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Wedding fees by Cynthia Gray

Solemnizing marriages is one of the traditional privileges of being a judge. Some states have rules regarding whether judges may personally accept fees for performing wedding ceremonies. Those provisions may be in statutes, codes of judicial conduct, advisory opinions, or court rules, orders, or directives.

In some states, a judge cannot personally accept a fee for solemnizing a marriage regardless when or where the marriage is performed. For example, the Illinois judicial ethics committee advised that a judge may not accept a fee, gift, gratuity, or compensation of any kind for solemnizing a marriage even if the ceremony would be held outside normal working hours and at a location other than the courthouse. *Illinois Advisory Opinion 1995-14*. The committee reasoned that, by accepting such a gift, a judge would be improperly receiving compensation for services in addition to the judge's salary, which is prohibited by court rule. Further, the committee concluded, the fee would constitute a "gift" given in return for an act performed by the judge in an official capacity, which is prohibited by the code of judicial conduct.

Similarly, the Oklahoma advisory committee stated that "the performance or solemnization of a marriage is an official act of a judge. A judge may not charge a fee nor accept a gratuity for the performance of any official act." *Oklahoma Advisory Opinion 2004-3*. The committee cited a state

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Failing to speak up: Recent cases

What judges say or write—intemperate comments, ex parte conversations, gratuitous references to the judicial office, and, increasingly, injudicious social media posts, for example—is a frequent basis for judicial discipline. But, as several recent cases demonstrate, failing to say something can also lead to a finding of judicial misconduct.

For example, the Illinois Courts Commission suspended one judge and censured a second, not for their extra-marital affair, but for their failure to disclose the relationship or take other appropriate action even when the husband of one of the judges appeared as an attorney before the other. *In re Drazewski and Foley*, Order (Illinois Courts Commission March 11, 2016) (http://tinyurl.com/hkxag5p).

On December 5, 2010, Judge Scott Drazewski and Judge Rebecca Foley began an affair while attending a conference in Washington D.C. On December 11 and 12, the judges texted each other 123 times. On December 13, they exchanged 105 text messages. Also on December 13, Judge Drazewski began presiding over the jury trial in a negligence case in which Joseph Foley, Judge Foley's husband, represented the defendant. Over December 14 and 15, the judges exchanged over 80 text messages. According to Judge Drazewski, the communications were related to their

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Recent advisory opinions

• Judges may be friendly with their staff, give them gifts, and treat them to meals but must keep their generosity reasonable and be sensitive to the possibility that gift-giving may create the appearance of favoritism, be perceived as sexual harassment, or make staff feel obliged to respond in kind. *California Judges Association Opinion 70* (2015).

• A judge may not accept a gift of food from a former judge who now practices in her court or from a bar group on the former judge's behalf. *New York Opinion 2015-122.*

• A judge may consult ex parte about matters pending in his court with court personnel who staff the city, town, and village courts resource center, and such communications need not be disclosed. *New York Opinion 2015-209.*

• A judge may not disqualify herself from cases involving adoption by same-sex married couples based on her strongly held religious beliefs with regard to the couple's sexual orientation. *Nebraska Opinion 2016-2.*

• After responding to a confidential request from a judicial appointments committee about an attorney, a judge is not disqualified when the attorney appears in a case, and disclosure is not required. *New York Opinion 2015-111.*

• A judge may not review his divorce lawyer on an on-line ratings service that displays individual reviews to the public even if his review is anonymous and does not refer to his judicial status. *New York Opinion 2015-103.*

• A judge must adamantly and genuinely encourage a law firm not to promote that an attorney with the firm is the judge's child. *Florida Opinion 2016-2.*

• When requested, a judge may privately recommend lawyers to family members and close friends. *Illinois Opinion 2016-1.*

• A judge may serve on a task force formed by county commissioners that will make recommendations about the appointment of guardian ad litems in juvenile court proceedings. *Nebraska Opinion 2016-1.*

• A judge who sits on the board of a charitable organization whose mission is to empower young women through mountain biking may thank donors in a call or personal note. *Colorado Opinion 2016-1.*

