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Nine Judges Removed in 2007

Between 1980 and the end of 2006, approximately 348 judges had been removed from office as a result of state judicial discipline proceedings. In 2007, nine state judges were removed.

Egregious pattern of misconduct

The **California** Commission on Judicial Performance removed a judge for an egregious, disturbing, and persistent pattern of misconduct that infringed the constitutional rights of defendants, "transgressed the limits of his authority, often in a capricious and malicious manner," and was "completely at odds with the standard of conduct expected of the judiciary." The Commission found that the judge (1) in eight cases, held unrepresented defendants who had appeared to request a modification of probation had violated their probation and imposed time in custody without complying with due process requirements; (2) in six cases, increased or threatened to increase a defendant's sentence for asking legitimate questions or offering a defense; (3) in five cases, asked defendants convicted of speeding violations if it felt good to "peel out" and conditioned their sentences on their responses; (4) in seven cases, informed unrepresented defendants at arraignment that their only choices were to plead guilty or accept diversion without advising them of their constitutional right to plead not guilty and have a trial; (5) improperly issued bench warrants for absent defendants because their attorneys were not present when their cases were called and refused to recall the warrants when the attorneys later appeared and explained their absence; and (6) made inappropriate comments in 14 instances that disparaged counsel or suggested, as a "joke," that a person appearing before him was about to be remanded to custody. *Inquiry Concerning Velasquez*, Decision and Order (California Commission on Judicial Performance April 25, 2007) (cjp.ca.gov/pubdisc.htm), *petition for review denied* (October 10. 2007). For more information about the case, see pages 4-5.

Noting that character witnesses had testified to the judge's reputation as a role model in the Latino community, the Commission acknowledged the

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Other Discipline in 2007

In addition to the nine judges removed from office in 2007 as a result of state judicial discipline proceedings, six judges resigned (or retired) in lieu of discipline pursuant to agreements with judicial conduct commissions that were made public. 104 additional judges (or former judges in approximately 15 cases) were publicly sanctioned in 2007.

In approximately 42 of those cases, the discipline was imposed pursuant to the consent of the judges. These figures do not include pending recommendations or decisions.

There were 19 suspensions without pay, ranging from one week to 18 months (with six months stayed with conditions). One suspension also included a public reprimand and $1000 fine; one also included a public reprimand and $1500 fine.

There were 24 public censures, 22 public admonishments, and 30 public reprimands (one also included a $500 fine, one also included a $3500 civil penalty). Finally, there were two cease and desist orders, three attorney discipline cases involving former judges for conduct as judges, and four other public dispositions (one private reprimand that was made public and three cases in which misconduct was found or stipulated to but no sanction was imposed).

Recent Advisory Opinions: Problem-solving Courts

A judge is not disqualified from cases involving a party or a potential party in interest who has made large contributions to the county's drug court program where the judge was not involved in the establishment of the drug court, does not preside over it, and only occasionally works with its personnel. *Alabama Opinion 05-850*.

A judge may preside over the criminal case of a defendant who had previously appeared before the judge in drug court but must disclose any recollection of the defendant previously going through drug court. *Nevada Opinion JE06-9*.

A judge is prohibited from directly soliciting by a letter on judicial stationery donations from local businesses for start-up supplies necessary for establishment of a "litter squad" as an alternative punishment to incarceration. *Alabama Opinion 07-878*.

A judge who presides over drug court may not solicit or receive incentive gifts from lawyers or law firms for use as rewards to drug court program defendants/participants. *Florida Opinion 07-5*.

A judge may not solicit businesses for donations of gift certificates and coupons to be used as rewards for good behavior by juveniles on probation. *Florida Opinion 07-18*.

A judge may not sign a letter requesting local businesses to donate small items for use as program rewards and incentives for defendants in the mental health court nor may the judge direct a court employee to solicit such donations. *Ohio Opinion 04-13*.

A judge may serve as a director of a non-profit corporation formed to solicit funds to provide incentives and other needs for participants in a local drug court as long as the judge's participation does not involve active or passive fund-raising. *Maryland Opinion 05-11*.

A judge who presides over a drug treatment court may not use excess campaign funds to purchase congratulatory gifts, such as dinners or theater tickets, for graduates who have successfully completed the drug court treatment program. *New York Opinion 05-132*.

A judge with drug court responsibilities may apply for, or authorize an entity to apply for, grant funding for the administrative support of state drug courts through the Department of Mental Health and Substance Abuse Services. *Oklahoma Opinion 02-2*.

A judge who presides over a drug court may receive from a treatment center reimbursement of expenses incurred to attend training programs required by federal grants that support operation of the drug court where treatment center employees do not routinely appear in the drug court as adversaries, litigants, or entities to which the judge may award income-producing business; the treatment center has no discretion in reimbursing the judge; and the current funding mechanism does not change the structure the drug court program has had from the outset. *Massachusetts Opinion 07-9*.

A judge may serve in an uncompensated advisory position as regional coordinator of the National Association of Drug Court Professionals facilitating the dissemination of information, lecturing, and providing training for drug court judges. *New York Opinion 05-155*.

