. The Commission alleged that the judge "knew or should have known that Dills was predisposed to suicidal tendencies, having previously signed an order placing her on a suicide-watch while she was in custody."

In December, based on the judge's resignation and agreement not to serve in judicial office again, the Commission dismissed the notice. *In re Williams*, Consent Order (Georgia Judicial Qualifications Commission December 19, 2011) (www.gajqc.com/news.cfm).

* * *

Based on an agreed statement of facts and joint recommendation, the New York State Commission on Judicial Conduct censured Judge Andrew Tarantino for speaking privately to J., a treatment court participant in his late teens or early 20s. *In the Matter of Tarantino*, Determination (New York State Commission on Judicial Conduct March 28, 2011) (www.cjc.ny.gov/). The judge took J., alone, for a 20-minute ride to a park approximately 16 miles from the courthouse. At the park, the judge and J. walked to a wildlife observation deck where they remained for approximately 10 minutes. En route to, at, and after they left the deck, the judge spoke with J. about his continuing substance abuse, his mother's death, and his need for grief counseling.

Concluding that the judge's "behavior, no matter how well-intentioned, was inappropriate and showed extremely poor judgment," the Commission emphasized that "the unique dynamics and relative informality of Treatment Court proceedings" do not "excuse such conduct, which overstepped the appropriate boundaries between a judge and a defendant in pending proceedings."

> Even in Treatment Court, a judge is not a social worker or therapist, but must maintain the role of a neutral and detached arbiter who at all times remains "cloaked figuratively with his black robe of office devolving upon him standards of conduct more stringent than those acceptable for others." ... Respondent's behavior showed a serious misunderstanding of the role of a judge.

* * *

Until 2010, then-judge Mary Ann Gunn had allowed proceedings in the drug court over which she presided to be broadcast several times a week on local TV stations to over 200,000 households. When commercial media representatives expressed an interest in broadcasting the drug court to a national audience, she asked for an advisory opinion about how to implement the broadcasts in conformity with the code of judicial conduct.

In response, the Arkansas Judicial Ethics Advisory Committee expressed broad concerns with the broadcasting of drug court proceedings even without a commercial component. *Arkansas Advisory Opinion 2010-1* (www.arkansas.gov/jddc/pdf/pr/2010/2010-01_advisory_opinion.pdf). The opinion explained:

> The [drug court] defendant is often young, contrite, and vulnerable and has come to the point that he or she will be compliant and go along with the requirements of the judge or court personnel. Under those circumstances we think it is unfair even to ask the defendant to consent to taping and broadcasting of these very personal proceedings in any venue, whether for profit or non-profit. One purpose of drug court is to avoid a conviction and the notoriety that comes with the conviction; to turn around a person and to get his issue behind him or her. In this modern media culture once the taping is done and it is released into the public domain it is there forever and can come up from time to time during the defendant's entire life. It could be used against this person in a personal, political, economic or social situation to his or her extreme detriment. . . . How might it appear to a defendant that he or she must be asked by the judge to waive any objection to appear on television? Would they be intimidated by the question knowing that the judge

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> encourages this production? Can it be easily argued that the waiver is given fully and without coercion? Might a defendant think the judge would hold it against him or her if he or she refused to cooperate in a televised court session?

The committee concluded that "the taping, releasing to the general media and televising of drug court proceeding involving troubled and unfortunate individuals to 200,000 households in a 'number one' ranked television show" does not promote public confidence in the judiciary."

Gunn retired in early 2011 to star in a syndicated reality TV show called "Last Shot with Judge Gunn."

In November 2011, the Judicial Discipline & Disability Commission informed Gunn that it had dismissed without prejudice three complaints against her because she had agreed not to serve again in the judiciary in Arkansas. *Gunn*, Public Dismissal Letter (Judicial Discipline & Disability Commission November 18, 2011) (www.arkansas.gov/jddc/pdf/pr/2011/mary_ann_gunn_111811.pdf). The dismissal letter does not describe the complaints against Gunn, but, according to news reports, there had been complaints she coerced people into appearing on televised segments of her drug court, used her official time, public facilities, and court personnel to lay the groundwork for her commercial TV show, and took court files with her when she left the bench.