• A judge may contribute to Planned Parenthood unless the funds are for a political arm of the organization. *New York Opinion 2015-77.*

• A judge may publicly participate in a non-fund-raising National Day of Prayer event, lead a prayer, and be identified as a judge. *New York Opinion 2015-79.*

• A judge may not be the guest speaker at a non-profit organization's annual dinner if she knows that, although tickets are modestly priced, attendees will be strongly urged to upgrade to silver, gold, life, or corporate memberships that will be publicly recognized during the dinner. *New York Opinion 2015-154.*

• A judicial officer may judge a "Battle of Lawyer Bands" competition for a young lawyers association fund-raiser but should not be featured on the program or permit his title be used in connection with the event. *Washington Opinion 2015-4.*

• A judge who has been voted "Judge of the Year" by a law-related organization may accept the award and complimentary tickets to the awards banquet even if members of the organization will appear before him as witnesses in future cases but should not take part in the acceptance video that will be shown at the awards ceremony, posted on the organization's web-site, and published on YouTube.com. *Oklahoma Opinion 2016-1.*

• A judge may not serve as the national president of an organization dedicated to the social, political, and economic well-being of an ethnic group if the organization's press releases usually mention the president's name and the organization has recently filed an amicus brief in a federal case, applauded a presidential program, commended the U.S. Supreme Court for several decisions, applauded the introduction of particular legislation, criticized statements made by presidential candidates, called for a national dialogue on responsible gun ownership, extended sympathies to families of mass murder victims, and called for an end to deporting undocumented immigrants. *Utah Informal Opinion 2015-1.*

• A judge who is an officer of a specialized bar association may sign the association's certificate of incorporation but may not use her judicial designation on the certificate or designate her chambers as the address for the organization. *New York Opinion 2016-40.*

• A retiring judge may allow a bar association to commission his portrait to present to the judiciary or the state archives. *Maryland Opinion Request 2016-2.*

• A judge may appear in a documentary about a case she prosecuted that has reached final disposition if she will not be identified as a judge. *Florida Opinion 2016-3.*

• A judge may not participate in a police department "ride along" program. *Illinois Opinion 2015-1.*

• A judge may serve as an executor of a will and as an agent under a health care power of attorney for someone with whom he has maintained a 40-year friendship, who has been a mother figure to him and a grandmother figure to his child, and who has been included in all of his family functions. *South Carolina Opinion 5-2016.*

• A judge may not participate in the World Series of Poker. *New York Opinion 2015-102.*

• A judge may not act as an election judge. *Maryland Opinion Request 2016-11.*

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

Wedding fees (continued from page 1)

constitutional provision requiring judges (as well as other public officials) to take an oath of office swearing "that I will not knowingly, receive, directly or indirectly, any money or other valuable thing, for the performance or non-performance of any act or duty pertaining to my office, other than the compensation allowed by law . . . ."

The states that prohibit judges from accepting fees for performing marriages are: Illinois, Missouri, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, South Carolina, and West Virginia. *See* "Prohibitions on fees for performing weddings" on page 3, below.

Time and place restrictions

In Wisconsin, the Ethics Code (not the code of judicial conduct) requires a judge to "refuse to accept a payment, even if unsolicited, for officiating at a marriage at a courthouse, regardless of the hour at which the marriage is performed." However, that code allows a judge to "accept a payment for officiating at a marriage any place other than a courthouse provided the payment does not exceed a reasonable amount that a member of the clergy might receive under like circumstances and provided the payment could not reasonably be expected to influence the judge's exercise of judicial duties." *Wisconsin Government Accountability Board Guideline GAB-1260*.

At least 12 states distinguish between ceremonies that take place during regular court hours and those that take place outside of court hours, prohibiting a judge from retaining honorariums for the former but allowing them for the latter. The states with this type of rule are Arizona, California, Colorado, Florida, Georgia, Indiana, Iowa, Nebraska, New York, Utah, Washington, and Wyoming. *See* "Time, day, and/or location restrictions on wedding fees" on page 6, *infra*.