A judge who is a member of the regional drug court team may appear with other team members when the team is honored at an American Red Cross fund-raising event, but the judge's remarks must be limited to a brief expression of thanks; the person making the presentation should explain why the judge is not named in the promotional material for the event but that the judge is part of the team that is receiving the award. *New York Opinion 05-42*.

A judge may participate in a press conference announcing the creation of a drug court as long as participation is limited to providing relevant information about the existence of the drug court and how it was created and introducing the members of the drug court and the judge does not offer other comments or answer questions. *South Carolina Opinion 14-05*.

A judicial officer may accept and retain on behalf of the court a ceremonial blanket received from the parents of a drug court graduate, who indicated it was a part of the Native American tradition to bestow these gifts, but the court should consider adopting a gift policy that will explain why it cannot accept such gifts in the future. *Washington Opinion 07-1*.

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** The Center for Judicial Ethics web-site has links to judicial ethics advisory committees at www.ajs.org/ethics/eth_advis_comm_links.asp*.

Misconduct Related to Pleas

Several judges were disciplined in 2007 for conduct related to plea agreements and arraignment practices.

For example, one California judge was publicly admonished for approving a plea agreement that sent a defendant to another state in violation of case law and public policy. *Public Admonishment of Iles* (California Commission on Judicial Performance November 15, 2007) (cjp.ca.gov/pubdisc.htm). The defendant had been charged with making criminal threats, child abuse causing great bodily harm, and assault with a deadly weapon arising from a domestic violence incident. The judge accepted a plea agreement proposed by the defendant and his counsel, without objection from the district attorney, in which sentencing would be postponed and the defendant released on his own recognizance on that condition that he leave California and remain outside the state. The judge ordered the defendant to cooperate with the public defender's investigator, who would transfer him to the Los Angeles airport; from the airport, the defendant would fly directly to Detroit, where he had family who had offered to assist him. The judge continued sentencing to May 1. When the defendant failed to appear at the continued sentencing hearing, the judge issued a bench warrant that specified it could be served only in California.

The defendant returned to California in 2006 and was arrested under the outstanding warrant. He filed a motion to withdraw his plea (which the judge denied) and a motion to disqualify the judge (which she struck as untimely). Granting a petition for a writ of mandate, the Court of Appeal held that the plea agreement was unconstitutional and void as overbroad, uncertain as to duration, and contrary to public policy.

The judge explained that she had approved the plea, in part, because the defendant could have been deported to Iraq if she had sentenced him, and counsel had assured her if he were deported he would be tortured and probably executed under a death warrant there. She did not think that his relocation to Michigan would subject citizens there to any risk because she believed that his wife and children were the only people he was likely to harm. She believed the plea bargain was an appropriate solution under the circumstances.

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Ex Parte Communications: Recent Cases

The prohibition on ex parte communications is one of the core principles of judicial ethics, ensuring that all parties get the same opportunities to address the judge. Violation of the rule in criminal and civil cases formed the basis for several judicial discipline cases in 2007.

For example, the Utah Supreme Court approved the censure of a former judge for changing a defendant's sentence after an ex parte communication with the defendant's attorney. *In re Lewis*, Order (Utah Supreme Court August 31, 2007). The Judicial Conduct Commission had noted that the case had received widespread publicity leading up to the November 2006 election, at which voters voted to not retain the judge.

The judge sentenced James Scott to three consecutive prison terms of 10-years-to-life after a conviction of three counts of sodomy on a child. Scott's attorney sent a letter to the judge expressing concerns for how she had treated him in her courtroom. The judge called the attorney, and they discussed the sentence. The judge told the attorney that she felt the sentence should be changed and would research to see if she still had jurisdiction, asking the attorney not to tell the prosecutor about their discussion. Without notifying the prosecutor, Scott's victim, the defendant, or defense counsel, the judge changed Scott's sentence so that two of the prison terms would run concurrently with each other but consecutively to the third count.

The New York State Commission on Judicial Conduct censured a judge who spoke to an arresting officer concerning a matter affecting a defendant's credibility. *In the Matter of Williams*, Determination (New York State Commission on Judicial Conduct November 13, 2007) (www.scjc.state.ny.us). It was the judge's third public sanction.

At a trial in which Daniel Wloch was charged with harassment arising from a dispute between Wloch and his neighbor about her dog's barking, Wloch testified that he had spoken to a state trooper who had told him, "Don't worry about it. It would only be a $100 fine" and that it would be "like a speeding ticket." The judge reserved decision and adjourned the matter. Sometime between the trial and the adjourned date, the judge saw one of the troopers Wloch had spoken to at the county fair. When the judge told the trooper about Wloch's testimony, the trooper told the judge that he had had no such conversation with Wloch.

Subsequently, Wloch appeared before the judge and was found guilty of harassment, second degree. The

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judge's laudable contributions to the community and the challenges he faced as the son of migrant farm workers. Nevertheless, the Commission concluded:

> These considerations are overwhelmed by the breadth and severity of the judge's past and present misconduct. Members of the community who appear before Judge Velasquez inside the courtroom are entitled to the same respect and dignity he accords those who consider him to be a role model outside the courtroom.

