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administration  
of justice*

# JUDICIAL CONDUCT REPORTER

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## 12 Judges Removed in 2006 *by Cynthia Gray*

**B**etween 1980 and the end of 2005, approximately 336 judges had been removed from office as a result of state judicial discipline proceedings. In 2006, 12 state judges were removed.

### **Callous Disregard**

The **Florida** Supreme Court removed a judge for the unjustified and preventable arrest and incarceration of 11 citizens, in addition to other misconduct. *Inquiry Concerning Sloop* (December 7, 2006).

On December 3, 2004, the judge issued arrest warrants for 11 traffic defendants who had not answered his docket call. The 11 defendants had

been directed to the wrong courtroom on their summonses or by bailiffs. Even after being informed that the 11 individuals had been in the adjoining courtroom, the judge had the arrest warrants carried out, and the 11 persons were handcuffed, chained, and transported to the jail where they were processed and strip searched. The judge signed orders for their release upon returning to the courthouse at 1:15 p.m. after running a personal errand, but they were not released until approximately 9:00 p.m.. The arrests occurred on Friday, and on the following Monday, Judge Sloop told the chief judge that he did not understand why this was a “big deal.”

Stating it did not fault the judge for issuing the warrants, the court emphasized that a judge’s authority to order the arrests of persons who fail to appear “carries a grave responsibility to exercise appropriate judicial restraint.” The court stated:

Judge Sloop’s callous disregard for these individuals was the antithesis of his judicial obligations. His conduct in dealing with these citizens, and his failure to recognize the enormity of the situation — to our knowledge, he has yet to send letters of apology to the eleven persons arrested — constitutes a clear abuse of the authority of the office.

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## Other Discipline in 2006

**I**n addition to the 12 judges removed from office in 2006, 11 judges resigned (or retired) in lieu of discipline pursuant to agreements with judicial commissions that were made public. Four former judges were barred from serving in judicial office again (the former judges were also censured in 2 cases). One judge was required to retire.

108 additional judges (or former judges in approximately nine cases) were publicly sanctioned in 2006. In 65 of those cases, the discipline was imposed pursuant to the consent of the

judge. These figures do not include any pending recommendations.

There were 18 suspensions without pay with the length of the suspensions ranging from five days to two years; two of the suspensions were deferred in whole or in part; three also included a public censure; two also included a public reprimand; one also included a public reprimand and a fine of \$5000. In addition, there were 18 public censures, 27 public admonishments, 34 public reprimands (one also included a \$1500 fine), three cease and desist orders, two public

warnings, and six other public dispositions (which included a finding of discourteous treatment to be made part of the judge’s permanent record; an expression of concern acknowledged by the judge; a one-year supervised probation; an agreement for the judge to undergo a medical examination, commit to treatment, and be monitored; an order that a judge take corrective action in three cases and take a course in constitutional law; and an order that a judge write a letter of apology for a misrepresentation in a campaign brochure). 

# Relevant Factors in Determining the Appropriate Sanction

by Cynthia Gray

In *In re Deming*, 736 P.2d 639 (Washington 1987), the Washington Supreme Court stated that, to determine the appropriate sanction, it would consider the following non-exclusive factors:

- (a) whether the misconduct is an isolated instance or evidenced a pattern of conduct;
- (b) the nature, extent and frequency of occurrence of the acts of misconduct
- (c) whether the misconduct occurred in or out of the courtroom;
- (d) whether the misconduct occurred in the judge's official capacity or in his private life;
- (e) whether the judge has acknowledged or recognized that the acts occurred;
- (f) whether the judge has evidenced an effort to change or modify his conduct;
- (g) the length of service on the bench;
- (h) whether there have been prior complaints about this judge;
- (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and
- (j) the extent to which the judge exploited his position to satisfy his personal desires.

In each subsequent judicial discipline case, the Washington State Commission on Judicial Conduct and the court have expressly used the *Deming* factors as a checklist when deciding what sanction to impose. In fact, the Commission has adopted the factors as part of its rules; one factor was amended to consider "whether there has been prior public disciplinary action concerning the judge" rather than prior complaints. The Commission also added as an additional factor "whether the judge cooperated with the commission investigation and proceeding." Other courts or commissions have also adopted the *Deming*

factors.

The Arizona Commission on Judicial Conduct has adopted many of the *Deming* factors but added a few others. Rule 19 of the Commission's rules of procedure provides that the following non-exclusive factors may be considered in determining the appropriate disciplinary action:

- (a) the nature, extent, and frequency of the misconduct;
- (b) the judge's experience and length of service on the bench;
- (c) whether the conduct occurred in the judge's official capacity or in his or her private life;
- (d) the nature and extent to which the acts of misconduct injured other persons or respect for the judiciary;
- (e) whether and to what extent the judge exploited his or her position for improper purposes;
- (f) whether the judge has recognized and acknowledged the wrongful nature of the conduct and manifested an effort to change or reform the conduct;
- (g) whether there has been prior disciplinary action concerning the judge, and if so, its remoteness and relevance to the present proceeding;
- (h) whether the judge complied with prior discipline or requested and complied with a formal ethics advisory opinion;
- (i) whether the judge cooperated fully and honestly with the commission in the proceeding; and
- (j) whether the judge was suffering from personal or emotional problems or from physical or mental disability or impairment at the time of the misconduct.