United States Supreme Court

Criticism of the off-the-bench conduct of some justices on the United States Supreme Court culminated in legislation proposed in Congress that would, among other things, apply to the justices the same code of conduct that applies to other federal judges and require the United States Judicial Conference to establish a process for other justices or federal judges to decide whether a justice should be disqualified from a case. Further, after the Court agreed to hear challenges to the Affordable Care Act, there were numerous calls for some of the justices to disqualify themselves from the case, primarily that Justice Elena Kagan disqualify herself because of her prior service as Solicitor General for President Obama or that Justice Clarence Thomas disqualify himself because of his wife's employment with an organization opposed to the Act.

In his year-end report on the federal judiciary (www.supremecourt.gov/publicinfo/year-end/2011yearendreport.pdf), Chief Justice John Roberts addressed ethical issues related to the Court to "dispel some common misconceptions." The Chief Justice noted that judicial responsibilities precluded him "from commenting on any ongoing debates about particular issues or the constitutionality of any enacted legislation or pending proposals."

The Chief Justice explained that the Code of Conduct for United States Judges, which was adopted by the Judicial Conference, applies by its terms only to federal judges other than the nine justices because of "a fundamental difference between the Supreme Court and the other federal courts."

> Article III of the Constitution creates only one court, the Supreme Court of the United States, but it empowers Congress to establish additional lower federal courts that the Framers knew the country would need. Congress instituted the Judicial Conference for the benefit of the courts it had created. Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body.

However, the Chief Justice stated, the claim that "the Supreme Court is exempt from the ethical principles that lower courts observe" "rests on misconceptions about both the Supreme Court and the Code" because the Code is only "'designed to provide guidance to judges'" (quoting Canon 1), and all of the justices consult the Code "for precisely that purpose."

> Each does so for the same compelling practical reason: Every Justice seeks to follow high ethical standards, and the Judicial Conference's Code of Conduct provides a current and uniform source of guidance designed with specific reference to the needs and obligations of the federal judiciary.

Although emphasizing that "the Code remains the starting point and a key source of guidance for the Justices as well as their lower court colleagues," the Chief Justice explained that "the Court has had no reason to adopt the Code of Conduct as its definitive source of ethical guidance" because the Code is phrased in general terms and "cannot answer all questions." The year-end report noted that the justices and other federal judges consult a wide variety of authorities to resolve ethical issues, including judicial opinions, treatises, scholarly articles, and disciplinary decisions, and seek advice from the Court's Legal Office, the Judicial Conference's Committee on Codes of Conduct, and their colleagues.

The report also noted that legislation requires the justices to disqualify themselves from cases in specified circumstances and to comply with financial reporting requirements and gift and outside income limits. The Chief Justice stated that the Court has never addressed whether Congress may impose those requirements, although he affirmed that "the Justices nevertheless comply with those provisions."

With respect to recusal, the report explained:

> As in the case of the lower courts, the Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case. Indeed, if the Supreme Court reviewed those decisions, it would create

an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate.

Further, the Chief Justice stated, although other federal judges can freely serve in each other's place, "the Supreme Court consists of nine Members who always sit together, and if a Justice withdraws from a case, the Court must sit without its full membership."

> A Justice accordingly cannot withdraw from a case as a matter of convenience or simply to avoid controversy. Rather, each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case.
>
> As with other ethical questions, Justices and lower federal court judges contemplating recusal can take good counsel from the principles set forth in Canon 14 of the original 1924 Canons of Judicial Ethics. That Canon addresses judicial independence. It provides that a judge "should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism." Such concerns have no role to play in deciding a question of recusal.

Without addressing any criticism of a specific justice, the Chief Justice emphasized:

> I have complete confidence in the capability of my colleagues to determine when recusal is warranted. They are jurists of exceptional integrity and experience whose character and fitness have been examined through a rigorous appointment and confirmation process. I know that they each give careful consideration to any recusal questions that arise in the course of their judicial duties. We are all deeply committed to the common interest in preserving the Court's vital role as an impartial tribunal governed by the rule of law.

Legislative interest

According to the Gavel-to-Gavel blog of the National Center for State Courts (http://gaveltogavel.us/site/2011/):

> 2011 saw more efforts to impeach or otherwise legislatively remove state judges from office than at any point in recent history, indeed perhaps in all of U.S. history. 14 bills in 7 states sought the impeachment of numerous judges . . . . In all but two instances . . . , the sole accusation was that the judge(s) in question issued opinions that displeased members of the legislature.

In addition, a March issue of Gavel-to-Gavel focused on proposed legislation about judicial conduct commissions, noting "legislatures have become remarkably active this year in seeking to change" the funding, composition, and confidentiality of commissions (www.ncsconline.org/D_Research/gaveltogavel/G%20to%20G%205-11.pdf). None of those measures had been enacted by the end of the year.

