JUDICIAL CONDUCT REPORTER

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Ex parte communications and independent investigations: Recent cases *by Cynthia Gray*

Scheduling

One exception to the prohibition in Rule 2.9(A) of the 2007 American Bar Association *Model Code of Judicial Conduct* allows ex parte communications for "scheduling, administrative, or emergency purposes"—but only if "circumstances require it," if no substantive matters are discussed, if "no party will gain a procedural, substantive, or tactical advantage," and if the parties are promptly notified and given an opportunity to respond.

In a recent case, a New Jersey judge invoked the scheduling exception to defend his ex parte call to ascertain the availability of a third-party witness for a hearing in a trust case. Rejecting that defense, the Advisory Committee on Judicial Conduct explained that "a judge's ex parte communications with a witness or potential witness for 'scheduling' purposes is fraught with ethical concerns and when done off-the-record and without counsels' knowledge or consent, as occurred here, may reasonably lead counsel and the parties to question the judge's integrity and impartiality." *In the Matter of Bergman*, Presentment (New Jersey Advisory Committee on Judicial Conduct December 13, 2021), adopted, Order (New Jersey Supreme Court October 6, 2022) (reprimand). The Committee stated that, except for some family court matters and requests for temporary restraining orders, it could think of no circumstances in which a judge would need to communicate ex parte with a witness, even in an emergency. The Committee noted that the judge had other options than making an ex parte call.

The judge also argued that his call was not an ex parte communication because he "never met with, spoke to, or otherwise exchanged any information" with the witness but only left a voicemail message requesting that the witness return his call. Disagreeing, the Committee explained that the rule "prohibits not merely the act of communicating ex parte, but the initiation of that ex parte conversation," regardless whether the communication was reciprocal and with no excuse if the attempt was unsuccessful. The Committee emphasized that the judge could not "evade his responsibility for this ethical breach" because the witness did not answer his call.

In *Bergman*, in addition to telephoning the witness, the judge had engaged in an "impermissible independent factfinding investigation" into the trustee's motion for reimbursement of personal funds he and his daughter allegedly spent for improvements to a house that was an asset of the trust. Objecting to the motion, one of the beneficiaries had argued that some of the expenses had been for the personal benefit of the trustee and his daughter, who was living in the house.

The judge personally researched public real estate tax records to verify when the trustee's daughter and her husband had purchased their marital home, and he had instructed his law clerk to contact the registrar for vital

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statistics to determine on what date she was married and when her child was born. Denying most of the trustee's request for reimbursement, the judge found based on his research that the daughter "was working on the house as her future residence, and was willing to pay for certain personal choices in exchange for the privilege of living in it rent free."

In the discipline case, the Committee found that the judge had demonstrated judicial bias by considering it his duty to ascertain additional information concerning the trustee and his daughter. The judge had argued that he could take judicial notice of each of the facts on which he had based his decision, but the Committee rejected that argument because he had failed to provide the trustee the notice and opportunity to be heard that the state rules of evidence require prior to taking judicial notice. As *Bergman* illustrates, a judge's research into even publicly available records is an inappropriate independent investigation unless the parties receive notice and an opportunity to correct or supplement the record.

Independent investigations

In disciplinary proceedings, an Ohio judge admitted that he should not have inspected a home in response to concerns that a children services agency had not removed the children living there after their father's arrest and that he should have recused himself from the custody case "triggered" by his inspection. ***Disciplinary Counsel v. Lemons*** (Ohio Supreme Court October 13, 2022). The Ohio Supreme Court reprimanded the judge, adopting the findings and recommendation of the Board of Professional Conduct, which were based on stipulations.

On Thursday, January 12, 2017, D.M. was arrested and jailed on a charge of corrupting a juvenile with drugs. D.M. had legal custody of his three oldest children; the children's mother was also incarcerated. On the evening of D.M.'s arrest, a caseworker for the county children services agency visited the home where D.M. had resided with the three children and their grandfather. The agency put in place an in-home safety plan for the children rather than removing them from the home.

The following day, a school resource officer expressed concern about the well-being of D.M.'s children to Greg Dunham, a member of the judge's staff. Dunham and a probation officer visited D.M.'s home. Dunham observed that the home was filthy, the water had been turned off, the toilet was overflowing with human waste, the floor was littered with dog feces, the refrigerator was not working, and the children had no beds. Dunham reported his observations to the judge and to the children services agency. The agency sent a caseworker to the home, but again decided not to remove the children.

After learning of the agency's decision, the judge conducted his own investigation of the home, accompanied by law enforcement officers. He confirmed Dunham's report and also observed that there was a wall heater with an open flame within a few feet of the grandfather's oxygen tanks; that there were only dirty dishes in the cooler that presumably was a substitute for the broken refrigerator; that a child who was not dressed appropriately

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for the weather was using the oven to warm himself; and that there were only mattresses without box springs on the floor in the upstairs bedrooms, which were colder than the rest of the house.

After the home visit, on his own motion and without a case number, the judge found that two of D.M.'s children were in imminent danger and ordered the children services agency to take temporary custody and investigate. The agency promptly complied. The judge did not send a copy of his emergency order to the children's parents. Subsequently, at the request of the children services agency, the judge entered an ex parte order giving the agency custody of the children pending final disposition.

At a probable cause hearing on January 19, the children services agency did not present any evidence about the conditions of D.M.'s home, basing its argument instead on the parents being unavailable to care for the children because they were incarcerated. The judge did not disclose that he had visited the home. However, the judge mentioned the home's conditions during the hearing. For example, after D.M. asked whether his children would be placed with their grandmother, the judge responded that if the grandmother's residence looked like D.M.'s home, "that's a NO," and that any possible home for the children would need to have running water and mattresses with box springs.

The judge continued presiding over the children's dependency proceedings. In 2019, the judge granted the children services agency permanent custody of the two children who were the subject of his 2017 emergency order.

During his disciplinary proceeding, the judge said that he had investigated D.M.'s home and issued the emergency order because he wanted to force the children services agency "to do their job." The judge explained that the county was the center of the opioid epidemic and that "every parent[ ] seemed to be high and strung out," but that the agency was not investigating or filing enough cases, and grandparents, schools, and hospitals were flooding the court with requests for action. The judge admitted that he had allowed his frustration to get the better of him.

The Board found that "by conducting the wellness check of D.M.'s residence—which included thoroughly inspecting the house and interacting with the children and their grandfather—. . . [the judge] made an independent investigation of facts pertinent to what became a formal custody case brought before him as a judge" and that his investigation was the "sole basis" for his emergency order removing two of the children from the home. The Board did find that the judge had been "motivated by the best of intentions" and that "his actions had likely benefited D.M.'s children by removing them from an environment without capable caregivers." However, the Board also concluded that the judge should have recused himself from the case, emphasizing that no matter how well-intentioned, the judge "could not be both the source of a private referral based on his personal knowledge and an impartial arbiter of the issues as a judge."

No matter how well-intentioned, the judge "could not be both the source of a private referral based on his personal knowledge and an impartial arbiter of the issues as a judge."