Rule 3.16 of the Arizona code of judicial conduct, for example, allows a judge to "charge a reasonable fee or honorarium to perform a wedding ceremony during noncourt hours, whether the ceremony is performed in the court or away from the court," while prohibiting a judge from charging or accepting "a fee, honorarium, gratuity or contribution for performing a wedding ceremony during court hours." *See Inquiry Concerning Villegas*, Order (Arizona Supreme Court November 19, 2002) (censure for, in addition to other misconduct, performing marriages for compensation during court hours).

In Georgia, a statute provides that "any judge who performs a marriage ceremony at any time, except normal office hours, may receive and retain as personal income any tip, consideration, or gratuity voluntarily given to such judge for performing such marriage ceremony." *Official Code of Georgia Annotated, § 19-3-49*. That law is reflected in a comment to Rule 2.2 of the Georgia code of judicial conduct that provides:

> Judges who perform weddings during their normal office

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Prohibitions on fees for performing weddings

Illinois: "A judge may not accept a fee, gift, gratuity, or compensation of any kind, for solemnizing a marriage." *Illinois Advisory Opinion 1995-14*.

Missouri: "A judge shall not receive any compensation for solemnizing a marriage." *Missouri Court Operating Rule 14.02*.

New Jersey: "The Supreme Court has requested me to advise all magistrates and judges that it considers it to be highly improper for them to accept a fee or gratuity for performing a marriage ceremony." *New Jersey Courts Administrative Directive #4-65*.

New Mexico: "No judge may receive any remuneration, including a gratuity, for performing a marriage ceremony." *New Mexico Code of Judicial Conduct, 21-312, Committee Commentary 3*.

Ohio: Ohio Const. art. IV, §6(B) prohibits a probate court judge from personally retaining the proceeds from the sale of marriage certificates. *Ohio Attorney General Opinion 83-022*.

Oklahoma: "A judge may not charge a fee for performing a wedding after court hours outside of the courthouse." *Oklahoma Advisory Opinion 2004-3*.

Pennsylvania: "The Code of Judicial Conduct does not prohibit a judge from receiving a fee for performing a wedding. However, the Pennsylvania Constitution Article 5, section 17(c) appears to prohibit a judge from receiving a fee for performing a wedding." *Pennsylvania Digests of Informal Opinions 10/6/04*.

South Carolina: "[T]he prohibition against a judge receiving compensation for performing marriage ceremonies applies to all judges regardless of when or where or under what circumstances the marriage ceremony is performed . . . ." *In the Matter of an Anonymous Former Probate Judge*, 594 S.E.2d 473 (South Carolina 2004), *citing Memorandum of Chief Justice* (October 14, 2003).

West Virginia: "[A] judge should not accept remuneration or an honorarium for officiating at weddings during work hours or on weekends, or after work hours." *West Virginia Advisory Opinion* (April 30, 2008).

> hours, for which they are collecting a salary or are paid a per diem, shall not require payment for this service. Judges may receive a reasonable tip, gratuity, or negotiated consideration only for weddings performed both away from the courthouse and outside their normal office hours.

The comment cautions that "it is inappropriate for a judge to have a policy of performing weddings only after-hours and off-site in order to receive payment."

The hours during which a judge may not personally collect a fee for performing a wedding are defined, depending on the state, as 8 a.m. to 5 p.m. Monday through Friday, except for legal holidays (Iowa); "all hours when the court is open and in session, or the clerk's office is open, including noon/lunch hours" (Nebraska); those hours "officially scheduled by the court for the performing of the judicial function" (New York); or before 5:00 p.m. on Monday through Friday (Wyoming). Pursuant to a stipulation and agreement, the Washington State Commission on Judicial Conduct reprimanded a judge for accepting compensation for solemnizing marriages during the hours the courthouse in which the judge served was regularly open to the public for business, that is, 8:30 a.m. to 4:30 p.m. Monday through Friday. *In the Matter of Ryan*, Stipulation, agreement, and order of reprimand (Washington State Commission on Judicial Conduct October 28, 2005) (http://tinyurl.com/hrhgjwt). The judge acknowledged regularly scheduling and performing weddings for a fee at 8:30 a.m., during the noon hour, and at 4 p.m. The judge believed he could accept a fee at those times because he was not actively presiding over hearings. The stipulation stated:

> While the Canons do not expressly define "regular court hours," Respondent now agrees that the reasonable interpretation of "regular court hours" is when the courthouse in which the judge serves is open to the public for business. Respondent agrees his prior reasoning failed to take into account the appearance of impropriety caused by, and the policy reasons against, accepting compensation for conducting weddings during the regular court hours. A judge should not receive compensation for solemnizing marriages during the court's normal business hours because the judge is already compensated, or is perceived by the public as already compensated, for that period of time in the form of the judge's salary. A judge should not receive private compensation for an extra-judicial activity when the judge is on duty doing the public's business for which the judge is being paid with public funds. In addition, there is a reasonable expectation that public courthouse facilities will not be used for the private financial benefit of a judge during the hours the court is open to the public, and that judicial officers (and their courtrooms) will be available for official judicial activities, such as hearing emergency or unscheduled matters, while the court is open for business.

The Commission noted that, because he stood to benefit financially, the judge should have sought clarification of the ambiguity he perceived in the code.

In California, it is a misdemeanor for a "judge, justice, commissioner, or assistant commissioner" to accept "any money or other thing of value for performing any marriage" except on Saturday, Sunday, or a legal holiday. *California Penal Code §94.5. See also California Judges Association Judicial Ethics Up-date*, at 15 (2001) (a judge may perform a wedding for a fee on the Friday after Thanksgiving, which is a judicial holiday).

At least 12 states distinguish between ceremonies that take place during regular court hours and those that take place outside of court hours . . . .

In Alabama, Louisiana, Mississippi, and Texas, judges (or at least some types of judges) are apparently allowed to receive a fee for performing a marriage regardless when or where the ceremony takes place. *Alabama Advisory Opinion 83-187* (a judge may collect the statutory fee permitted for any person authorized to perform the rite of matrimony and an offered honorarium above the required fee); *Louisiana Revised Statutes §13:2588* ("A justice of the peace who performs a marriage ceremony may charge a usual and customary fee for that service"); *Mississippi Code Annotated, Section 25-7-25(3)* ("In addition to the salary provided . . . , each justice court judge may receive a fee of not more than Twenty-five Dollars ($25.00) for each marriage ceremony he performs in the courtroom or offices of the justice court at any time the courtroom or offices are open to the public. This fee shall be paid by the parties to the marriage. Each justice court judge may receive money or gratuities for marriage ceremonies performed outside of and away from the courtroom and the offices of the justice court, that the parties to the marriage request to have performed at any time the courtroom or offices of the justice court are closed"); *Texas Advisory Opinion 236* (1998) (a judge may receive a fee for performing a marriage ceremony during regular office hours or for weddings after hours, away from the courthouse as long as the fees are reasonable).

Other guidelines

If a judge cannot accept or opts to decline an honorarium, the judge may not direct or suggest that the wedding party make a donation to a charity because that suggestion is

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"in essence" a solicitation of funds in violation of the code of judicial conduct. *New York Advisory Opinion 1988-168. Accord Minnesota Summary of Advisory Opinions MN-1993*; *Washington Advisory Opinion 1997-3. See also In the Matter of Smoger*, 800 A.2d 840 (New Jersey 2002) (removal of a judge for, in addition to other misconduct, recommending that persons at whose weddings he had officiated make donations to specific charities and having his court staff receive and deliver those donations).