In *In re Brown*, 626 N.W.2d 403 (Michigan 2001), the Michigan Supreme Court "articulated several factors that were among the criteria to be used in evaluating judicial discipline cases:"

- (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
- (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
- (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
- (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
- (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
- (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
- (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

## Additional Factors

The following additional factors have been identified in other cases as relevant to a decision regarding the appropriate sanction in a judicial discipline case.

- Whether the judge requested an advisory opinion before engaging in the conduct (*In the Matter of Fleischman*, 933 P.2d 563 (Arizona 1997)).
- Whether the judge made an effort to keep the prohibited activity secret (*id.*).

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# Abuse of the Contempt Power

**A**lthough courts and conduct commissions are generally reluctant to second-guess a judge's decision to control the courtroom through use of the contempt power, failure to adhere to proper procedures when exercising the contempt power is cognizable in the judicial discipline process given the liberty interests at stake. Several cases in 2006 involved abuse of the contempt power.

Accepting the determination of the State Commission on Judicial Conduct, for example, the New York Court of Appeals censured a judge who failed to properly exercise the summary contempt power. *In the Matter of Hart*, 849 N.E.2d 946 (New York 2006).

The judge had three times declared mistrials in *Modica v. Modica*, a constructive trust and unjust enrichment suit by John Modica against his father. Prior to the third mistrial, John Modica's attorneys had complained to the administrative judge that Judge Hart was delaying the case; subsequently, they moved to recuse him on the ground that he had pre-determined the case. Judge Hart held the recusal motion in abeyance after the third mistrial. One day when Modica was on the stand in the retrial, the judge declared shortly before 1:00 P.M. that because of a personal matter, court would recess for the day. Modica then requested an additional day's adjournment so that he could attend his son's championship soccer game, but the judge denied the request and told the parties to be in court the next day.

After leaving the courthouse, Modica saw the judge in the judges' parking lot and approached him intending to revisit the request for the adjournment. After Modica said, "Excuse me, Your Honor," the judge called out to a court officer to secure Modica. The officer walked over, called her supervisor, and escorted

Modica to the security booth. The supervisor soon arrived and spoke with Judge Hart, who directed him to let Modica go with a warning.

When the judge took the bench the next morning, he appeared angry and upset, stating that Modica had "accosted" him in the parking lot, and he was considering holding Modica in contempt. The security supervisor was brought into the courtroom and reported that he had given Modica a "very harsh" warning, that Modica had been cooperative, and that no further action was taken. Based on the officer's statement and his own feelings, the judge concluded he would not hold Modica in contempt.

When counsel for Modica asked to make a record of the incident, the judge replied that, if counsel placed the matter on the record, he would hold Modica in contempt. After conferring with Modica, counsel insisted on making a record. The judge demanded that Modica admit that the encounter was intentional, but counsel claimed that it was coincidental. The judge stated, "if you insist upon making that record, I've got to take some remedial action, so that I and the other judges aren't bothered by Mr. Modica." Counsel placed on the record Modica's account of the incident, and the judge declared Modica in contempt. When testimony in the trial concluded, the judge dismissed the lawsuit and vacated the contempt finding.

## Misuse of Judicial Power

The court held that the judge's actions were seriously flawed and a misuse of judicial power, stating that summary contempt may not be employed retributively against a litigant because his attorney makes a record. Acknowledging that Modica's out-of-court approach to the judge was intrusive, the court noted that it did not

affect proceedings actually in progress or undermine the dignity of the court to the extent that court business foundered.

The court also found that the judge had not been dignified, courteous, and considerate, stating that his own words in issuing the contempt order "speak volumes" about his deportment and temper: "if I hear so much as a muttering from him, if I think that he's making a face at me, if I think he's doing anything, he shall be remanded by Officer Battle forthwith, and he shall spend every bit of 30 days as a guest of the City of New York."

The court noted "troubling" elements in addition to the judge's abuse of the contempt power: the judge's adamant assertion that no misconduct occurred and that he would "absolutely" do the same thing a second time if the circumstances presented themselves, several instances of conflicting testimony, and his tendency to accuse others of misdeeds to justify his own misbehavior. Noting that the judge continued to insist that he has not misused his judicial authority, the court acknowledged that a "judge need not adopt a posture of obeisance before the Commission or this Court but emphasized that a judge must "recognize wrongdoing in order to forestall the inevitable, unfortunate conclusion that, absent a harsher sanction, more of the same will ensue."

## No Warning

Based on an agreed statement of facts and joint recommendation, the New York Commission determined that admonition was the appropriate sanction for a non-lawyer judge who held a defendant and his attorney in contempt without a warning or an opportunity to desist. *In the Matter of Van Slyke*,

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## 12 Judges Removed in 2006 *(continued from page 1)*

The judge had presented in mitigation evidence that he had Attention Deficit Hyperactivity Disorder that contributed to his poor judgment that day. The court stated, however, that the judge's "indifference over hours and then days to the plight of the eleven persons arrested cannot be fully explained by the subsequent diagnosis." The court noted that this was the fourth time the judge had faced allegations of judicial misconduct and that, at several points during his 15 years on the bench, other judges had cautioned him about his temper.