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Other examples of independent investigations for which judges have been disciplined:

- In a request for an injunction to keep a parent off the field as a coach and away from the officers of a girls' softball league, a judge did "some digging," contacting another coach and city officials regarding the league's authority and use of city parks. ***Inquiry Concerning Andress*, Order** (Arizona Supreme Court October 26, 2010).
- After a hearing on a motion to suppress, a judge decided that not all of the facts had been presented, issued a subpoena duces tecum for an audio recording of a traffic stop, and relied on the tapes to deny the motion. ***Letter of Reprimand to Crow*** (Arkansas Judicial Discipline and Disability Commission May 17, 2013).
- Before a hearing on a restraining order, a judge checked on-line records regarding the petitioner and had his clerk bring him the petitioner's divorce file and other files involving the petitioner and the respondent. ***In the Matter of Friedenthal*, Decision and order** (California Commission on Judicial Performance April 3, 2012).
- While presiding over a breach of contract suit between two software developers, a judge solicited computer consultants and experts ex parte for information about technical issues relating to damages in the case. *Inquiry Concerning Baker*, 813 So. 2d 36 (Florida 2002).
- While lunching with two state senators, a state supreme court justice asked about the accuracy of the dollar amounts reported in newspapers related to a case about school funding. ***Inquiry Concerning Nuss*, Findings of fact, conclusions of law, and disposition** (Kansas Commission on Judicial Qualifications August 18, 2006).
- In a small claims case, a judge had her constable obtain the police report of an altercation between the parties. *In re Foret,* 144 So.3d 1028 (Louisiana 2014).
- In an eviction case, a judge visited the apartment without the landlord's representative and then stayed the warrant of removal. *Commission on Judicial Performance v. Sutton*, 985 So. 2d 322 (Mississippi 2008).
- During the trial in a civil case against an oil change company, a judge went to her chambers, called a mechanic friend to ask about the validity of the parties' arguments, called another judge to ask about the testimony given at an initial hearing, and then ruled based on the information she received. *Commission on Judicial Performance v. Bozeman*, 302 So.3d 1217 (Mississippi 2020).
- In a divorce case, a judge used Zillow and tax records to determine the value of the marital home, to choose a valuation date, and to determine the approximate rental value of a second unit in the home. ***In the Matter of Albee*, Reprimand and caution** (New Hampshire Judicial Conduct Committee May 9, 2016).
- While presiding over a child custody and support hearing, a judge used Google to find information about the mother's photography business,

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visited her website several times, viewed her photographs, and read her poems, which gave him "hope for the kids and showed that [she] was not as bitter as he first thought." ***Public Reprimand of Terry*** (North Carolina Judicial Standards Commission April 1, 2009).

- When a mother filed a petition for a protection order, a judge told the parties that she was going to conduct an "investigation," spoke repeatedly with the county children services agency, and concluded that because the agency was not treating the case like an emergency, neither would she. *Disciplinary Counsel v. Squire*, 876 N.E.2d 933 (Ohio 2007).
- During a recess in a hearing regarding a protective order, a judge placed an ex parte call to the hospital where the petitioner said that she had been treated after being assaulted. *Judicial Inquiry and Review Commission v. Shull*, 651 S.E.2d 648 (Virginia 2007).
- A judge relied on his ex parte contacts with several medical societies to deny name-change petitions filed by two individuals going through gender affirmation therapy. ***In re Hutchinson*, Decision** (Washington State Commission on Judicial Conduct February 3, 1995).
- In a petition to modify a parenting plan, a judge solicited information from the father's ex-wife in a call and questioned a child psychiatrist ex parte about how she had reached the conclusions in her report. ***In re Tollefson*, Stipulation, agreement, and order** (Washington State Commission on Judicial Conduct August 21, 2000).
- A judge spoke with the police chief about a petition for a harassment injunction involving neighbors and reviewed the police file about the conflict. *In the Matter of Calvert*, 914 N.W.2d 765 (Wisconsin 2018).
- Before sentencing a former nurse who had pled guilty to delivery of controlled substances, a judge used the internet to investigate her nursing licenses in other states, discovered what he believed to be incriminating information, and sentenced her based on incorrect deductions he made from that information. *Judicial Commission v. Piontek*, 927 N.W.2d 552 (Wisconsin 2019).

Social media

In a recent case, over a six-month period, a Louisiana judge engaged in improper ex parte communications on Facebook Messenger with the maternal grandmother of children involved in a child-in-need of care case over which he was presiding. *In re Denton,* 339 So. 3d 574 (Louisiana 2022).

At the request of the Department of Children and Family Services, the judge had ordered two children removed from their mother's custody where they had been cared for primarily by their maternal grandmother, Stephanie Bardeau-Marse, and placed them in the temporary custody of the agency. In October 2017, the state filed a petition to adjudicate the children in need of care.

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In December 2017, Bardeau-Marse filed a petition to intervene and requested custody of the children. The judge denied the petition. Following a hearing, the judge granted custody of the children to the father with monitoring by DCFS, ordered visitation for the mother and the grandparents to be facilitated by a relative, and set a case review hearing for April 12.

Approximately three weeks before the hearing, Bardeau-Marse sent a private message to the judge on Facebook Instant Messenger, mentioning a "small circle of friends that we share and both consider friends" and "Ex-mayor Jimmy Durbin." She told the judge, "I'm begging for someone to listen to me . . . since my attorney was pretty much thrown out of the courtroom and my pleading petition was not heard. . . . I'm asking to please let me have a heart to heart conversation with you, again on a personal level, I want to explain my situation/self how those babies are loved how they are our heart . . . ." The judge did not know Bardeau-Marse and did not respond to her message.

On April 12, the judge denied Bardeau-Marse's second petition to intervene and granted sole custody of the children to the father, with supervised visitation to the mother but no specific visitation rights for Bardeau-Marse.

At 7:49 p.m. that day, the judge called Bardeau-Marse; the call lasted for an hour and 40 minutes. On the call, the judge told Bardeau-Marse that he would keep his eyes on the children's father and gave her the name and number of a private investigator.

For the following six months, the judge frequently exchanged messages about the case with Bardeau-Marse on Facebook Messenger.

For example, in a message to the judge on April 30, at 6:05 a.m., Bardeau-Marse discussed her difficulty in seeing her grandchildren. The judge replied at 6:32 a.m.: "I am so sorry for your continued pain. I don't have the answer, but I am working on the entire situation. I assure you because I am not happy with the current exigencies as currently exist. Keep praying and I will do the same."

On May 11, Mother's Day weekend, at 11:43 p.m., Bardeau-Marse sent the judge a lengthy message about her grandchildren, her daughter, and their conflict with the father over visitation/custody, the father's alleged drinking and drug abuse, and his alleged mental and emotional abuse of the mother and her side of the family. The judge responded with a "thumbs-up" emoji.

In response to a message from Bardeau-Marse in July, the judge said "I do strenuously suggest you go hire the best lawyer you can afford[,] get legal advice and go to court where jurisdiction over custody can be fought over. I wish I could do more but I have a court of limited jurisdiction." A few minutes later the judge messaged: "I wish I could do more to help[.] But as it currently sits my hands are tied. I wish you the very best! I will continue to pray for you and your family." Bardeau-Marse replied: "I understand . . . I just appreciate you listening . . . ."