Even in circumstances in which a judge may accept fees, there are restrictions on a judge's ability to promote a wedding "business," including prohibitions on advertising, web-sites, and personal solicitations. Rule 3.16(C) of the Arizona code provides that, "A judge shall not advertise his or her availability for performing wedding ceremonies." The Arizona Commission on Judicial Conduct reprimanded a judge for placing advertisements for wedding services on his personal web-site even after it sent him an advisory letter on the issue. *Jayne (11-155)*, Order (Arizona Commission on Judicial Conduct November 16, 2011) (http://www.azcourts.gov/portals/137/reports/2011/11-155.pdf). The Minnesota Board on Judicial Standards privately admonished a judge who appeared as an exhibitor at a wedding trade show where he personally solicited attendees to hire him; to promote his wedding service, the judge also created and maintained a web-site promoting his wedding service on which he was identified and pictured as a judge. *Minnesota Private Discipline Summaries 2009-113*.

Judicial ethics committees also caution against promotion of a judicial wedding business.

- "A judge may not advertise via a web site or print media to solicit business to perform weddings for a fee." *California Judges Association Judicial Ethics Up-date*, at 15 (2001).
- A judge may not advertise her availability to perform wedding ceremonies by sending fliers to wedding planners and may not otherwise solicit business as a wedding officiant. *Colorado Advisory Opinion 2007-5*.
- A judge may not advertise in newspapers to perform weddings. *Minnesota Summary of Advisory Opinions MN-2004*.
- A judge may not engage in the "business" of performing marriages, solicit requests for such services as a for-profit business, or otherwise actively seek to be engaged in such activity. *New York Advisory Opinion 2008-74.*
- A judge may not directly solicit couples as they leave a county clerk's office with their marriage licenses to perform their marriage ceremonies for pay. *Texas Advisory Opinion 292* (2006).
- A justice of the peace may not advertise "justice of the peace weddings" in the telephone book. *Texas Advisory Opinion 193* (1996).
- A court may put wedding information in the white pages of the telephone directory, but the judges should avoid any appearance that they are using the listing to solicit weddings or otherwise personally benefit. *Washington Advisory Opinion 1991-14.*

Of course, a judge should not allow officiating at a wedding to interfere with court business. *See Arizona code of judicial conduct, Rule 3.16(B)* ("A judge shall not interrupt or delay any regularly scheduled or pending court proceeding in order to perform a wedding ceremony"); *Colorado Chief Justice Directive 98-06* ("Performing weddings and civil unions are important public services that judges and magistrates may continue to perform at any time so long as it does not interfere with, nor delay any judicial duties"); *Florida Advisory Opinion 1983-15* (performing marriages should not interfere with judicial duties); *Georgia code of judicial conduct*, *Commentary 1, Rule 2.5* ("Judges may perform weddings during their normal office hours, when doing so does not interfere with or delay court proceedings, security, or operations. Some courts and judges may have minimal time available for conducting weddings"); *Texas Advisory Opinion 236* (1998) (conducting ceremonies during business hours should not unreasonably interfere with required judicial duties); *Utah Informal Advisory Opinion 1998-8* (a judge should not interrupt a trial or hearing to officiate at a wedding); *Washington Advisory Opinion 1990-5* (marriages may be conducted during regular court hours as long as they do not conflict with the performance of judicial duties).

Several advisory opinions address the use of court personnel and resources in arranging marriage ceremonies. *See Texas Advisory Opinion 236* (1998) (clerks may assist a judge in weddings performed at the judge's office during business hours, but that use must be reasonable); *Utah Informal Advisory Opinion 1998-8* (a judge or other court personnel may perform administrative duties incident to a marriage for which the judge does not charge a fee during court hours, and costs of postage and envelopes need not be borne by the judge); *Washington Advisory Opinion 1993-30* (a judge who receives an honorarium for performing a wedding outside of court hours but in court facilities is not required to pay for the use of court facilities and may use court staff to schedule the wedding as long as the arrangements do not unduly interfere with the staff's ability to perform their official duties). ★

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Time, day, and/or location restrictions on wedding fees

Arizona: "(D) A judge shall not charge or accept a fee, honorarium, gratuity, or contribution for performing a wedding ceremony during court hours. (E) A judge may charge a reasonable fee or honorarium to perform a wedding ceremony during non-court hours, whether the ceremony is performed in the court or away from the court." *Arizona code of judicial conduct, Rule 3.16*.