Conduct related to affair

The **Louisiana** Supreme Court removed a judge for charges related to his 10-year adulterous affair with his secretary and failing to comply with court policies on travel expenditures. *In re Miller*, 949 So.2d 379 (Louisiana 2007). The relationship began in 1992, when Heather Viator was his secretary in private practice, at which time both were married to other people. In September 1, 1994, Ms. Viator gave birth to a baby boy, A.V. She told the judge that A.V. was his child, and he began giving cash to Ms. Viator monthly that he considered to be child support payments.

After Judge Miller took the bench in 1997, he engaged in sexual intercourse with Ms. Viator in his chambers at the courthouse once or twice a week after business hours. In May 1997, the judge signed a consent judgment in the Viators' divorce proceedings that ordered Mr. Viator to pay child support. Ms. Viator was still his secretary, they were still involved in a sexual affair, and the judge believed that Ms. Viator's child A.V. was his own child, which Mr. Viator did not know.

The sexual relationship between the judge and Ms. Viator ended in July 2002. In May 2004, Michael and Heather Viator remarried each other.

On July 3, 2003, Ms. Viator filed a federal suit against the judge, alleging he sexually harassed her after their affair ended, constructively discharged her, and continued to attempt to contact her, personally, by telephone, and in writing, despite her requests that he leave her alone. On August 28, the federal judge entered an order prohibiting the judge from having "direct or indirect contact or communication" with Heather Viator. Thereafter, on three occasions in early 2004, the judge mailed $400 checks to Ms. Viator at her home address, intending these checks as child support for A.V. The federal judge held Judge Miller in contempt of court and fined him $500 for violating the order. The contempt order was affirmed by the 5th Circuit.

In 2003, the judge gave an interview to a reporter, which formed the basis for an article, in which the judge discussed his relationship with Ms. Viator, his belief that A.V. was his son, his monthly support to Ms. Viator for A.V., and his suit to establish the boy's paternity and Ms. Viator's federal suit against him. The judge also issued at least two press releases to give his "side of the story."

The judge maintained that, because the suits involved him personally, his right to defend himself in the public media superseded his obligation as a judge not to make public comments about a pending case. The Judiciary Commission found that a judge is expected to have faith in the judicial system and that his right to "give his side of it" occurs in the court proceeding – "not by making a media circus out of the case, and inflaming an already bad situation." The court agreed that the judge's comments were intended to influence the courts and

More on Velasquez

As noted, the California Commission found that, in six criminal cases, Judge Velasquez became embroiled with the defendant at sentencing and, acting with anger, threatened to increase time in custody and in some instances actually increased time in custody. For example, as the judge was sentencing Toni Merwin to 10 days in jail on a misdemeanor, Merwin asked "is there a way you can make the time less?" The judge responded, "I can make it more." Merwin's sentence was not increased. The Commission found that the judge did not like Merwin questioning the sentence (which he characterized as "nickel and diming me") and that his remark was designed to make her stop questioning the sentence and deter others from doing the same.

In five cases, the judge asked a defendant who was being sentenced on a misdemeanor charge of speeding if it "felt good" to "peel out." The Commission found that the judge equated an affirmative answer with taking responsibility and a negative answer with a failure to accept responsibility. For example, the judge told Aaron Lynch that he would be fined between $200 and $1,000 depending on his answer to the question whether it felt good to "peel out." When Lynch answered "yes," the judge told Lynch "that's the answer I wanted," imposing

the public by lending the prestige of his office to advance his private interests.

Incompetence and animosity

The **Louisiana** Supreme Court removed a judge for issuing judgments in two cases filed by a consumer loan company without conducting hearings or providing for service of process of the suits or the judgments and making contradictory, unsupported statements to the Judiciary Commission. The court found that the record supported the Commission's conclusion that the judge was either too incompetent or too inexperienced to properly perform her judicial role. *In re Franklin*, 969 So.2d 591 (Louisiana 2007).

Advantage Financial Services filed suits in the judge's court against Patricia Davis and Chelis Cain. The judge did not issue citations to summon Davis or Cain or forward citations to her constable for service. On the day and hour purportedly fixed for trial of the Davis case, neither Davis nor any representative of Advantage was present in the judge's courtroom, but the judge signed a judgment against Davis. No notice of the judgment was served on Advantage or Davis. The judge handled the case against Cain in the same fashion.

The manager for Advantage testified that he was rarely able to contact the judge, creating the impression that she was trying to dodge the work required to resolve the suits. The manager stated that Advantage does limited business in the judge's parish because the company feels it has no recourse there based on the judge's actions in these cases, adding that a potential borrower from the judge's jurisdiction would be looked at much more closely because the company could not be certain that it could collect on outstanding debts.

The judge presented two inconsistent versions of service returns to the Commission. The court stated it was difficult to determine whether the judge was intentionally misrepresenting the truth or whether she was unable to understand the requirements of her role and the serious consequences of her conduct. The court noted its resolution of the issue was "hampered by her utter failure to cooperate with the Commission in the investigation," stating that the judge failed to produce documents, to answer interrogatories and requests for admission, to appear at the hearing, to file a brief in the court, or to appear for oral argument.