Judges and social media

There were no judicial discipline cases involving Facebook, Twitter, Linkedin, or other social networking sites in 2011, but judicial ethics committees continued to provide advice for judges looking for guidance. The Oklahoma Judicial Ethics Advisory Panel advised that a judge may hold an internet social account and "friend" court staff but not attorneys, law enforcement officers, social workers, and others who may appear in his or her court. *Oklahoma Advisory Opinion 2011-3*. Similarly, the Massachusetts Supreme Judicial Court Committee on Judicial Ethics issued an opinion advising that a judge may not "friend" any attorney who may appear before the judge because to do so creates the impression

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that those attorneys are in a special position to influence the judge. *Massachusetts Advisory Opinion 2011-6*.

Prior to 2011, the Florida committee gave similar advice (*Florida Advisory Opinion 2009-20*), while the judicial ethics committees in Kentucky, New York, and Ohio have issued less restrictive opinions, allowing judges to "friend" attorneys who may appear before them while emphasizing that judges must exercise caution in their use of social networks. *Kentucky Advisory Opinion JE-119* (2010); *New York Advisory Opinion 08-176*; *Ohio Advisory Opinion 2010-7*. The California committee issued an opinion stating that a judge may interact on a social media site with attorneys who may appear before the judge but should not interact with attorneys who have cases pending before the judge. *California Advisory Opinion 66* (2010). (The Center for Judicial Ethics has links to the websites of judicial ethics committees at www.ajs.org/ethics/.)

Stay tuned

Three of the most widely reported stories in judicial ethics were unresolved at the end of 2011, but judicial conduct commissions employed an exception to their confidentiality rules to reassure the public that they were not ignoring reports of judicial misconduct and to remind the public that judges are also entitled to a fair process without prejudgment.

For example, the Wisconsin Judicial Commission confirmed in a June press release that it had authorized an investigation of an alleged physical altercation between Supreme Court Justice David Prosser and Justice Ann Bradley that had been widely reported in the media. The Commission cited a provision in its statute that states:

> If prior to the filing of a formal complaint or a petition an investigation of possible misconduct or permanent disability becomes known to the public, the commission may issue statements in order to confirm the pendency of the investigation, to clarify the procedural aspects of the disciplinary proceedings, to explain the right of the judge . . . to a fair hearing without prejudgment, to state that the judge . . . denies the allegations, to state that an investigation has been completed and no probable cause was found or to correct public misinformation.

Similarly, in a December press release on an unrelated complaint, the Wisconsin Commission stated:

> The Wisconsin Democracy Campaign has made public the fact that it filed a request for investigation of Wisconsin Supreme Court Justice Michael J. Gableman. The Judicial Commission acknowledges receipt of the request for investigation, which will first be evaluated by the Commission to determine whether to authorize an investigation. Justice Gableman is entitled to a fair hearing without prejudgment. The request for investigation will receive a thorough review by the Commission in due course, as are all requests for investigation.

According to the Wisconsin Democracy Campaign website, it had asked the Commission to investigate whether Justice Gableman violated ethics codes by receiving free legal services from a law firm that had defended him against an earlier ethics complaint and hearing cases in which that firm represented parties.

* * *

On November 2, 2011, the Texas State Commission on Judicial Conduct released the following statement (www.scjc.state.tx.us/pdf/PublicStatement.pdf):

> The State Commission on Judicial Conduct has learned from numerous sources, including the media, the existence of a YouTube video purporting to depict a Texas judge engaging in the act of striking his teenage daughter with a belt. As a result of the media attention surrounding the release of this video on the internet, the Commission has been flooded with telephone calls, faxes, and emails from concerned citizens, public officials, and others, calling for an investigation into the videotaped incident.
>
> Due to the high profile nature of the matter, the Commission believes that the interests of the judiciary and the public would be best served by issuing this public statement announcing that it has commenced an investigation into the incident. This case will proceed in accordance with the rules and procedures promulgated by the Texas Supreme Court, and as permitted by the Texas Government Code and the Texas Constitution.
>
> In an effort to avoid burdening already limited agency resources, and to prevent delays in the investigation of the case, the Commission asks that no additional complaints be filed on this matter.

The Commission's statement does not identify the judge, but news reports stated that the 23-year-old daughter of Judge Williams Adams had posted on the internet a seven-minute video from 2004 of the judge screaming at her and hitting her with a belt. The video has been viewed more than half a million times on YouTube, Reddit, and other websites.