As the judge had advised, Bardeau-Marse then consulted with her attorney, Maria Finley, disclosing for the first time her communications with the judge. On August 10, Finley filed suit in family court against the father on behalf of Bardeau-Marse, seeking custody or visitation. The suit was assigned to Judge Lisa Woodruff-White.

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Judge Denton called and then emailed Judge Woodruff-White, suggesting that Finley was forum shopping and asking that Judge Woodruff-White allow him to retain jurisdiction as a "professional courtesy." After briefing by the parties, Judge Woodruff-White dismissed the family court suit against the father, stating that Judge Denton's court was the more appropriate forum.

In her sworn statement in the discipline proceeding, Bardeau-Marse stated that she had trusted the judge and followed his advice, only to feel "betrayed" on learning of his letter to Judge Woodruff-White. She further testified that she was "hurt" because she "thought he was being sincere" and acting in her "best interest," adding that "[y]ou can['t] trust the system at all."

Agreeing with the Commission, the Court found that the judge's "words and conduct manifested at the very least bias" in favor of Bardeau-Marse. The Commission noted that the judge had "offered no satisfactory explanation" for his communications with her except that he was "sympathetic to the plight of the grandmother," which may have "impacted and overshadowed some of [his] judgment," and that he had been receptive to her initially because they both had a connection to the former mayor. The Court suspended the judge for four months without pay based on stipulations and the findings and recommendation of the Judiciary Commission.

Examples of other ex parte communications on social media for which judges have been sanctioned:

- A judge used several Facebook aliases to communicate with the parties in a domestic relations case. ***In the Matter of Blocton*, Final judgment** (Alabama Court of the Judiciary December 10, 2021).
- A judge failed to immediately recuse from all cases involving a female defendant with whom he was exchanging "friendly to flirty" messages on Facebook Messenger and by telephone and, after he recused, engaged in sexual communications and ex parte communications with her about her cases. ***Letter of resignation and prohibition from office (Throesch)*** (Arkansas Judicial Discipline & Disability Commission May 1, 2020).
- A judge communicated ex parte on Facebook with counsel for a party in a child custody and support matter being tried before him, stating, for example, "I have two good parents to choose from." ***Public Reprimand of Terry*** (North Carolina Judicial Standards Commission April 1, 2009).
- A judge had numerous communications with a litigant on Facebook Messenger and the phone about four cases over which the judge was presiding, including the litigant's custody case with his ex-wife. *Disciplinary Counsel v. Winters*, 184 N.E.3d 21 (Ohio 2021).
- A judge reviewed a social media post in which the wife of a criminal defendant criticized the judge. ***Staggs*, Order** (Arizona Commission on Judicial Conduct November 17, 2020).
- A court commissioner reviewed comments that the parties in two child custody cases had made about him on a Myspace page and on an on-line

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forum. ***In the Matter of Friedenthal,*** **Decision and Order** (California Commission on Judicial Performance April 3, 2012).

In the courtroom

One ex parte hazard into which several judges have stumbled is, after a hearing is over, talking about a case with whoever is still in the courtroom after other parties or attorneys have already departed.

- A judge often remained on the bench after the day's docket was complete and engaged in off-the-record conversations with those still in the courtroom, for example, giving defendants advice or pep talks. *In the Matter of Rand*, 332 P.3d 115 (Colorado 2014).
- In a lengthy ex parte conversation with the petitioner after the other party left the courtroom following a hearing on a petition for a stalking protection order, a judge discussed the evidence in the case, expressed her views of the absent party's integrity, indicated how she intended to rule, made inappropriate comments about the parties' religions, and used profanity. *Disciplinary Counsel v. Porzio*, 153 N.E.3d 70 (Ohio 2020).
- In a harassment case in which the defendant was appearing by telephone, a judge continued to speak with the plaintiff for 10 minutes after disconnecting from the defendant, for example, advising the plaintiff that her other option for "dealing with" the situation would be to pursue criminal charges and stating about the defendant, "people don't understand that the way they comport themselves in a hearing is important." ***Inquiry Concerning Parker,*** **Order** (Arizona Supreme Court June 4, 2012).
- As the jury in a driving under the influence case was deliberating and when the defendant and his attorney were not present, a judge said to an assistant district attorney gathering his papers to leave the courtroom, "Do you want to know what I would have done?" and talked to him about an argument that might have "defeated the defense theory" on the accuracy of the breathalyzer. ***Inquiry Concerning Mills,*** **Decision and order** (California Commission on Judicial Performance August 28, 2018).
- After the jury returned a guilty verdict in a resisting arrest case, when the assistant district attorney returned to the courtroom to pick up her things, a judge gave her feedback on her trial technique, complimented her style, suggested that she could make her direct examinations shorter, and told her that he would have been much more aggressive on rebuttal. ***In the Matter of Scott,*** **Decision and order** (California Commission on Judicial Performance February 17, 2016).

In a recent discipline case, in ***In the Matter of Arndt,*** **Determination** (New York State Commission on Judicial Conduct September 28, 2022), the judge had ex parte communications in two small claims cases after one of the parties had left the courtroom. In one case, after the plaintiff left the courtroom, the judge told the defendant that the plaintiff had "bombarded [him] with

One ex parte hazard into which several judges have stumbled is, after a hearing is over, talking about a case with whoever is still in the courtroom after other parties or attorneys have already departed.

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a bunch of stuff," which was "impossible" for him "to try to decipher," and that he "can't understand a word [the plaintiff is] saying." The judge told the defendant that he was "going to adjourn the case, probably do a dismissal." The defendant continued to speak to the judge about the substance of the claim until the court clerk told the defendant that the judge had to "stop hearing," which prompted the judge to state, "Yeah, I can't really hear much more." The defendant then left the courtroom.

In the second case, which involved an unfinished painting job and ladders confiscated by the plaintiff-homeowner, the judge reserved judgment following a hearing, and the defendant-painter left the courtroom. The homeowner's wife then asked the judge, "So what happens now?" The judge replied, "I'm going to think this out and do a judgment against him, more than likely . . . And then you put a lien on his house, but I'm not sure about [his] ladders. You might have to give him his ladder back." The judge allowed the plaintiff and his wife to continue talking to him about the substance of their claim until an attorney in the courtroom for an unrelated case intervened and advised the plaintiff that the judge was not permitted to give him legal advice or listen to him after the proceeding had ended. After the plaintiff and his wife left the courtroom, the attorney told the judge that he was "making the wrong decision." In response, the judge said that he had "some more thinking" to do but that the defendant "was getting real snotty" and had "disappeared" on the plaintiff.

Pursuant to the judge's agreement, the New York State Commission on Judicial Conduct censured the judge for his conduct in these two small claims cases and unrelated misconduct

In another recent case from New York, while presiding over a small claims dispute between a homeowner and a plumber, a judge, without administering an oath or affirmation, questioned the plaintiff's witness, who was also a plumber, and then allowed the defendant-plumber to question the witness. A spectator who was in the courtroom for another small claims case, interjected his own opinion, but the judge did not admonish him. After exchanges between the judge, the defendant, and the judge's clerk, the judge accused the defendant of attempting to take advantage of the plaintiff. Eventually, a sheriff's department sergeant interceded and suggested that the judge end the proceeding because both sides had presented their cases and it was "starting to get heated."