The **New York** State Commission on Judicial Conduct removed a non-lawyer judge whose handling of a property dispute was a "travesty" that had been "tainted both by his acknowledged animosity towards the defendants and by his connection with one of the sellers." *In the Matter of Ellis*, Determination (New York State Commission on Judicial Conduct July 24, 2007) (www.scjc.state.ny.us). Based on the sellers' ex parte representations that the purchasers under a installment land contract had failed to make required payments, the judge issued a notice to the purchasers terminating their tenancy; the notice not only referred to a non-existent "lease," but was signed by the judge on the line marked "landlord." One of the sellers was living with the judge's niece and was the father of her two children.

Two months later, based upon information provided ex parte, the judge signed a summons directing one of the purchasers to appear in the court and stating that, if she failed to appear, a judgment of $3,100 would be taken against her for "failure to pay rent and taxes" without giving the 22 days' notice required for a small claims hearing. After another ex parte discussion with the seller, the judge issued a

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a $200 fine. The Commission found that the judge "became embroiled in the process, acted in a way that might have suggested he had prejudged the case, and used his own experience as a young man as a factor in the ultimate sentence given."

In 14 instances, the judge made inappropriate comments in the courtroom, including joking about imposing jail time and disparaging attorneys. For example, when a defendant asked if he could work off a fine, the judge said: "I wasn't going to give you any jail time, but if you want some, I'll give you some. How many days would you like? You have 180 to pick from." In another case, after a defendant's attorney made a two and a half minute plea that his client not be incarcerated, the judge responded, "Let me wake up."

The judge contended that he was attempting in good faith to interject humor into the courtroom. The Commission noted that the people to whom the judge addressed his jail comments were being respectful and appropriate and were often asking legitimate questions about their sentences, that the brevity of the judge's remarks does not make them any less offensive or inappropriate, and that the comments most likely caused stress and concern to the defendants, even if for a brief moment. Finally, the Commission concluded that the judge's attempts at humor in a public courtroom under the circumstances were undignified, out of place, and prejudicial to public esteem for the judiciary.

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warrant of eviction that stated inaccurately that a petition had been served on the purchaser and that a judgment had been entered.

At a court hearing, the parties agreed to settle. After the terms of the settlement were placed on the record, the judge turned off the recording equipment and, in a belligerent manner, stated in words or substance to the purchasers that they should "stop jewing other landlords."

The Commission found that the judge's actions conveyed the appearance that he was using his power to benefit his relative's interests. The Commission concluded: "Whether respondent's conduct was the result of incompetence or a deliberate intent to benefit his relative's interests, the record in its totality demonstrates conclusively that he is unfit to serve as a judge and that his continued retention on the bench is inconsistent with the fair and proper administration of justice in his court."

The **New York** Court of Appeals upheld the removal of a judge who had dismissed several cases based on ex parte communications and had altered her court calendar to support her false testimony. *In the Matter of Marshall*, 872 N.E.2d 247 (New York 2007). The judge engaged in ex parte conversations with three defendants concerning the merits of code violation cases against them and told them that they did not have to appear in court that evening as scheduled. At the court session, the judge told the town attorney and the code enforcement officer that the cases would be adjourned to January 26, 2004, and she wrote that date in her court calendar. Prior to January 26, however, the judge dismissed the cases without providing the town attorney or code enforcement officer an opportunity to be heard. When questioned by the Commission, the judge repeatedly testified that she had not adjourned the cases. She also used white-out to conceal the adjourned date originally written in her court calendar.

The court stated it was not persuaded by the judge's claim that her use of white-out "was merely a routine alteration intended only to update the status of the cases." Noting that "the use of a Judge's 'lack of candor' as an aggravating circumstance should be approached cautiously to minimize the risk that the investigative process itself will be used to generate more serious sanctions," the court concluded removal was appropriate when the judge "gave patently false explanations to the Commission despite contrary objective proof."

Offensive conduct

The **Pennsylvania** Supreme Court affirmed the decision of the Court of Judicial Discipline to remove a judge who routinely used improper and offensive language in dealing with his staff. *In re Berkhimer*, 930 A.2d 1255 (Pennsylvania 2007). For example, the judge said to one of the women "I am not a political whore. I don't kiss anybody's ass unless pussy's involved." The judge told another employee, in front of her colleagues, that he had relayed her sexual interest in a police officer to that officer at an official function even though she had made no such request. On more than one occasion, the judge invited three female employees to look at pornographic images on his computer; in one instance, the image was evidence from a child pornography case. When one of the employees refused to view the image, the judge described it to her in graphic detail despite her protests.

Noting that the judge's staff had no choice but to endure his conduct, the court concluded the judge's conduct could not be separated from his judicial position. The women, the court stated, "were subjected to expletive-filled language on a daily basis, as well as offensive comments intended to embarrass," and to them, the judge "was not a colleague with bad taste and behavior; he was their boss, robed with the official stamp of approval from the judicial branch."