California: "Every judge, justice, commissioner, or assistant commissioner of a court of this state who accepts any money or other thing of value for performing any marriage, including any money or thing of value voluntarily tendered by the persons about to be married or who have been married by such judge, justice, commissioner, or assistant commissioner, whether the acceptance occurs before or after performance of the marriage and whether or not performance of the marriage is conditioned on the giving of such money or the thing of value by the persons being married, is guilty of a misdemeanor. . . . This section does not apply to an acceptance of a fee for performing a marriage on Saturday, Sunday, or a legal holiday." *California Penal Code §94.5*.

Colorado: "[J]udges and magistrates may charge a fee for weddings and civil unions performed outside of normal business hours. However, compensation of any kind may not be received for performing these services during normal business hours." *Colorado Chief Justice Directive 98-06*.

Florida: A judge may "accept compensation for performing a marriage in a home or park in the evening or on a weekend" but not "for performing marriages during normal working hours at the courthouse because the judge would then be using the facilities and authority provided him by his office for private gain." *Florida Advisory Opinion 1983-15*.

Georgia: "In addition to any compensation otherwise provided by law, any judge who performs a marriage ceremony at any time, except normal office hours, may receive and retain as personal income any tip, consideration, or gratuity voluntarily given to such judge for performing such marriage ceremony." Official Code of Georgia Annotated, § 19-3-49. "Judges who perform weddings during their normal office hours, for which they are collecting a salary or are paid a per diem, shall not require payment for this service. Judges may receive a reasonable tip, gratuity, or negotiated consideration only for weddings performed both away from the courthouse and outside their normal office hours." *Georgia code of judicial conduct, Commentary 2 to Rule 2.5*.

Indiana: "Judges must . . . decline the personal acceptance of any fees or gratuities for solemnizing marriages during regular court hours while on court premises. If a judge is offered payment for performing an after-hours marriage ceremony, the source and amount of funds must still be evaluated to determine whether acceptance may lead to an appearance of impropriety." *Indiana Advisory Opinion 2-2015*.

Iowa: "A judge or magistrate may charge a fee for officiating . . . for each marriage solemnized at a time other than regular judicial working hours and at a place other than a court facility. This fee shall not exceed the sum of $200." *Rule 22.29(1), Iowa Rules of Judicial Administration*.

Nebraska: "(A) The performance of marriage ceremonies by a judge during courthouse hours is permitted if there is no gift, honorarium, or payment of any kind received for such service. Courthouse hours include all hours when the court is open and in session, or the clerk's office is open, including noon/lunch hours. (B) A judge may accept a reasonable fee, honorarium, gratuity, gift, or contribution to perform a marriage ceremony during noncourthouse hours, whether the ceremony is performed in the court or away from the court." *Nebraska code of judicial conduct §5-303.16*.

New York: "Notwithstanding any statute, law or rule to the contrary, no public officer listed in section eleven of the domestic relations law shall be prohibited from accepting any fee or compensation having a value of one hundred dollars or less, whether in the form of money, property, services or entertainment, for the solemnization of a marriage by such public officer at a time and place other than the public officer's normal public place of business, during normal hours of business." *New York General Municipal Law § 805-B*.

Utah: "A judge shall not receive compensation for performing a marriage ceremony during regular court hours. A judge may receive compensation for performing a marriage ceremony during non-court hours." *Utah code of judicial conduct, Rule 3.12(B)*.

Washington: "It is not proper for a judge to accept a fee or gratuity for the solemnization of a marriage during regular court hours." *Washington Advisory Opinion 1990-5*.

Wisconsin: "A judge should refuse to accept a payment, even if unsolicited, for officiating at a marriage at a courthouse, regardless of the hour at which the marriage is performed. . . . The Ethics Code provides no obstacle to a judge's accepting a payment for officiating at a marriage any place other than a courthouse provided the payment does not exceed a reasonable amount that a member of the clergy might receive under like circumstances and provided the payment could not reasonably be expected to influence the judge's exercise of judicial duties." *Wisconsin Government Accountability Board Guideline GAB-1260*.