After the defendant left the courtroom, the judge allowed the plaintiff to tell him that the plumber who was her witness was an "honest man. Very honest man."

Then, after the plaintiff left the courtroom, the judge talked ex parte with the man who had interjected in the hearing and the plaintiff's witness, who was still present, about the substance of the case and the defendant's business practices.

Pursuant to the judge's agreement, the New York Commission censured the judge for allowing the proceedings in that case to get out of hand and unrelated misconduct. ***In the Matter of Kraker,*** **Determination** (New York State Commission on Judicial Conduct October 6, 2022).

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Letters in adjudicative proceedings

by Cynthia Gray

Canon 2B of the 1990 American Bar Association *Model Code of Judicial Conduct* provided: "A judge shall not testify voluntarily as a character witness." A comment explained:

> A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross examining the judge.

Similarly, Rule 3.3 of the 2007 model code provides: "A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned." Comment 1 explains: "A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the interests of another."

The model rules create an exception when a judge is "duly summoned" and, therefore, their testimony is not voluntary. But comments to both versions caution that, "except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness." As noted below, some of the cases and advisory opinions indicate that the judge had not received an official request for a character letter, suggesting that a reference might be appropriate in response to a formal request from the adjudicatory body even in the absence of a subpoena or other summons.

Sentencing

Absent a summons, Rule 3.3 prohibits judges from testifying as a character witness in a sentencing hearing or submitting a letter to be used as a reference in the sentencing of a defendant. Although a written reference may not be testimony as it is not under oath, submitting a letter is clearly included in the prohibition on "vouch[ing] for the character of a person in a legal proceeding" in the 2007 version of the rule. Moreover, under the 1990 version, courts held that sending a letter on judicial or court stationery to a sentencing judge without an official request was a misuse of the prestige of judicial office and a violation of the prohibition on testifying voluntarily as a character witness. Judges were sanctioned for that conduct, particularly as judges frequently crossed the line between describing a defendant's character and arguing that their character justified a lenient sentence. *See In re Decuir*, 654 So. 2d 687 (Louisiana 1995) (censure for, in addition to other misconduct, writing a letter on personal judicial stationery to a federal judge recommending leniency in the sentencing of a friend); *In re*

For an article on letters of recommendation in employment, education, bar admission, and other contexts, see the summer 2022 issue of the Judicial Conduct Reporter.

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Marullo, 692 So. 2d 1019 (Louisiana 1997) (judge wrote to a federal judge on his official stationery a letter solicited by the attorney for a defendant the judge had known for 25 years); ***In re Bonner*, Stipulation, agreement, and order** (Washington State Commission on Judicial Conduct August 3, 2007) (admonishment for, at a defendant's personal and informal request, writing a letter on court stationery addressed to a sentencing judge).

In 1994, the Florida Supreme Court publicly reprimanded four judges for writing character references on official court stationery for the same defendant, an attorney and personal friend of the judges who had pled guilty in federal court after being charged with money-laundering and tax evasion. The defendant had asked the judges for the letters for use at his sentencing hearing. The Court rejected the argument that the judges were not testifying because the letters were not under oath or affirmation, finding that the prohibition on testimony "'is sufficiently broad to encompass written statements voluntarily submitted with the knowledge and understanding that such statements may be used directly or indirectly in some adjudicatory proceeding.'" *Inquiry Concerning Fogan*, 646 So. 2d 191 (Florida 1994). The Court also held that a probation officer's agreement that the defendant could submit the judges' letters was not an official request. Rejecting the argument that a judge's letter was merely "information" and, therefore, permissible, the Court noted that the letter extolled the defendant's virtues and recommended probation, making it a character reference. *Inquiry Concerning Ward*, 654 So. 2d 549 (Florida 1995). *Accord Inquiry Concerning Stafford*, 643 So. 2d 1067 (Florida 1994); *Inquiry Concerning Abel*, 632 So. 2d 600 (Florida 1994).

Acknowledging how difficult it is for judges to refuse requests for such letters, the New York State Commission on Judicial Conduct emphasized that ethical transgressions are not excused by "a 'sincere, albeit misguided desire' to help." ***In the Matter of Martin*, Determination** (New York State Commission on Judicial Conduct December 26, 2002) (admonition for, in two unrelated proceedings, sending to sentencing judges ex parte letters on judicial stationery seeking special consideration for defendants who were the sons of family friends). *See also* ***In the Matter of Engle*, Determination** (New York State Commission on Judicial Conduct February 4, 1997) (censure for sending a letter on judicial stationery requesting a lenient sentence for a defendant the judge knew personally).

Consistent with that caselaw, judicial ethics opinions have advised that a judge may not, absent an official summons, write a letter for use in a sentencing proceeding for family members, friends, family members of friends, lawyers, court staff, and others. *See* ***Arkansas Advisory Opinion 2005-1*** (on behalf of a lifelong friend); ***Connecticut Informal Advisory Opinion 2013-30*** (on behalf of a long-time friend awaiting sentencing in federal court)*;* ***Florida Advisory Opinion 2010-34*** (on behalf of a relative of a friend regarding a drug program as an alternative to incarceration)*;* ***Florida Advisory Opinion 1975-18*** (to a federal judge); ***Illinois Advisory Opinion 1995-12*** (to a federal judge); ***Indiana Advisory Opinion 5-1991*** (to a federal court on behalf of a lawyer in the judge's county); ***New York Advisory Opinion 1991-46*** (on behalf of a close friend); ***New York Advisory Opinion 1989-73***

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(on behalf of a lawyer awaiting sentencing); *New York Advisory Opinion 1988-63* (to the probation department on behalf of a court employee); *Oklahoma Advisory Opinion 2015-2* (on behalf of the judge's grandson awaiting sentencing in another court); *Pennsylvania Formal Advisory Opinion 2021-1*; *Pennsylvania Informal Advisory Opinion 9/13/2005* (on behalf of their son's former coach); *Washington Advisory Opinion 1992-17* (on behalf of the adult child of a family friend even if the letter would be on plain paper and the judicial title would not be used); *West Virginia Advisory Opinion 2007-3* (on behalf of a family member of a good friend). *But see* Canon 2B(3), *California Code of Judicial Ethics* ("A judge may initiate communications concerning a member of the judge's family with a representative of a probation department regarding sentencing, . . . provided the judge is not identified as a judge in the communication").

The Arizona committee advised that a judge may not send a letter to a sentencing judge within the state on behalf of a family member even if it is on plain paper, does not include the judge's title, and is addressed "To Whom it May Concern," noting that "judges throughout the state are often in contact with one another, be it at conferences, while serving on committees or at other professional or social functions" and "may well have colleagues in common or be aware that the writer holds judicial office." *Arizona Advisory Opinion 2010-5*. However, explaining that "an out-of-state judge is far less likely to be aware of the writer's judicial status or to be perceived as harboring any feelings of judicial collegiality," the Arizona committee created a limited exception that allows a judge to send a letter to a judge in another state, if the letter is on behalf of a family member, on plain paper, and with no reference to the writer's judicial status.