The **Virginia** Supreme Court removed a judge for initiating an improper ex parte telephone call during a recess in a custody hearing and twice directing the mother in the case to lower her pants in the courtroom and, during a hearing in a different case, twice tossing a coin in the courtroom to resolve a visitation dispute. *Judicial Inquiry and Review Commission v. Shull*, 651 S.E.2d 648 (Virginia 2007). Seeking to extend a protective order against her husband and to secure custody of their two children, Tammy Giza claimed that Keith Giza had inflicted a wound on her thigh, which Keith disputed. The judge admitted that Tammy twice lowered her pants in the courtroom during the custody hearing to allow him to inspect her thigh wound and that he had "initiated" both incidents. The court concluded that the judge's actions were "egregious" and showed "an obvious lack of concern for Giza's personal dignity or the dignity of the judicial proceedings."

Criminal conduct

Two judges were removed following their convictions for crimes unrelated to their office. *In the Matter of Myles*, Determination (New York State Commission on Judicial Conduct November 1, 2007) (www.scjc.state.ny.us) (tampering with utility company meter measuring electricity to his home); *In re Balance*, 643 S.E.2d 584 (North Carolina 2007) (failure to file federal income tax returns).

Misconduct Related to Pleas *(continued from page 3)*

Noting that the judge had the obligation to evaluate the legality of a plea agreement, the Commission concluded that the impropriety of an agreement whereby the defendant is transferred to another state in contravention of public policy is not subject to a reasonable difference of opinion and found that the judge's approval of the plea agreement reflected a purpose other than the faithful discharge of judicial duties.

Plea negotiations

A judge in New Jersey was publicly reprimanded for, in addition to other misconduct, participating in plea negotiations in two cases. *In the Matter of Broome*, 935 A.2d 1153 (New Jersey 2007). In *State v. Palmer*, when a defendant expressed a reluctance to accept an offer from the prosecutor, the judge stated: "I understand . . . You don't have to take it. I mean, you know, but, if you were my brother, I'd say you're lucky." Following the judge's remarks, the defendant accepted the prosecutor's offer, and the judge accepted the guilty plea without ascertaining from the defendant the factual basis for his plea. The judge admitted that he "appears to have negotiated" with the defendant in *State v. Plaud* for dismissal of a charge of leaving the scene of an accident and a guilty plea to an amended charge of failure to report an accident and a no-point violation. The judge accepted the defendant's guilty plea without first ascertaining the factual basis for the plea.

In the presentment accepted by the supreme court, the Advisory Committee on Judicial Conduct found that the judge had "crossed the line into the realm of participating in plea bargaining, a function that is solely for the prosecutor." The Committee acknowledged that the judge's intent was to help the defendants appreciate their situations, but emphasized that the court rules "simply do not allow him the latitude to do so."

Coercing guilty pleas

The Ohio Supreme Court sanctioned a judge for, in addition to other misconduct, "strong-arm measures to coerce a plea agreement," which the court stated, "necessarily compromise a defendant's right to trial or a prosecutor's discretion and are antithetical to a fair and balanced criminal justice system." *Disciplinary Counsel v. Parker*, 876 N.E.2d 556 (Ohio 2007).

Other judges were sanctioned in 2007 for plea practices that coerced defendants' waiver of constitutional rights.

While presiding over a jury trial in a domestic violence case, the judge recessed the jury, stepped down from the bench, and told defense counsel that the prosecutor was "about ready to offer" a plea and that the defense counsel was "about ready to take it." When the judge returned, he learned that the prosecutor had refused to offer a minor-misdemeanor plea. The judge resumed the trial but stopped it again after about 15 minutes and ordered counsel and the arresting officer into chambers. He challenged the prosecutor and police officer, asking whether they were "listening to the same trial that [he was] listening to" and whether they knew they were "watching an acquittal." When the arresting officer said that he was unwilling to agree to a minor-misdemeanor plea, the judge lost his composure and ordered everyone else out of his chambers. Alone with the officer, the judge tried to persuade him to agree to the lesser minor-misdemeanor charge. The judge was visibly irritated, according to the officer, acting short-tempered and agitated and slamming his hands down when he did not get the answers he wanted. The officer did not relent, and the defendant was acquitted.

In a second case, the defendant, who was pregnant, was charged with felony theft of a credit card and misdemeanor possession of drug paraphernalia. At a preliminary hearing, the prosecutor rejected the judge's proposal that he offered the defendant a misdemeanor plea, insisting that the case remain a felony. Because her lawyer expected that the grand jury would not indict, the defendant signed a waiver of her right to a preliminary hearing, which required the judge to order her bound over to the court of common pleas. The judge instead rejected the waiver, apparently because he wanted to "help" the woman through her pregnancy, and held a preliminary hearing. The judge concluded that the state had not met its burden of proof and told the prosecution that the defendant was going to stand trial on misdemeanor charges. The judge then pressed defense counsel to have his client plead guilty. At that point, the prosecution moved to dismiss the charges for presentment to the grand jury. The judge denied the motion and ordered the prosecutor to re-file the charge as a misdemeanor. The prosecutor reluc-

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tantly complied, and the defendant ultimately pleaded guilty to a first-degree misdemeanor theft charge.

Practices that coerce guilty pleas

Other judges were sanctioned in 2007 for plea practices that coerced defendants' waiver of constitutional rights. One California judge gave a mass advisement of constitutional rights to those seated in the courtroom that included the right to plead not guilty and go to trial. However, when defendants appeared individually for arraignment on misdemeanor alcohol or marijuana charges, the judge presented them with a choice of diversion (attending AA meetings after which the charges would be dismissed) or jail time without telling them that they had the option of pleading not guilty and having a trial. *Inquiry Concerning Velasquez*, Decision and Order (California Commission on Judicial Performance April 25, 2007) (cjp.ca.gov/pubdisc.htm), *petition for review denied* (October 10, 2007).