The relevant rule for the Texas Commission provides:

> The Commission may issue a public statement through its executive director or its Chairman at any time during any of its proceedings . . . when sources other than the Commission cause notoriety concerning a Judge or the Commission itself and the Commission determines that the best interests of a Judge or of the public will be served by issuing the statement. ★

Recent decisions

Unwanted conduct, retaliation

Based on a stipulated resolution, the Arizona Supreme Court censured a former judge for hearing cases involving an attorney with whom he had an intimate relationship and for unwanted sexual conduct toward a second attorney; the Court also permanently enjoined him from serving as a judicial officer and suspended him from the practice of law for two years. *In the Matter of Abrams,* 257 P.3d 167 (Arizona 2011).

In June 2008, the judge began an intimate, consensual relationship with Attorney A. During and after the affair, Attorney A often appeared before the judge, and the judge did not disqualify himself or disclose the relationship to the parties or other counsel.

For more than a year, the judge repeatedly pursued a sexual relationship with Attorney B, a recently admitted lawyer and assistant public defender assigned to his courtroom. The judge made lewd comments and "slurping noises" to her and groped her under a table at which they were sitting with others after work. Attorney B persistently rebuffed his advances. Between November 2009 and October 2010, the judge left Attorney B at least 28 voicemail messages and sent her at least 85 text messages; many included sexual innuendos or explicit sexual content, and several referred to cases in which Attorney B had appeared before the judge.

In December 2009, the judge described a sexual act he wanted Attorney B to perform in a voicemail message to her that even he characterized as "obscene." The next day, the judge asked Attorney B to pick up some paperwork in his chambers where he asked her if she had received the message and to go to a friend's condominium for sex. When she declined, he inappropriately touched her. Later that day, the judge repeated the explicit voicemail message. At some point, the judge reminded Attorney B of her probationary employment status and his connections in the community.

In October 2010, Attorney B appeared before the judge in her first jury trial. At the end of the state's case, when she moved to dismiss for lack of jurisdiction, the judge became angry and accused her of wasting judicial resources, violating her duty of candor, and committing a fraud on the court. He denied the motion and declared a mistrial. During an unrelated proceeding several days later, the judge criticized Attorney B in front of court staff and the prosecutor. At another, unrelated in-court conference, the judge told Attorney B that he would require her to confirm jurisdiction in future cases.

A court investigator found that the judge's actions were in retaliation for Attorney B's rejection of his sexual advances and her telling a mutual friend about the advances. The presiding judge upheld those findings, the city council voted to remove the judge, and the Commission instituted formal proceedings. In January 2011, the judge resigned.

More than casual

The New Mexico Supreme Court ordered that a judge be formally reprimanded and fined $6,000 for initiating a romantic relationship with an assistant public defender and failing to immediately disqualify himself from her cases; the court also ordered that the judge take a course in sexual harassment. *Inquiry Concerning Schwartz*, 255 P.3d 299 (New Mexico 2011).

On a Friday in July 2009, when assistant public defender Mary Griego had at least two cases set for trial the next Monday before him, the judge invited her to lunch "as a device and with the intent to create a romantic relationship." At lunch, the judge gave Griego a pair of purple latex gloves and a book entitled *The One Hour Orgasm,* with his official court photograph pasted over the picture of the author, whose name was similar to his. Both understood the gift to be a joke. That Saturday, the judge took Griego to a concert and two bars. At the end of the date, they kissed. They never had sexual relations. Both were single.

The Tuesday after their dates, the judge took actions in two cases in which Griego represented the defendant, before eventually recusing himself. In one case, he withdrew his denial of the defense motion to dismiss and recused because, he said, he had questions about the validity of his ruling and wanted another judge to hear the matter. In the second case, he explained that he was recusing himself because he had questions about the interstate compact on detainers and wanted to hear from the court of appeals.

The Court stated that a judge's impartiality will not normally be questioned merely because the judge has a social relationship with an attorney and that a judge is not prohibited from becoming romantically involved with an attorney. However, the Court concluded that, when a "relationship becomes something more than casual social interaction, and involves sexual jokes and the desire for a romantic relationship, then it raises reasonable questions about the judge's ability to be impartial" and that, before initiating a romantic relationship with an attorney, a judge must recuse from any cases in which the attorney is or has been involved. Finally, the Court concluded that the judge's stated reasons for recusal were not the real reasons but were "disingenuous at the very least" because uncertainty about a ruling is not a reason to recuse. ★

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