The Wyoming committee refused to adopt that exception and advised that a judge may not write a letter on behalf of a family member even if they are awaiting sentencing in another state and the letter is not on court letterhead, does not mention what the writer does for a living, and does not include "any reference to the Wyoming Judiciary." *Wyoming Advisory Opinion 2016-2*. The inquiry to the committee was from a judge whose relative had pled guilty to a very serious crime in another state and who had drafted a letter they wanted to send to the sentencing judge without a subpoena. The committee acknowledged that a judge in another state was not likely to "have any idea who the Wyoming judge is or what he does for a living." However, it stated, "in today's information environment," anyone reading the letter—not just the out-of-state judge but also litigants and lawyers—could quickly identify the writer as a Wyoming judge. The opinion concluded: "However tempting it may be to carve out exceptions in cases where harm is uncertain or where the motives of the writer are pure," the proposed letter would violate the code of judicial conduct.

Post-conviction proceedings

Similarly, judges may not submit written statements or otherwise weigh in on requests for parole, pardon, clemency, or expungement, at least absent an official, formal request from the agency reviewing the request. *See Colorado Advisory Opinion 2021-1* (a judge who was the prosecutor in a case may

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comment on an application for clemency and on the applicant's character if requested to do so by the Office of Executive Clemency but should respond solely as the former prosecutor and should not identify themself as a judge or use judicial letterhead); ***Kansas Advisory Opinion JE-103*** (2000) (a judge may not write a letter of recommendation for a former client knowing that the letter will be submitted to another judge who is considering expunging the former client's conviction); ***Nebraska Advisory Opinion 2007-4*** and ***Virginia Advisory Opinion 2006-1*** (a judge may not initiate letters supporting someone's efforts to have their civil rights restored); ***New York Advisory Opinion 2019-95*** (a judge may not write a letter in support of an inmate's clemency application at the request of the inmate or his attorney, but the inmate may list the judge as a reference); ***Pennsylvania Formal Advisory Opinion 2021-1*** (a judge may not offer character evidence in any form, including a letter, on behalf of an individual in connection with parole, pardon, or clemency). *See also* "**Vouching for pardon, parole, or clemency**," *Judicial Conduct Reporter* (NCSC Fall 2018).

However, at least two states have exceptions when family members are involved. ***Alaska Advisory Opinion 2003-1*** states that a judge may write a letter to the pardon or parole board "in their personal capacity when a member of their immediate family is either the victim of the crime or the convicted person." **Canon 2B(3) of the California code** provides: "A judge may initiate communications concerning a member of the judge's family with . . . the Board of Parole Hearings regarding parole, or the Office of the Governor regarding parole, pardon, or commutation of sentence, provided the judge is not identified as a judge in the communication."

The rule also prohibits a judge from acceding to a request on behalf of a defendant to provide a character reference:

- To be used at a bond hearing for a family friend charged with murder (***South Carolina Advisory Opinion 21-2005***);
- In support of a bail application for a former client (***New York Advisory Opinion 1998-88***);
- To a district attorney in connection with a former law clerk's plea bargain (***New York Advisory Opinion 1989-4***);
- To the district attorney about the good reputation and character of a close friend arrested for driving while intoxicated (***Pennsylvania Informal Advisory Opinion 3/12a/08***); or
- Absent a subpoena, in a habeas corpus action regarding the judicial officer's prior representation of the defendant ***California Expedited Opinion 2022-49)***.

See also ***In the Matter of Freeman,*** **Determination** (New York State Commission on Judicial Conduct November 8, 1991) (admonition for writing a letter on court stationery to another judge in support of a customer of his sporting goods shop who was attempting to have his pistol permit reinstated after a conviction for driving while ability impaired).

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Discipline proceedings

The rule prohibiting voluntary character testimony has been applied to attorney or judicial conduct proceedings.

- A judicial official may not write a character reference letter in response to a request by an attorney who is the subject of a grievance. ***Connecticut Informal Advisory Opinion 2014-9***.
- A judge may not provide a letter of reference for use in a bar adversarial character and fitness proceeding. ***Connecticut Informal Advisory Opinion 2008-15***.
- Unless requested by the bar, a judge may not write a letter of recommendation to the Florida Bar in defense of an attorney who has had a grievance filed against them by a client about their handling of a trial over which the judge presided. ***Florida Advisory Opinion 1992-1***.
- A judge may not provide a letter on behalf of a disbarred attorney seeking re-admission to the bar. ***Florida Advisory Opinion 1988-19***.
- A judge may not submit a character letter to the state supreme court in bar proceedings to suspend an attorney pending an appeal from a conviction for tax evasion. ***Florida Advisory Opinion 1975-6***.
- A judge may not write a letter to the attorney grievance commission attesting to the character of a former employee. ***Maryland Opinion Request 2020-22***.
- A judge may not send a letter or affidavit attesting to an attorney's character, competence, and service to the bar for use at a hearing to determine the sanction in a discipline proceeding. ***Nebraska Advisory Opinion 2002-2***.
- A judge may not provide a letter on behalf of a disbarred attorney seeking re-admission to the bar. ***New York Advisory Opinion 1995-75***.
- A judge may not provide a letter of support for a lawyer in a proceeding involving discipline or reinstatement. ***North Dakota Advisory Opinion 1991-1***.
- A judge may not provide a character reference for an attorney being investigated for conduct that occurred in a trial over which the judge presided. ***New York Advisory Opinion 1990-156***.
- A judge may not provide a character reference on behalf of a lawyer seeking reconsideration of their disbarment. ***New York Advisory Opinion 1989-73***.
- A judge may not write a letter on behalf of a lawyer who appeared before the judge unless the Disciplinary Board requests factual information. ***Pennsylvania Informal Advisory Opinion 5/1/2013***.
- A judge may not write a letter in support of a lawyer who is being investigated by a discipline committee. ***Pennsylvania Informal Advisory Opinion 7/29/2002***.
- A judge may not sign an affidavit attesting to an attorney's competency for use in a grievance proceeding. ***Texas Advisory Opinion 277*** (2001).

The rule prohibiting voluntary character testimony has been applied to attorney or judicial conduct proceedings, unless requested by the discipline authorities.

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- A judge may not write a letter to the state bar supporting a petition for reinstatement filed by an attorney who had surrendered his license to practice law. ***Virginia Advisory Opinion 2006-1***.
- A judge may not voluntarily write a letter of support in a lawyer disciplinary proceeding. ***West Virginia Advisory Opinion 2020-25***.
- A judge may not offer character evidence in any form, including a letter, on behalf of an individual in connection with discipline. ***Pennsylvania Formal Advisory Opinion 2021-1***.
- An administrative judge should not write a letter to the State Commission on Judicial Conduct expressing their views on the professional performance of a judge but may authorize the judge's lawyer to tell the Commission that it may directly contact the administrative judge, who may write a letter in response. ***New York Advisory Opinion 1999-101***.
- In the review of a determination of the State Commission on Judicial Conduct, individual judges and a judges' association should not communicate with the Court of Appeals that a judge, who is a member of the association, should not be removed. ***New York Advisory Opinion 1997-97***.
- A judge may not voluntarily write a letter of support in disciplinary proceedings involving judges. ***West Virginia Advisory Opinion 2020-25***.
- At the request of another judge's lawyer, a judge may not write a letter about their impressions of the other judge to be submitted to the supreme court with their response to judicial discipline charges. ***West Virginia Advisory Opinion 1997-22***.