The Commission on Judicial Performance found that the judge's "conduct interfered with the defendants' exercise of one of the most basic and important of constitutional rights, the right to jury trial." The Commission agreed with the masters' statement that defendants were "given a Hobson-like choice that did not include the right to plead not guilty and have a trial. Rather than ensuring constitutional rights, which Judge Velasquez was obliged to do, Judge Velasquez created an environment in which the full exercise of those rights was unlikely."

A discipline case in Washington arose from a judge's practice of requiring any criminal defendant who had two pre-trial bench warrants to choose between being taken into custody with bail or waiving the right to jury trial and not being required to post bail. The Commission found that, while a judge may impose bail based on a defendant's failure to appear in court, the judge's "practice set up a choice that may have coerced waivers of the right to jury trial." *In the Matter of Odell*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct June 8, 2007) (www.cjc.state.wa.us/).

The admonishment of the judge was also for his "inadequate dialogue" during arraignments that "created the impression of a mechanical process that may have undercut the public's respect for the judiciary." The judge's standard arraignment practice was to provide each defendant a written form that identified criminal defendants' fundamental rights, which the defendant provided to the clerk when the judge called his or her individual case. Without inquiring whether the defendant had read and understood the form or wished to waive the right to counsel, the judge would note the crime charged and ask the defendant how he or she wished to plead.

The judge also instructed those defendants who pleaded guilty to fill out a guilty plea form and wait until the end of the calendar. At that time, the judge would re-call the defendant's case, confirm that the defendant still intended to plead guilty, and, if so, find him or her guilty and impose sentence without making a finding that the plea was knowingly and voluntarily made or inquiring whether the defendant wished to make a statement or present information to court prior to sentencing.

The Commission emphasized:

> Judges have a basic responsibility to ensure that criminal defendants are properly advised of their constitutional and due process right so that they are able to make informed decisions regarding their case. This basic duty is dictated by the constitutional requirement that waiver of fundamental rights, such as the right to counsel or to a jury trial, and/or the decision to enter a guilty plea may be legally recognized only if done knowingly, intelligently and voluntarily. In addition, judges have a duty to ensure that guilty pleas are constitutionally valid – that they are made voluntarily, competently and with an understanding of the nature of the charge and the consequence of the plea.

The Commission noted that the procedures necessary to safeguard fundamental rights were clearly set forth in the court rules, statutes, and cases, highlighted in the Commission's prior decisions, and described in the criminal bench book.

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Seth S. Andersen
Executive Vice President

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

American Judicature Society
The Opperman Center
at Drake University
2700 University Avenue
Des Moines, IA 50311

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judge then stated in court that he had spoken to the trooper and that the trooper either did not recall the conversation or recalled it differently from Wloch's testimony about it. According to Wloch and his attorney, the judge said that he had been planning to find Wloch not guilty but "because of that" conversation, he was finding Wloch guilty.

Noting the judge's testimony that he spoke to the trooper to advise him not to tell defendants about the potential outcome of a charge, the Commission stated, "it was improper for respondent to have that conversation while the case was pending; if he believed it was necessary to impart that advice, he should have done so after the case was concluded." Moreover, the Commission stated, the trooper's response to the judge's communication – either that he did not recall the conversation or that it did not take place as Wloch had testified – "clearly affected" the judge's determination as to the defendant's credibility or, at the very least, the judge's "conversation with the trooper created the appearance that he had obtained, and relied upon, out-of-court unsworn information in making his decision in the case, thereby depriving the defendant of the fundamental right to confront and respond to the evidence against him."

Respondent's insistence that the out-of-court conversation did not influence his decision as to the defendant's credibility is unconvincing. It is difficult to imagine how it would not influence his decision, since respondent has acknowledged that he concluded from the trooper's statements that the defendant had lied under oath. The uncontroverted testimony that he told Mr. Wloch, after finding him guilty, of his conversation with the trooper supports the conclusion that it influenced his decision, since it is unclear why he would have referred to that conversation except to bolster his conclusion that the defendant was not credible. The patent unfairness of his reliance on the trooper's statements is underscored by the fact that respondent may have spoken to the wrong trooper, since it is unclear whether Mr. Wloch had identified the trooper in his testimony. Most importantly, the ex parte conversation was improper regardless of whether respondent relied on it to convict the defendant.

The Commission also rejected the judge's argument that his disclosure cured the adverse effects of the improper ex parte communication, stating the disclosure after he had rendered his verdict, "obviously had nothing to do with protecting the fairness of the proceedings, but rather appears to have been a self-serving attempt to bolster his verdict by announcing why the defendant was unworthy of belief."