### Unsuited to be a Judge

The **California** Commission on Judicial Performance removed a judge who, in four unrelated criminal cases, abridged the defendants' constitutional rights to counsel and fair hearings and against self-incrimination and abused his judicial authority; acted as a private arbitrator during the filming of a pilot

for a television program that was used to market and promote a proposed new syndicated reality series; and made improper comments about pending cases during appearances on a TV program. *Inquiry Concerning Ross, Decision and Order* (November 16, 2005) ([cjp.ca.gov/pubdisc.htm](http://cjp.ca.gov/pubdisc.htm)). (The Commission decision was not final until the state supreme court denied review in 2006.) For a discussion of the judge's misconduct related to the television programs, see the box below.

The Commission found that the judge became improperly embroiled in two of the four criminal cases in which it found misconduct. For example, in *People v. Aka*, the defendant was charged with zoning and other violations for holding religious services in his home. During a progress report, a deputy city attorney announced that Wilfred Aka had not complied with a diversion agreement. The judge

informed Aka of his right to legal representation, to which Aka responded directly, "I would need to seek legal representation." The judge immediately questioned Aka regarding the restraining order requested by the city. Many of the defendant's neighbors were in court and loudly disagreed when Aka stated that only 20-25 people attended services at his home. The judge said to Aka: "Well, we've got a choir over here that's disagreeing with you. Let the church say Amen, okay?" After suggesting that someone – either Aka or the neighbors were "not telling the truth" – the judge told Aka to "be straight" with him. The deputy city attorney handed the judge photographs that showed an altar and 12 benches in Aka's home. The judge began accusing Aka of lying to him, until Aka admitted that as many as 60 people had come to his house for services that he "officiated." After these admissions, the judge entered a not-guilty plea on

## More on Ross

Judge Ross had been a regular participant on a public affairs program broadcast on the PBS station in Los Angeles. Agreeing that his participation in the program "was consistent with the strong public policy encouraging California judges to promote public awareness of the judiciary and the judicial system," the Commission stated that the issue was whether, in discharging his judicial outreach activities, the judge had violated the canons.

For example, on one show, the judge discussed a pending juvenile delinquency case and the young man's difficult family background, the nature of the offenses, and the

judge's intentions regarding disposition. The Commission rejected the judge's argument that, because the proceedings remained confidential, there was no ethical impropriety, noting that numerous persons familiar with the juvenile or his case likely could have recognized his identity from the judge's discussion. The Commission also found that it appeared from the judge's discussion that he had prejudged the case and rejected the judge's assertions that his comments were directed primarily at explaining the juvenile system and the difficult issue of rehabilitation of troubled youth. The Commission also rejected the

judge's argument that the prohibition on commenting on pending cases violated the First Amendment.

During the summer of 2002, the judge participated as a judge/host in a pilot for a proposed reality television series, tentatively titled *Mobile Court*, described as taking "justice from the courtroom to the streets." In the videotape, he was identified as "Judge Kevin Ross," appearing in a dark suit with a uniformed bailiff who announces that Judge Kevin Ross is "presiding."

In the pilot, Judge Ross arbitrated two pending cases that had been filed as small claims matters. The first case, entitled "Revenge and

Aka's behalf and told Aka that he needed to get a lawyer.

The Commission found that the judge violated Aka's constitutional rights to counsel and against self incrimination and that the judge was aware he was abusing his authority by his determined extraction of incriminating admissions in the absence of counsel, noting his pre-bench experience as a prosecutor and his on-bench experience. The Commission also found that the judge "manifestly was swayed by the audible protests from Mr. Aka's neighbors in the courtroom," concluding the embroilment and lack of impartiality were clear.

The Commission also found that "Judge Ross's lack of candor is another demonstrated and predominant theme of these proceeding; it is pervasive," noting that he fabricated stories, altered documents, attempted to mislead the Commission, and gave evasive answers. The Commission concluded the judge's persistent and pro-

found lack of veracity and refusal or inability to be accountable compelled the conclusion that he is fundamentally unsuited to be a judge that was not mitigated by his dedication and talents as a community leader and role model, his outreach activities, and his excellent credentials.

### Unprecedented Conduct

Accepting the determination of the State Commission on Judicial Conduct, the **New York** Court of Appeals removed a judge who had directed a court officer to escort a defendant out of her courtroom through a non-public stairway to elude a police detective who was waiting to effect a lawful arrest. *In the Matter of Blackburne*, 851 N.E.2d 1175 (New York 2006).

The judge was presiding over a specialized court in which non-violent felons with a history of addiction can avoid incarceration by undergoing drug treatment. A court officer told the judge that a detective had arrived to

question a defendant about a robbery. Subsequently, when advised that the detective intended to arrest the defendant, the judge instructed a court officer to take the defendant out of the courtroom and the building through a doorway that led to a secure hallway and stairwell used by judges, jurors, and court staff and a back exit to the judges' parking lot. The court officer and a prosecutor advised the judge against having the defendant taken out through the back. The judge responded that she was insulted that the detective had entered the courtroom under the "ruse" of merely questioning the defendant. The court officer escorted the defendant out the back exit. When the detective learned of the defendant's exit, he hurried out the front door but did not find him. The defendant was arrested the following day at his drug treatment program and charged with robbery and assault. The charges were ultimately dismissed.