See also ***Barth*, Order** (Arizona Commission on Judicial Conduct September 7, 2012) (reprimand for submitting a character reference letter on behalf of an attorney in a reinstatement proceeding without being duly summoned); *In re Whitaker*, 948 So.2d 1067 (Louisiana 2007) (one-year suspension of a former judge from the practice of law for, in addition to other misconduct, sending a letter while he was a judge on his official court stationery to the Chief Disciplinary Counsel in support of a disbarred lawyer); **Canon 2B, *Louisiana Code of Judicial Conduct*** ("A judge shall not initiate the communication of information in any court or disciplinary proceeding, but may provide such information for the record in response to a formal request by a court or disciplinary agency official"); ***North Dakota Advisory Opinion 1992-1*** (advising a judge to consider not writing a letter for an attorney who is being disciplined unless requested to do so by the disciplinary board); *In the Matter of Waddick*, 605 N.W.2d 861 (Wisconsin 2000) (it is "at least, inadvisable" for a judge to write a letter about the character of a respondent in a judicial disciplinary proceeding). *See* ***New York Advisory Opinion 2005-107*** (a judge may not write a letter of recommendation on behalf of an attorney applying for a life insurance policy who has been rehabilitated from their addiction to a controlled substance); ***Washington Advisory Opinion 1987-1*** (a judge may not write a "to whom it may concern" letter on behalf of an attorney who had their insurance policy canceled as a result of a malpractice claim).

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However, in several states, judges are allowed to write a character letter in attorney and/or judicial discipline proceedings even absent an official request.

Several advisory opinions allow Alabama judges to submit a letter of support or an assessment of an attorney's performance in discipline proceedings. *Alabama Advisory Opinion 1978-48* (a judge may respond to a general notice of a petition for reinstatement to the state bar that requests that members of the public furnish information about the petitioner's qualifications); *Alabama Advisory Opinion 1980-84* (a judge may submit a letter in support of an attorney's application for reinstatement at the attorney's request); *Alabama Advisory Opinion 1986-269* (a judge may submit a letter to the Board of Bar Commissioners in support of an attorney against whom disciplinary action has been taken or is being contemplated); *Alabama Advisory Opinion 1989-390* (a judge may submit an assessment of an attorney's performance at a trial over which the judge presided to the state bar grievance committee even if the case is pending on appeal).

A Washington advisory opinion reasoned that a judge could write a character letter to the state bar association about the reinstatement of a disbarred attorney because the bar operates as an arm of the supreme court. *Washington Amended Advisory Opinion 1988-5*. *See also* *Washington Advisory Opinion 2003-8* (a judge may provide factual testimony to a bar association about an attorney's professional skills in a letter that will be part of the attorney's disciplinary file, not as a mitigating factor but as evidence that the attorney is considered an excellent trial attorney).

In an exception for judicial discipline proceedings, Canon 2B(2)(b) of the California code states that, even without a subpoena, a judge may "provide the Commission on Judicial Performance with a written communication containing . . . information related to the character of a judge who has a matter pending before the commission, provided that any such factual or character information is based on personal knowledge." Comment 2 to Rule 3.3 of the Nevada code provides that the rule against a judge acting as a character witness does not apply to "attorney or judicial discipline proceedings," adding that "a judge may voluntarily appear and testify as to the character of the bar applicant, attorney, or judge who is the focus of those proceedings."

Opinions have also prohibited judges from providing letters of reference in disciplinary proceedings involving court employees.

- A judge may not write a letter attesting to a court employee's character and opposing termination of the employee for use in the appeal from a termination decision. *Massachusetts Advisory Opinion 2004-4* and *Massachusetts Advisory Opinion 2004-5*.
- A judge may not, at the request of a court employee, provide a letter for use in the employee's disciplinary proceeding, but may authorize the employee to provide the judge's name as a reference and respond to a request from the office of court administration. *New York Advisory Opinion 2011-16*.

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- A judge should not write a letter at the request of a court employee facing disciplinary charges attesting to the employee's good character, work ethic, and job performance. ***New York Advisory Opinion 2005-34***.

Finally, judges have been advised not to participate as character references in employment actions in professional settings not related to the courts.

- A judge should not send a letter to an employer recommending that a former employee be reinstated. ***Nebraska Judicial Ethics Opinion 2007-4***; ***Virginia Advisory Opinion 2006-1***.
- A judge may not write a letter of support on behalf of their personal physician in a hearing by state medical licensing authorities considering whether the doctor may continue to practice. ***Nevada Advisory Opinion JE2004-004***.
- A judge may not offer character evidence in any form, including a letter, on behalf of an individual in connection with discipline. ***Pennsylvania Formal Advisory Opinion 2021-1***.

See also ***In the Matter Concerning Meyer,*** **Decision and order** (California Commission on Judicial Performance April 5, 2022) (admonishment for, in addition to related misconduct, sending a letter to the police chief on official court stationery endorsing and supporting two detectives who were being investigated for their conduct in a case over which the judge had presided).

Other adversarial proceedings

Family court matters

- Absent a summons or official request from an appropriate agency, a judge may not write a recommendation to the effect that their stepson is a person of good character for use in a marital dissolution involving child custody. ***California Judges Association Advisory Opinion 40*** (1988).
- A judge may not provide information on character issues to a guardian ad litem in a post-dissolution of marriage action involving a close personal friend even if it is pending outside their circuit. ***Florida Advisory Opinion 2003-19***.
- A judge may not voluntarily provide a reference in support of an attorney's application to adopt a child that will be considered by a court in the county where the judge presides, but the judge may permit the attorney to submit their name to the adoption agency as a reference and respond to the agency's inquiry. ***New York Advisory Opinion 2008-211.***
- A judge may not provide a reference for a friend's application to be a foster parent because the application will be heard in family court. ***New York Advisory Opinion 2005-60***.

See also ***In re Poyfair,*** **Stipulation, agreement, and order** (Washington State Commission on Judicial Conduct December 1, 1995) (admonishment for,

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without a subpoena or official summons but under threat of a subpoena, signing an affidavit about the parenting skills of the parties in a matter pending in a different county, identifying himself as a judge, and stating that his opinion was shared by other judges in the county). *But see* ***New Hampshire Advisory Opinion 2005-1*** (a judge who has relevant personal knowledge may voluntarily serve as a reference in connection with the investigation of a close friend by the division for children, youth, and families).