Independent investigations

The Texas State Commission on Judicial Conduct publicly admonished a judge who had found a defendant guilty based in part on her independent investigation. *Public Admonition of Gomez* (Texas State Commission on Judicial Conduct June 15, 2007) (www.scjc.state.tx.us/pdf/actions/FY2007PUB-SANC.pdf). A criminal complaint was filed in the judge's court charging a local police officer with assault. Over several weeks, the judge summoned witnesses, including the complaining witness and the officer, to appear in her office, where she met with each individual privately to "gather" information pertaining to the allegations. Subsequently, in a letter to law enforcement officials, the judge stated that she was unable to rule on the case due to lack of evidence and requested further investigation by police officers. In a letter, the sheriff's department informed the judge that it had completed its investigation. Based upon her review of the complaint, the offense report, and her private discussions, Judge Gomez found the officer guilty of assault. Through an attorney, the officer filed an application for a writ of certiorari with the county court, but his attempts to challenge the conviction were unsuccessful because the judge never entered a final judgment. The attorney filed a motion for a new trial that the judge eventually granted, recusing herself from the case.

Independent investigations were part of a judge's mishandling of two civil protection order cases, two divorce cases, and one case involving a complaint that a child was abused and neglected. *Disciplinary Counsel v. Squire*, 876 N.E.2d 933 (Ohio 2007). The Ohio Supreme Court suspended the former judge from the practice of law for two years, staying 12 months on condition that she commit no further disciplinary violations.

In one civil protection order case, the judge failed to rule the same day the petition was filed as required by statute, stating she was going to conduct an "investigation" and consult with county children services. The judge spoke with a representative of county children services "on at least seven or eight occasions," and had heard information from the child's grandmother outside the presence of the mother's attorneys. The court rejected the judge's contention that she could not make a decision due to the need for investigation, noting that her "so-called attempts at 'investigations' resulted in ex parte communications."

In a second case, in which a father filed a petition for an ex parte civil protection order asking that he and his two children be protected from his wife, the judge stated that she needed to conduct an "investigation." The

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Ex Parte Communications: Recent Cases *(continued from page 9)*

judge then called the maternal grandparents from her telephone on the bench and engaged in an ex parte communication about the children and the need for protection. Rejecting the judge's contention that it was proper for her to investigate the allegations, the court emphasized that "Ohio law does not require or permit respondent to conduct her own investigation of circumstances underlying the petition for a CPO or permit respondent to delay her decision in order to conduct or require such an investigation."

In addition to the improper investigations, the judge was found to have engaged in a pattern of ignoring clear procedural and substantive requirements of the law; a pattern of intemperate, unjudicial conduct; a pattern of blaming other judges, lawyers, and litigants for the consequences of her failures and actions; "a pattern of rationalizing and revising the facts of past events to excuse her own conduct or to blame others by making baseless allegations of wrongful or malicious actions and motives of others; a pattern of judicial over-reaction and abuse of judicial power to hold or threaten to hold lawyers in contempt of court; . . . a pattern of failure or refusal to recuse herself as judge in proceedings where her impartiality and bias was manifested;" and "submitted affidavits with self-serving statements and opinions contradicting both the record of proceedings and the otherwise unrebutted testimony of others."

Rejecting the judge's argument that she took many of her actions or inactions out of concern for the children involved in the cases, the court stated "strong feelings do not excuse a judge from complying with the judicial canons and the Disciplinary Rules." Rejecting the former judge's argument that decisions of judges of "specialized courts" lie within the discretion of the judge and should not be subject to sanction, the court noted that Judge Squire was a judge in a domestic relations court, which is a court that exists in all of Ohio's 88 counties, and stating "clearly there is no lowering of professionalism standards for 'specialized' courts." The court held: "To conclude that domestic relations judges are unable to hold themselves to a high standard simply due to the nature of the cases over which they preside is an affront to the domestic relations judges

2007 Model Code Ex Parte Rule

With some fine-tuning, the 2007 *American Bar Association Model Code of Judicial Conduct* retains the prohibition on ex parte communications in Rule 2.9. For example, the exception that allows a judge to consult with court staff and other judges now cautions judges to make "reasonable efforts to avoid receiving factual information that is not part of the record" and not "abrogate the responsibility personally to decide the matter."

The prohibition on independent investigations of facts was strengthened by new language that emphasizes that a judge "shall consider only the evidence presented and any facts that may properly be judicially noticed" and by a new comment that indicates the prohibition "extends to information available in all mediums, including electronic." The 2007 revisions create a new exception in a comment that allows a judge to "consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code."

The reporters' notes state that the Joint Commission to Evaluate the Model Code "heard a great deal of testimony about therapeutic or problem-solving courts," but decided not to create special rules for such courts "because therapeutic courts were too many and varied for the Commission to devise rules of general applicability." Instead, a new comment explains that the exception for ex parte communications "authorized by law" may permit certain ex parte communications in those courts where "judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others." In addition, the application section includes a new comment: "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 non-traditional 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. When local rules specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions set forth in the Code. Nevertheless, judges serving on 'problem solving' courts shall comply with this Code except to the extent local rules provide and permit otherwise."

throughout Ohio, who go about their jobs each and every day making decisions in the same environment in which respondent operated."