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Rotten Eggs," involved cross claims by teenagers for damage allegedly caused when rotten eggs were thrown on two vehicles. The filming took place on a residential street with numerous spectators. The parties engaged in nasty name-calling, personal insults, and derogatory language, generally ignoring the judge's repeated admonitions. In the second case, entitled "Beauty and the Beast," an "erotic model" claimed an adult club cheated her out of prize money when a security guard disqualified her from a "Miss Wet on the Net" contest. The filming took place inside a strip club. The parties engaged in substantial name-calling and exchanged derogatory and insulting remarks that Judge Ross was unable to control.

After the filming, Judge Ross signed a document for each case entitled in large capital black letters, "ARBITRATOR'S AWARD" that stated the amount of money awarded to the prevailing party. Judge Ross received \$5,000 for his work on the pilot, which he turned over to the Judicial Resources Office, net of taxes.

The producer's sales presentations included marketing the fact that Judge Ross "was an actual legitimate judge in Los Angeles" because the promoters thought that would "lend credibility to the show" and increase the opportunity to sell the series to an interested buyer. Articles about the proposed show in *Variety* included the statement that the proposed syndicated series would be "hosted by

Judge Kevin Ross, who gets dispatched into the streets by car with his bailiff . . . ." The judge testified that the producers had assured him orally that they would not use his judicial position for marketing although he did not ensure that the alleged assurance was reduced to writing. Ultimately, the show was not purchased or developed into a series.

The Commission found that the judge acted as a private arbitrator, used the judicial position for the financial advantage of himself and others, and used the prestige of office to engage in a commercial or business enterprise. The Commission also found that the "videotape of the 'judicial' proceedings was degrading to Judge Ross and to the judiciary."

## 12 Judges Removed in 2006 *(continued from page 5)*

Noting that “judicial misconduct cases are, by their very nature, *sui generis*,” the court rejected the judge’s argument that her removal would be unprecedented and emphasized that her “conduct was unprecedented.” The court stated that the judge’s misconduct did not consist of “only a single, unconsidered act,” noting she made no effort to clarify the situation and failed to reconsider her position despite at least two chances. Stating “things might easily have turned out otherwise,” the court held:

Although “removal is not normally to be imposed for poor judgment, even extremely poor judgment” petitioner’s dangerous actions exceeded all measure of acceptable judicial conduct. By interposing herself between the defendant and the detective, petitioner abandoned her role as neutral arbiter, and instead became an adversary of the police. This is completely incompatible with the proper role of an impartial judge.

### Fraud on the Electorate

The Florida Supreme Court removed

a judge for “flagrant misrepresentations made to the voting public” and serious campaign financial misconduct and violations of law. *Inquiry Concerning Renke*, 933 So. 2d 482 (Florida 2006). Noting that its “previous opinions have cautioned against the exact type of misconduct,” the court stated “today we make clear that those warnings cannot be ignored by those who seek the trust of the public to place them in judicial office.”

The court concluded that the judge had made a series of blatant, knowing misrepresentations in his campaign literature, including creating the impression that he was the incumbent judge when he was not, attempting to convince the public that he had the official support of the local firefighters, and misrepresenting his qualifications by stating he had almost eight years of experience handling complex civil trials.

Prior to becoming a judge, Judge Renke had worked at his father’s law firm. During 2002 when he was running for judicial office, he earned over \$140,000, which was over \$100,000

more than he had ever earned in any previous year. The court found that both the timing of the payments and their prompt deposit into the campaign account indicated that the funds were campaign contributions from Renke senior far in excess of the \$500 limitation imposed by controlling law, not loans to the campaign from income earned by Renke junior as he reported in comparing disclosure reports.

The court held that, regardless of the judge’s present abilities and reputation, “one who obtains a position by fraud and other serious misconduct . . . is by definition unfit to hold that office. . . . Those who seek to assume the mantle of administrators of justice cannot be seen to attain such a position of trust through such unjust means.”

The California Commission removed a judge for falsely listing herself as the source of a \$20,000 contribution to her campaign, two convictions for driving under the influence of alcohol, and improperly questioning a prosecutor about his exercise of an unqualified right to disqualify her. *Inquiry*

## Shock to the Conscience

One of the public reprimands in 2006 was for conduct that the Kentucky Judicial Conduct Commission found shocked its conscience and stated would have led to removal if proven in a hearing; however, the judge’s resignation, pursuant to an agreement with the Commission (he was already a senior status special judge) made a public reprimand the most severe sanction the Commission could impose. *In the Matter of Bamberger*, Order of Public Reprimand (February 24,

2006).

The judge had presided over a class action involving a diet drug known as Fen-phen. In May 2001, the case was settled for over \$200 million for over 400 known claimants. A close personal friend of the judge, Mark Modlin, played a substantial role as a consultant for claimants’ attorneys, was involved in the settlement, and received compensation of \$2,050,000 and additional income from the settlement pursuant to the judge’s orders.

In consultation solely with attorneys for the claimants, with Modlin present, the judge approved the attorneys’ allocation of payments for their own fees and expenses. The judge’s orders did not identify the amounts approved, either in dollars or percentages, did not require any accounting, did not explain how the attorneys’ fee interests were correlated to the claim interests of the claimants, and did not give any direct notice to claimants. The attorney fees were at least \$86 million and perhaps as much as \$104

*Concerning Hall*, Decision and Order (December 10, 2006) (<http://cjp.ca.gov/pressrel.htm>). The Commission stated that the “judge’s election fraud overwhelms other considerations and compels our removal decision.”