Firearm permits

- A judge may not initiate letters supporting an individual's attempts to renew permits such as those allowing the possession of concealed weapons. ***Nebraska Advisory Opinion 2007-4***; ***Virginia Advisory Opinion 2006-1***.
- A judge may not be a character reference for a court intern who has applied for a pistol permit. ***New York Advisory Opinion 2016-18***.
- A judge may not serve as a character reference for a friend who is applying for a pistol permit. ***New York Advisory Opinion 2010-17***.
- A judge may not write a letter of reference in connection with the application of a long-time client for a pistol permit. ***New York Advisory Opinion 1995-33***.

Immigration proceedings

- A judge may not provide a letter of recommendation for submission to a government agency at the request of a friend who is seeking permission to enter a foreign country. ***New York Advisory Opinion 2014-33***.
- A judge may not write a letter to the Immigration and Naturalization Service attesting to the good character of a member of the judge's church and requesting an expedited exclusion hearing. ***New York Advisory Opinion 2003-51***.
- A judge may not write a letter to the state department of labor supporting an application for labor certification for a foreign worker at the request of a waiter at a neighborhood restaurant the judge and their family know. ***New York Advisory Opinion 2003-47***.
- A judge may not write a letter of reference for their dog walker to be submitted to the U.S. embassy in a foreign country to help the dog walker's fiancé obtain a visa. ***New York Advisory Opinion 2002-123***.

For an article on letters of recommendation in employment, education, bar admission, and other contexts, *see* the summer 2022 issue of the Judicial Conduct Reporter.

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Time limits on complaints about judicial misconduct

Judicial conduct commissions may receive complaints about judges years after the alleged misconduct took place. Some commissions have provisions that address whether that time gap affects their review of a complaint, with the periods specified ranging from one to six years.

Some of the provisions are not hard-and-fast rules but guidance for the commission. For example, an administrative policy in Arizona explains:

> As a general rule, the Commission [on Judicial Conduct] will not investigate complaints involving allegations of misconduct that occurred more than three years prior to the date of the complaint, unless the allegations involve a long-term pattern of misconduct. It is difficult and unfair to require a judge to respond to a complaint involving conduct that occurred so far in the past that neither the judge nor the witnesses, if any still exist, would be able to accurately remember the incident. This is especially true if the alleged misconduct took place during a court proceeding for which records may no longer exist.

Arizona Commission on Judicial Conduct Administrative Policy 4.

In Michigan, the Judicial Tenure Commission is required when "deciding whether action with regard to a judge is warranted, . . . [to] consider all the circumstances, including the age of the allegations and the possibility of unfair prejudice to the judge because of the staleness of the allegations or unreasonable delay in pursuing the matter." *Michigan Court Rules, Subchapter 9.200, Rule 9.205(B)(3)*.

In several states, allegations about misconduct outside a certain period can be investigated only if the commission finds that there is good cause to proceed.

For example, in Maryland, "if a complaint alleges acts or omissions that all occurred more than three years prior to the date the complaint was filed," the complaint is dismissed unless there is a finding of good cause, which is made by weighing "any prejudice to the judge" "against the seriousness of the conduct alleged in the complaint." *Maryland Court Rules, Division 3, Rule 18-421(d)(2)*.

A Massachusetts statute provides:

> Except where the commission [on judicial conduct] determines otherwise for good cause, the commission shall not deal with complaints arising out of acts or omissions occurring more than one year prior to the date commission proceedings are initiated . . . .

Massachusetts General Laws c.211C, §2(3). The provision adds that, "when the last episode of an alleged pattern of recurring judicial conduct arises within the one year period, the commission may consider all prior acts or omissions related to such alleged pattern of conduct."

In several states, allegations about misconduct outside a certain period can be investigated only if the commission finds that there is good cause to proceed.

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A Vermont rule states:

> Except when the Board determines otherwise for good cause, the [Judicial Conduct] Board shall not deal with complaints arising out of acts or omissions discovered by the complainant more than three years prior to the date of the complaint.

Vermont Supreme Court Rules for Disciplinary Control of Judges, Rule 6(18). The rule notes that, "when the last episode of an alleged pattern of recurring judicial conduct arises within the three year period, the Board may consider all prior acts or omissions related to that alleged pattern of conduct, even if the prior acts or omissions are part of a complaint that was previously dismissed."

The Pennsylvania Judicial Conduct Board has a similar rule, although the limit there is four years:

> Except where the Board determines otherwise for good cause, the Board shall not consider complaints arising from acts or omissions occurring more than four years prior to the date of the complaint, provided, however, that when the last episode of an alleged pattern of recurring judicial misconduct arises within the four-year period, the Board may consider all prior acts or omissions related to such an alleged pattern of conduct.

Pennsylvania Judicial Conduct Board Rules of Procedure, Rule 15.

By statute, the Alaska Commission on Judicial Conduct is only authorized to inquire into an allegation of misconduct that took place "not more than six years before the filing of the complaint or before the beginning of the commission's inquiry based on its own motion." *Alaska Statutes, §22.30.011*. The North Dakota Judicial Conduct Commission is also limited to investigating "alleged acts occurring more than six years before receiving a complaint." *North Dakota Century Code 27-23-03*.

In some states, when the complainant learned or should have learned about the misconduct is the relevant starting point or can extend the deadline. For example, a rule requires the West Virginia Judicial Investigation Commission to dismiss "any complaint filed more than two years after the complainant knew, or in the exercise of reasonable diligence should have known, of the existence of a violation of the Code of Judicial Conduct . . . ." *West Virginia Rules of Judicial Disciplinary Procedure, Rule 2.12*.

In New Hampshire, a report of alleged misconduct must be filed with the Judicial Conduct Committee or a Committee-generated complaint must be docketed "within two (2) years after the commission of the alleged misconduct except when the acts or omissions that are the basis of the report were not discovered and could not reasonably have been discovered at the time of the acts or omissions, in which case, the report must be filed within two years of the time the reporter discovers, or in the exercise of reasonable diligence should have discovered, the acts or omissions complained of." *Rules of the New Hampshire Supreme Court, Rule 40(4)(c)*. The rule explains that misconduct is "deemed to have been committed when every element

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of the alleged misconduct has occurred, except, however, that where there is a continuing course of conduct, misconduct will be deemed to have been committed beginning at the termination of that course of conduct."

The Connecticut provision states:

> No complaint against a judge, compensation commissioner or family support magistrate . . . shall be brought . . . but within one year from the date the alleged conduct occurred or was discovered or in the exercise of reasonable care should have been discovered, except that no such complaint may be brought more than three years from the date the alleged conduct occurred.

Connecticut General Statutes, Chapter 872a, § 51-51l (d).

Similarly, in Nevada, the Commission on Judicial Discipline is prohibited from considering "complaints arising from acts or omissions that occurred more than 3 years before the date of the complaint or more than 1 year after the complainant knew or in the exercise of reasonable diligence should have known of the conduct, whichever is earlier." ***Nevada Revised Statutes, Chapter 1, §1.4655(2)***. In Nevada, those time limits are extended under certain circumstances.