Motivation

The prohibition on ex parte communications applies regardless of the benevolence of the judge's motive. Based on an agreed statement of facts and joint recommendation, the New York Commission, for example, censured a non-lawyer judge who dismissed two charges against a defendant and reduced a third charge based on ex parte discussions with an Army recruiter and without notice to or the consent of the district attorney's office. *In the Matter of Ballagh*, Determination (New York State Commission on Judicial Conduct November 7, 2007) (www.scjc.state.ny.us). The Commission stated that, although the judge was motivated by a desire to give a young defendant the chance to straighten out and improve his life by entering military service, he acknowledges that it was improper for him to excise the district attorney from the proceedings and otherwise to circumvent the procedures he was sworn to uphold.

On or about June 4, 2006, Sean Gardner was charged with driving while intoxicated. Gardner was scheduled to appear before the judge in August. Gardner decided to enlist in the Army, with an induction date of on or about July 19, 2006. The Army recruiter advised the judge by telephone that Gardner was scheduled to enlist on July 19 and asked that the pending matters against him be accelerated. The judge re-scheduled Gardner's return date to July 17, without notifying the district attorney. On July 17, Gardner appeared before the judge and indicated that, although he was scheduled to enlist in the military, an alcohol-related conviction would delay his enlistment date. The district attorney's office was not present. The judge left the courtroom, telephoned the recruiter, and discussed with him the effect that a reduction to a driving while ability impaired charge would have upon Gardner's enlistment. The recruiter informed the judge that a conviction for any alcohol-related offense would delay Gardner's enlistment for a year from the conviction date. Returning to the courtroom, the judge dismissed two charges and reduced a third to a traffic infraction, imposing a fine and surcharge.

The North Carolina Supreme Court censured a judge for speaking ex parte with an attorney representing a defendant in an action to recover unpaid child support and striking an order entered by a different judge finding the defendant in contempt. *In re Royster*, 648 S.E.2d 837 (North Carolina 2007). The judge argued that because he believed that the defendant had not had proper notice of the previous hearings, he was obligated to protect the defendant's due process rights by striking the earlier order and that his actions were allowed by a statute that permits ex parte orders for temporary custody and support of minor children pending the issuance of a permanent order. The court emphasized that the issue was the judge's conduct, not his motives. The court noted that the judge's action enabled the defendant to evade his child support obligations and that he had subsequently vanished.

Providing legal advice

The Arizona Supreme Court censured a non-lawyer judge for giving legal advice to a defendant in a civil case in several ex parte conversations and failing to disqualify himself. *Inquiry Concerning Morales*, Order (Arizona Supreme Court January 22, 2007) (www.supreme.state.az.us/ethics/2006_Complaints/06-275%20Final.pdf) A bank filed a lawsuit against a married couple that was assigned to the judge. The judge met with one of the defendants and her daughter at the courthouse four times and gave legal advice in Spanish and English. When the women asked if they should hire an attorney, he told them they did not need one. Eventually, the judge entered a judgment in favor of the bank. After the defendant's attorney filed a motion to set aside the judgment, the judge realized he had violated the code of judicial conduct and self-reported his conduct to the Commission. *See also Commission on Judicial Performance v. Fowlkes*, 967 So.2d 12 (Mississippi 2007) (public reprimand and 30-day suspension for ex parte communications with and giving legal advice to a litigant).

Expert opinion

In 2006, the Nebraska Commission on Judicial Qualifications publicly reprimanded a judge for a substantive ex parte conversation with a child welfare worker while a case was pending on appeal. *In the Matter of Turnbull*, Public Reprimand (Nebraska Commission on Judicial Qualifications January 27, 2006) (www.supremecourt.ne.gov/professional-ethics/judges/public-reprimands.shtml?sub16)

The judge telephoned Nancy Thompson, a child welfare worker, about a juvenile case; Thompson had not previously been involved in the case. The judge advised the Commission that he intended to ask if Thompson would be interested in providing a court-appointed evaluation after the appeals were over and the case was back in his jurisdiction. However, the conversation developed into a substantive discussion about the merits of the case. The judge disclosed the conversation to the parties, including Thompson's recommendation that the child in the case should maintain a relationship with her aunt.

The Commission concluded that a judge is not authorized by law to obtain an expert opinion ex parte and that the judge should have obtained the advance consent of all the parties and made a proper record.

The Opperman Center
at Drake Univerity
2700 University Ave.
Des Moines, Iowa 50311

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The 21st National College on Judicial Conduct and Ethics

Chicago, Illinois • October 29–31, 2008

The Center for Judicial Ethics will hold its 21st National College on Judicial Ethics on October 29–31, 2008 at the Embassy Suites Downtown Lakefront, 511 N. Columbus, Chicago, Illinois.

The National College provides a forum for judicial conduct commission members and staff, judges, and judicial educators to learn about and discuss professional standards for judges and current issues in judicial discipline. The College will begin Wednesday afternoon with registration. Thursday through Friday morning, there will be 6 sessions with concurrent workshops. Topics under consideration include: public comment by judges; revisions to the ABA Model Code of Judicial Conduct; ethical standards for commission members; ethical issues for judges and their families; judicial campaign conduct; disqualification; sanctions; issues for new members of conduct commissions; and issues for public members.

More information will be provided in subsequent issues of the *Judicial Conduct Reporter* and at www.ajs.org/ethics.