At the time of her re-election campaign in 2002, the judge lived with Deidre Dykeman but did not want their romantic relationship known. Dykeman gave the judge \$20,000 from her personal accounts for the campaign. Concerned that the contribution might raise questions about the relationship, the judge deposited the \$20,000 into her personal checking account to conceal its source and then wrote a check to her campaign for \$25,000, comprised of Dykeman’s \$20,000 and \$5,000 of her own money. Under penalty of perjury, Judge Hall signed four campaign reports that listed herself as the sole source of the \$25,000 and failed to report that Dykeman had contributed to her campaign.

Stating “Judge Hall engaged in deceit and misrepresentations to keep her position as a judge,” the Commission concluded “at a minimum, there is an appearance Judge

Hall holds her judicial office as the result of election fraud.”

### **Egregious Impropriety**

The **New York** Commission removed a judge for using the power of his judicial office, directly and indirectly, to solicit contributions to his legal expense fund from lawyers who appeared before him, in addition to other misconduct. *In the Matter of Spargo*, Determination (March 31, 2006) ([www.scjc.state.ny.us](http://www.scjc.state.ny.us)).

After the Commission had filed its original formal charges based on campaign and political conduct, the judge filed a federal lawsuit challenging the canons on First Amendment grounds. In 2003, the Court of Appeals for the 2nd Circuit held that the district court should have abstained from exercising jurisdiction. By the fall of 2003, the judge owed his attorney over \$140,000 for the federal litigation, and, with his knowledge and approval, a defense fund was established.

The Commission found that the judge “brazenly asked one local attorney, in a private meeting in chambers, to donate \$10,000, then continued to pressure the attorney over the next few

weeks to make the contribution.” The Commission also found that a lunch attended by the judge “was an integral part of an ongoing scheme to solicit specific attorneys to contribute” to his defense fund. The Commission also found that, with the judge’s apparent knowledge and approval, his close friend “asked several other attorneys, all who regularly appeared before the judge, to contribute a similar amount to help defray respondent’s legal expenses.” Noting that a legal expense fund for a judge, “raises serious ethical issues,” the Commission concluded that “the egregious impropriety of soliciting what is essentially a monetary *gift* for the judge is self-evident, and having an intermediary solicit money on the judge’s behalf does not diminish the impropriety.”

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Based on a complaint filed by the Judicial Conduct Board, the **Pennsylvania** Court of Judicial Discipline removed a former judge for attempting in several cases to persuade prosecuting witnesses to reduce

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million, exceeding what was provided for in the fee agreements with the claimants and what was distributed to claimants (approximately \$74 million).

In addition, the judge set aside a portion of the settlement as a charitable fund and created The Kentucky Fund for Healthy Living, a non-profit corporation. The judge’s orders gave no indication of the monetary amount involved; information furnished to the Commission indicated it was over \$20 million.

The judge appointed Modlin and three of the claimants’ attorneys as directors of the Fund. The Fund paid Modlin a \$6,500 monthly stipend

and a \$1,000 monthly expense allowance and paid each of the attorneys a \$3,000 monthly stipend and a \$350 monthly expenses allowance.

A week before his retirement, the judge relinquished the court’s control over the Fund. The judge became a director of the Fund approximately seven months later at the invitation of Modlin and the three attorneys the judge had appointed as directors.

The Commission noted the judge’s claim that judges frequently preside in cases in which the attorneys are friends of the judge. However, the Commission stated:

The disturbing events in this case cannot be dismissed so simply. The judge’s failure to disqualify due to his close friendship and other connections with Modlin, the blanket and unrestricted orders approving the distribution of the funds, the creation of the charitable fund and appointment of the friend and attorneys as paid directors, and Judge Bamberger’s acceptance of their invitation to a position of profit, are inexcusable. The amount and disposition of the settlement funds did not come to public attention until some of the claimants raised questions more than three years after the settlement.

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charges and failing to disqualify from the cases. *In re Zupsic*, Opinion (December 29, 2005) and Order (March 13, 2006) ([www.cjdpa.org/decisions/index.html](http://www.cjdpa.org/decisions/index.html)). The court concluded that to say the judge's conduct "was egregious would be to understate; to say it is the embodiment of the kind of judicial conduct which the Judicial Conduct Board was created to eradicate was more accurate."

For example, the judge asked a state trooper to stop by his office, and when the trooper did so, the judge closed the doors and asked about charges filed against Anthony Martorella for threatening to kill someone who could not repay money owed to him. The judge told the trooper that Martorella was either a relative or friend of the judge's previous employer, said he was "really not a bad guy," and asked if there was anything the trooper could do. The trooper said it was a very serious incident and there was nothing that could be done. The judge persisted, insisting that he would appreciate it if there was anything the trooper could do. Some time later, the judge called the trooper at home and importuned him to consider diversion for Martorella.

### Abiding by the Law

Adopting the recommendation of the Judicial Conduct Commission, the **Utah** Supreme Court removed a judge who had a plural marriage relationship with three women. *In re Inquiry of Steed*, 131 P.3d 231 (Utah 2006). The judge sat in a predominately polygamous community. At the time of his appointment in 1980, he had one wife to whom he was legally married and one to whom he believed himself to be married according to the traditions of their mutual religious faith. In 1985, a third wife was added to the plural marriage relationship. The judge and his wives were all adults when their mar-

riage relationships began. Polygamy is prohibited by a state statute.