- "Where there is a continuing course of conduct, the conduct will be deemed to have been committed at the termination of the course of conduct."
- "Where there is a pattern of recurring judicial misconduct and at least one act occurs within the 3-year or 1-year period, as applicable, the Commission may consider all prior acts or omissions related to that pattern."
- "Any period in which the judge has concealed or conspired to conceal evidence of misconduct is not included in the computation of the time limit for the filing of a complaint pursuant to this section."

In North Carolina, the time limit depends on the type of misconduct. In general, disciplinary proceedings "must be commenced within three years of the act or omission allegedly giving rise to the violation," but complaints about violations of the rules regarding political and campaign activities must be filed within three months, and "disciplinary proceedings may be instituted at any time against a judge convicted of a felony during the judge's tenure in judicial office." ***North Carolina Code of Judicial Conduct, Limitation of Proceedings***.

In California, the time limit is measured backwards from the beginning of a judge's term, not from the filing of the complaint: the Commission on Judicial Performance may only "censure a judge or former judge or remove a judge for action occurring not more than 6 years prior to the commencement of the judge's current term or of the former judge's last term . . . ." ***California Constitution Article VI, §18(d)***.

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Past issues of the *Judicial Conduct Reporter* and an index are available on the CJE website.

Recent cases

Legal error and injudicious conduct

Pursuant to his consent, an Arkansas judge was censured by the Judicial Discipline & Disability Commission and suspended by the state supreme court.

The Commission publicly censured the judge for a pattern of failing to consider the legal standard for appointing the public defender for misdemeanor defendants. ***Bourne*, Letter of censure and recommendation of suspension** (Arkansas Judicial Discipline & Disability Commission August 1, 2022). For years, the judge rarely approved affidavits of indigency submitted by defendants. Without reviewing the affidavits, he "often discouraged defendants from seeking appointments, telling them they would 'probably not' qualify" and "frequently just respond[ing] with, 'I am not going to appoint a lawyer for you. Get a job'."

The Commission noted that, as part of an extensive TV news report, an investigative reporter had interviewed many citizens who were denied appointed counsel on misdemeanor charges in the judge's court. In an on-camera interview, the head of the Public Defender Commission agreed that affidavits from defendants in the judge's court showed that they had been qualified for appointed counsel, but counsel had not been appointed.

Although the Commission noted that the decision to appoint counsel is a legal determination and that a judge could incorrectly decide the issue without violating the code of judicial conduct, it concluded that the judge's pattern of failing to appoint counsel, his disregard for the proper procedure, and his failure to consider the legal standard "pushes his legal error into the realm of judicial misconduct."

Based on the Commission's recommendation, the Arkansas Supreme Court suspended the same judge for 90 days without pay for a pattern of injudicious conduct toward defendants, holding 75 days of the suspension in abeyance subject to conditions; the Court also ordered that he never again hold judicial office after his current term ends on December 31, 2024. ***Judicial Discipline & Disability Commission v. Bourne*, Per curiam** (Arkansas Supreme Court August 9, 2022). The Court noted that "in addition to the public signal that a suspension without pay sends, the suspension also imposes a financial penalty of several thousands of dollars in lost pay."

The judge often commented on "factors that were not relevant to the proceedings and had no purpose in determining guilt, sentence, or administrative matters," and made "rash statements" about the "appearance, background, residency, and ethnicity of the people who appeared in his court." The comments included but were not limited to:

- "Commenting to Spanish-speaking defendants that they need to learn English if they are going to be in this country/county/city."

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- Telling a defendant, "[i]f you were a good employee, you wouldn't have been laid off. Go get a job and get that crap out of your eyebrows."
- "Making comments on the appearance of litigants, particularly haircuts and hairstyles."
- Making "negative comments about defendants who were not from the county, for example, "You should have stayed in south Arkansas;" "I wish you would stay in California;" "I wish you would have stayed in Illinois;" "I get a lot of troublemakers from California;" "You should have stayed in Chicago;" and "You should have stayed in California."

Tardiness, absences, and refusing to follow the law

Accepting a discipline by consent agreement and the recommendation of the hearing panel of the Judicial Qualifications Commission, the Georgia Supreme Court suspended a judge for 90 days without pay and ordered that she be publicly reprimanded for (1) regularly arriving to work much later than when she was scheduled to preside over matters; (2) being absent from work approximately 122 days beginning in 2016 through July 17, 2018; and (3) refusing to provide six in-custody defendants the opportunity to appear in court to which they were entitled by law. *Inquiry Concerning Gundy*, 877 S.E.2d 612 (Georgia 2022).

(1) The judge's tardiness was described by several witnesses and confirmed by access-card records for the courthouse. The records showed that:

- From September 1 through December 31, 2015, on approximately 69 days, the judge arrived well after 9:00 a.m. for her 8:00 a.m. calendars, arriving after 10 a.m., when her second calendar was scheduled to begin, on approximately 62 of those days.
- From January 1 through June 1, 2016, the judge arrived at the courthouse after 9:00 a.m. for her 8:00 a.m. calendars on approximately 80 days and, on approximately 57 of those days, did not arrive at the courthouse until after her second calendar was scheduled to begin.
- From July 10 to December 31, 2017, the judge arrived late on approximately 62 days, 33 days after 9:00 a.m. and four days after her 10:00 a.m. calendar was scheduled to begin.
- From January 1 through February 22, 2018, the judge arrived late on approximately 18 days, five of those after 9:00 a.m.

(2) The judge was absent from work approximately 40 days in 2016, 63 days in 2017, and 19 days from January 1 through July 17, 2018. The amended formal charges noted that the judge was ill in early 2017, but alleged that she was absent on 33 days in 2017 after her illness. A significant number of the judge's absences, including those unrelated to her illness, resulted in the court expending resources to employ senior judges or judges pro tem to cover for her.

(3) On March 8, 2017, the judge was presiding over her in-custody municipal court calendars that included at least six defendants who

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were scheduled for their first appearances after their arrests. When she reached these defendants on the call, however, the judge either bound the cases over to state court or reset the arraignment dates without giving the defendants the opportunity to appear required by law. The prosecutor and defense counsel informed her that the law required that the six defendants be brought into the courtroom and seen that morning, but the judge refused because she was attempting to hurry through the calendar. As a result, the six defendants remained incarcerated for approximately a week after they were entitled to release.

The Court noted that the judge had not explained much of her misconduct. The Court accepted the agreement "with some hesitation," emphasizing that "the allegations, all of which Judge Gundy either admits altogether or agrees that the JQC could prove, are serious, especially the refusal to follow the law—over objection by both the State and defendants—that led to six defendants each spending an unnecessary week in jail." However, noting that the discipline proceedings had been pending for over three years and that a 90-day suspension would be one of the most serious sanctions it has ever imposed short of removal, it concluded that the judge and "the people she serves deserve a resolution (which would be delayed even further if we reject this agreement)."

Recent posts on the blog of the Center for Judicial Ethics

Supporting or opposing political candidates

Degrading stereotypes

Code provisions about social media

More Facebook fails

Professional connections, reactions, and monitoring on social media

Institutional concerns

Intent and impact

COVID comments, likes, and warrants

Recent cases (August)

Recent cases (September)

A sampling of recent judicial ethics advisory opinions