The court held that "it is of little or no consequence that the judge may believe a criminal statute is constitutionally defective." The court concluded:

Civil disobedience carries consequences for a judge that may not be applicable to other citizens. The dignity and respect accorded the judiciary is a necessary element of the rule of law. When the law is violated or ignored by those charged by society with the fair and impartial enforcement of the law, the stability of our society is placed at undue risk.

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Based on an agreement in which the judge consented to any sanction, the **South Carolina** Supreme Court removed a judge for engaging in adulterous sexual activity with two female court staff. *In the Matter of Cash*, 630 S.E.2d 283 (South Carolina 2006). Female 1 said she engaged in sexual activity with the judge only because his initiation of sex surprised her and, due to her fragile emotional state, she believed she could not refuse. The judge represents he believed the sexual activity was mutually desired. The judge acknowledged engaging in extra-marital sexual activity with female 2, including while attending court-related seminars out of town. After the judge and female 2 were both divorced from their respective spouses, they married.

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The **New Mexico** Supreme Court permanently removed a judge without an opinion or description of the judge's conduct, granting a petition of the Judicial Standards Commission that found that the judge had tested positive for the use of cocaine; failed to comply with a Commission order to obtain

testing; and attempted to gain preferential treatment for a woman with whom he had a personal relationship. *In the Matter of Garza*, Order (New Mexico Supreme Court November 8, 2006).

\* \* \*

The **New York** Commission removed a part-time, non-lawyer judge for failing to remit funds promptly to the state comptroller and failing to cooperate with the Commission. *In the Matter of Lockwood*, Determination (November 7, 2006) ([www.scjc.state.ny.us](http://www.scjc.state.ny.us)).

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The **New York** Commission removed a non-lawyer judge who (1) participated in the collection of signatures on designating petitions for candidates for local political office and in the filing of the petitions with the county board of elections; (2) refused to answer questions during the Commission investigation, asserting that to do so might incriminate him notwithstanding that he had not been charged with a crime; (3) failed to effectuate a defendant's right to counsel in a criminal case, attempted to elicit incriminating statements from the defendant, engaged in unauthorized ex parte communications, and conveyed the impression that he was biased against the defendant; (4) expressed bias and hostility toward the county district attorney's office and attempted to intimidate an assistant district attorney and the district attorney from making a complaint about him to the Commission; and (5) while presiding over various criminal cases, engaged in unauthorized ex parte communications and made statements or engaged in other conduct indicating that his impartiality might reasonably be questioned. *In the Matter of Greaney*, Determination (December 18, 2006) ([www.scjc.state.ny.us](http://www.scjc.state.ny.us)). 



## Relevant Factors in Determining the Appropriate Sanction *(continued from page 2)*

- Whether the judge's conduct was contrary to an important public policy (*In the Matter of Seaman*, 627 A.2d 106 (New Jersey 1993)).

- Whether the misconduct evidenced lack of independence or impartiality (*id.*).

- Whether the misconduct resulted in economic detriment to the public (*Inquiry Concerning Gallagher*, 951 P.2d 705 (Oregon 1998)).

- Whether the judge was experienced and should have been familiar with the high standards of behavior demanded of judges (*id.*).

- Whether the conduct occurred in the judge's administrative or adjudicative role (*In the Matter of Crawford*, 629 N.W.2d 1 (Wisconsin 2001)).

- Whether the ethics law in the area was uncertain at the time of the judge's action (*In re Marullo*, 692 So. 2d 1019 (Louisiana 1997)).

- Positive contributions made by the judge to the court and the community (*Commission on Judicial Performance v. Dodds*, 680 So. 2d 180 (Mississippi 1996)).

- The lack of prior judicial precedent indicating the conduct was unethical (*id.*).

- The judge's commitment to fairness and innovative procedural reform (*id.*).

- The number of persons affected (*id.*).

- Whether moral turpitude was involved (*id.*).

- Whether the judge ignored efforts to persuade the judge to change (*In the Matter of King*, 568 N.E.2d 588, 599 (Massachusetts 1991)).

- Whether the judge's problems were due to stress brought on by heavy caseload and inadequate facilities (*id.*).

- Whether the judge has suffered other repercussions from the misconduct (*In the Matter of Williams*, 777 A.2d 323 (New Jersey 2001)).

- Whether the misconduct took place over a significant period of time (*In re Jones*, 581 N.W.2d 876 (Nebraska 1998)).

- Whether the judge made a timely good faith effort to make restitution or to rectify consequences of misconduct (*In re Inquiry Concerning a Judge*, 788 P.2d 716 (Alaska 1990)).

- The judge's character or reputation (*id.*).

- Whether the judge suffered from a physical or mental disability or impairment (*id.*).


- The vulnerability of the victim of the misconduct (*id.*).

- Whether the judge failed to accept full and complete responsibility until the eleventh hour (*In re Cresap*, 940 So.2d 624 (Louisiana 2006)).

- Whether the sanction is consistent with that imposed in previous cases (*Commission on Judicial Performance*

*v. Sanford*, 941 So.2d 209 (Mississippi 2006)).

- Whether the judge appeared to have gained office through fraud on the electorate (*Inquiry Concerning Renke*, 933 So. 2d 482 (Florida 2006)).

- Whether previous opinions had cautioned against the exact type of misconduct (*id.*). 

*This article is an excerpt of A Study of State Judicial Discipline Sanctions published by the American Judicature Society in 2002. AJS publications can be ordered on-line at [www.ajs.org](http://www.ajs.org).*

### New Model Code

As this issue of the *Judicial Conduct Reporter* went to the printers, the American Bar Association House of Delegates adopted a revised model code of judicial conduct based on the recommendations of the Joint Commission to Evaluate the Model Code of Judicial Conduct at its 2007 Midyear Meeting. The new code makes important changes that clarify the ethical obligations of judges, filling in some of the gaps in the former versions, and reflecting recent developments. The ABA also held the ground against arguments that restrictions on judges' political conduct cannot be justified after *Republican Party of Minnesota v. White*, rejecting efforts to eliminate almost all restrictions on the political and campaign conduct of all judges, even those who are not elected.

Moreover, as a result of last minute changes, the new model code affirms the importance of the "appearance of impropriety" as both an aspirational standard and the basis for disciplinary enforcement. For more information on the model code of judicial conduct, see [www.ajs.org/ethics/eth\\_ABA\\_commission.asp](http://www.ajs.org/ethics/eth_ABA_commission.asp).

### Judicial Conduct Reporter

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## Abuse of the Contempt Power *(continued from page 3)*

Determination (New York State Commission on Judicial Conduct December 18, 2006) ([www.scjc.state.ny.us](http://www.scjc.state.ny.us)).

The judge held a bench trial in *People v. Sebastiano Pagano*, in which the defendant was charged with harassment. The judge summarily found Pagano in contempt of court and imposed a \$50 fine, without warning Pagano concerning his allegedly contemptuous conduct or providing him with an opportunity to desist or to make a statement on his own behalf. The judge failed to issue an order stating the facts that constituted the offense.

When the defendant's attorney attempted to make a record, the judge summarily found him in contempt of court and imposed a \$50 fine without warning the attorney concerning his allegedly contemptuous conduct or providing him with an opportunity to desist or to make a statement on his own behalf. The judge failed to issue an order stating the facts that constituted the offense.

The Commission stated:

An attorney has a right to attempt to assert his client's interests in an appropriate manner, and it would be improper for a judge to use the contempt power to punish him for doing so. Moreover, respondent also owed the defendant a clear warning that his actions could result in a contempt citation, notwithstanding that respondent had earlier expressed annoyance at the defendant's comments and behavior.

The Commission concluded that "omission of such warnings is not simply an error of law. Had the appropriate warnings and opportunity to desist been provided, it might not have been necessary for respondent to exercise the awesome power of summary contempt in an effort to maintain order."

In mitigation, the Commission noted that the defendant and his attor-

ney did not suffer a loss of liberty as a result of the judge's actions and that the judge had committed himself to exercise restraint and to scrupulously observe the applicable statutory and decisional mandates should he ever have to exercise the summary contempt power in the future.

Pursuant to an agreed disposition, the Massachusetts Commission on Judicial Conduct closed with an expression of concern formal charges alleging that a judge abused the power of custody by ordering a court officer to take a 19-year-old defendant waiting for her case to be called into custody when she was walking out of the courtroom without giving her any warning or attempting to follow any of the procedures for a finding of summary contempt and even though her behavior was not disrupting court business. *In re Ruma*, Agreed Disposition (Massachusetts Commission on Judicial Conduct April 13, 2006) ([www.mass.gov/cjc/Ruma041406.pdf](http://www.mass.gov/cjc/Ruma041406.pdf)). The judge recognized the Commission's concern, agreed to follow rules in any contempt matter, and acknowledged that it is ordinarily preferable to issue a warning before placing a spectator in custody.

### Silencing Attorney

The California Commission on Judicial Performance publicly admonished a judge for, in one criminal case, denying a defendant full opportunity to be heard through counsel regarding sentencing, treating defense counsel rudely and impatiently, and holding the attorney in contempt and immediately incarcerating him. *In the Matter Concerning Espinosa*, Decision and Order Imposing Public Admonishment (California Commission on Judicial Performance February 9, 2006) ([cjp.ca.gov/pubdisc.htm](http://cjp.ca.gov/pubdisc.htm)). The Commission noted the Court of Appeal

holding that the public defender had been made to suffer "the ignominy of being removed from the courtroom simply for doing his job" and emphasized that "the power of a judge to silence an attorney does not arise until after the attorney has had a reasonable opportunity for legitimate advocacy."

After finding a defendant in violation of probation, the judge ordered a diagnostic study. At the next hearing, after several exchanges, the defendant's public defender Michael Pentz asked to make an argument regarding the appropriate sentence and said that his remarks might not even take five minutes. Less than one minute after Pentz began speaking, the judge interrupted to ask when the defendant had been arrested to calculate his credits for jail time already served. The judge secured counsel's agreement as to the amount of credit, and this exchange followed.

THE COURT: All right. Then Mr. Netterville, you are sentenced to —

MR. PENTZ: Your Honor, the Court still has not allowed me to complete —

THE COURT: Okay, Counsel —

MR. PENTZ: I'm disheartened here.

THE COURT: Counsel, you be quiet. I've made up my mind. I'm not going to listen — one more peep out of you, and you're in contempt of court. Do you understand this?

MR. PENTZ: I understand that.

THE COURT: All right. Then be quiet.

The judge proceeded to sentence the defendant to three years in state prison. When he finished, he said, "Next case." This exchange followed:

MR. PENTZ: I'd like to state as [sic] an objection to these proceedings, Your Honor, with what I take to be the cavalier way with which this Court —

THE COURT: All right, Counsel, that will be \$50.00.

MR. PENTZ: Your Honor, the Court is going to have to set —

THE COURT: Do you want to go for a hundred?

MR. PENTZ: If the Court can set it for \$250, I want [a] hearing on it, and I want to order a transcript.

THE COURT: That will be \$250. You are sanctioned. That will be payable — I'll give you a chance to appeal this.

MR. PENTZ: Judge, I'm requesting a hearing.

THE COURT: This is a direct —

MR. PENTZ: I'm requesting a hearing. I hope the Court understands my request.

THE COURT: Your request for a hearing is denied. You've already had a hearing. How many hearings do you want?

MR. PENTZ: A hearing on an order to show cause is a fundamental law, Your Honor. I'm asking for that. I'll bring you the Penal Code — the civil code section if you wish.

THE COURT: This is a direct contempt of court, and you are ordered to pay the sum of — what did we say? — \$250?

MR. PENTZ: I think that was the last sum, yes.

THE COURT: Payable by — when can you pay that? — or five days in the county jail. What do you want?

MR. PENTZ: Judge, it's —

THE COURT: All right. Do you want five days in the county jail?

MR. PENTZ: I'm ready to surrender.

THE COURT: Take him in. That's five days in the county jail, Counsel.

Pentz was removed from the courtroom and taken to a holding cell. Later, Pentz appeared before the judge, represented by the chief deputy public defender. The judge told Pentz that he had given the judge no alternative but to remove him from the courtroom and that Pentz had continued to disobey after being warned and had "openly insulted" the court. The judge said that


he was going to impose five days in jail and that he would stay the sentence because he knew that Pentz was an attorney and might want to seek review. The judge also said it was "entirely false at least from this Court's perspective" that he had not given Pentz an opportunity to fully state his position as to the defendant's sentence. He said that "this attorney kept on arguing even after the Court made a ruling," and that he was "deeply insulted by this behavior." The judge added that, unless there was some reason for a further stay, Pentz should "bring [his] toothbrush" when he next appeared. The judge issued a written order of

instance of disorderly, contemptuous, or insolent behavior towards the respondent court tending to interfere with the due course of a trial or other judicial proceeding within the meaning of Code of Civil Procedure . . . ."

The Court of Appeal vacated the defendant's sentence and remanded the matter for re-sentencing before a different judge. The appellate court held that Judge Espinosa "committed a miscarriage of justice and reversibly erred in violation of appellant's rights to counsel and fair trial by precluding Pentz from completing his sentencing argument." With respect to the contempt issue, the Court of Appeal determined

that the judge violated the mandatory stay provisions of the penal code that require that when an order of contempt is made affecting an attorney, the execution of any sentence shall be stayed for

three court days. The appellate court also found that the judge had mischaracterized the record of the proceedings leading to the contempt finding and made various material omissions and misstatements in the written contempt order.

*See also Inquiry Concerning Albritton*, 940 So.2d 1083 (Florida 2006) (reprimand, 30-day suspension without pay, and \$5,000 fine for, in addition to other misconduct, in some dependency cases, asking the parent if they were using drugs and if the person said "no," ordering a drug test on the spot and holding the person in contempt and having them immediately jailed if the test came back positive); *In re Cresap*, 940 So.2d 624 (Louisiana 2006) (30-day suspension without pay for, in addition to other misconduct, holding an attorney in contempt four times for refusing to answer a question calling for the disclosure of attorney-client privileged information). 

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## The Commission concluded that "omission of such warnings is not simply an error of law.."

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contempt stating that Pentz had continued to argue after being ordered to be quiet, had used the word "cavalier," an insult, in open court, had argued that he was entitled to a hearing on contempt, and had "further insulted the court by insinuating that the court didn't understand that he was entitled to a hearing," and "sarcastically threw his hands in the air [and] waved them" while saying that he was ready to surrender. The order further stated that the judge "felt compelled to order Mr. Pentz removed from the court room in order to continue the orderly process of other court proceedings" and included a finding that Pentz "had knowledge of the order and was able to comply by simply taking a writ without the necessity of mocking the court and challenging it to find him in contempt."

Another judge granted Pentz's petition for a writ of habeas corpus, annulling the contempt order. The second judge concluded that "the record in this case does not disclose a clear



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This publication, funded by the State Justice Institute, maintains that, under the code of judicial conduct, no reasonable question is raised about a judge's impartiality when the judge, in an exercise of discretion, makes procedural accommodations that will provide a diligent self-represented litigant acting in good faith the opportunity to have his or her case fairly heard—and, therefore, that a judge should do so. Written by Cynthia Gray, *Reaching Out or Overreaching* also includes proposed best practices for cases involving pro se litigants and a self-test, hypotheticals, a talk, small group exercises, a debate, and panel discussion for use by judicial educators a session covering the topic at judicial conferences. To purchase, visit <http://ajs.org/cart/storefront.asp>.