Wyoming: "[S]upreme court justices, district judges, circuit judges, and full-time magistrates . . . cannot solicit or accept any money or other form of remuneration for performing marriage ceremonies, which are conducted at court facilities or on courthouse property at any time. Furthermore, fees charged for conducting marriage ceremonies may be collected only if the ceremony is performed after 5:00 p.m. on Monday through Friday or anytime on Saturday, Sunday or an official court holiday." *In the Matter of Fees and Rules Regarding Marriage Ceremonies*, Order (Wyoming Supreme Court April 24, 2003).

respective lives and what they were doing at work, but they did not discuss particular cases.

As of February 16, 2011, Judge Drazewski was presiding over approximately eight cases in which Joseph Foley was the attorney for one of the parties. On February 17, the two judges met in the early morning at the courthouse. Judge Foley told Judge Drazewski that her husband was aware of their relationship and had confronted her about it that morning. Two days later, Judge Foley informed Judge Drazewski that Joseph Foley "was requesting that [he] recuse [him] self from [Mr. Foley's] cases" and that "if [he] didn't, [Mr. Foley] was going to notify [Mrs. Drazewski]." On February 22, Judge Drazewski began recusing himself from Mr. Foley's cases. Judge Drazewski reported the recusals to the chief judge; he cited several reasons but did not mention that Mr. Foley had requested he recuse himself after learning of the affair.

[A]s several recent cases demonstrate, failing to say something can also lead to a finding of judicial misconduct.

The court administrator and several other judges testified that they were aware of the affair. They had observed, for example, that the respondent-judges were spending a lot of time together in each other's chambers, frequently behind closed doors. During judges' meetings, Judge Drazewski and Judge Foley were obviously texting each other; they would "press[ ] buttons, look up at the other one, the other one would look at their phone, read it, press buttons and so on." Other judges also noted their flirtatious conduct at a Law Day event sponsored by the bar association. Local attorneys began talking about the relationship between the respondent-judges to the other judges.

The Commission found that a reasonable person might question Judge Drazewski's ability to rule impartially in cases involving Mr. Foley and, therefore, he was required to either disclose the relationship or recuse himself. The Commission found:

> Any objective onlooker with knowledge of the facts could reasonably question whether respondent Drazewski would have been inclined to rule unfavorably toward Mr. Foley due to his ongoing relationship with Mr. Foley's wife. Likewise, an objective onlooker could also suspect that respondent Drazewski would be motivated to rule favorably toward Mr. Foley out of guilt, at respondent Foley's request, or in an attempt to preemptively thwart a later claim of judicial bias. These scenarios, which need not be established here, nonetheless support the fact that respondent Drazewski's impartiality could reasonably be questioned.

The Commission also found significant that Judge Drazewski had misled the chief judge and that the affair became "a matter of public knowledge and "comment among members of the legal community" and an ethical concern for several judges and court staff.

Judge Foley admitted that she knew "for certain" that her husband was trying a case in front of Judge Drazewski and that she was aware that Judge Drazewski was continuing to preside over other matters in which her husband was representing a party. The Commission found:

> Although respondent Foley had knowledge of respondent Drazewski's misconduct and his continuing failure to recuse himself from matters involving Mr. Foley, she did not act. She did not disclose the affair to Mr. Foley or insist that respondents reveal their relationship. She did not urge respondent Drazewski to recuse himself, seek help or advise the Chief Judge of the facts. In sum, she did not take or initiate any disciplinary measures when she had an ethical obligation under Canon 3 to do so.

Failing to communicate

Following a de novo proceeding, a Special Court of Review Appointed by the Texas Supreme Court reprimanded a former judge for, in addition to other misconduct, a pattern of leaving the bench and failing to communicate about when or whether she would return. *In re Mullin*, Opinion (Special Court of Review Appointed by the Texas Supreme Court October 21, 2015) (http://www.scjc.texas.gov/media/34156/In-re-Mullin.pdf).

The judge often "left the bench with matters still to be heard."

> Those remaining in the courtroom could not discern whether to go (as waiting would be futile) or stay (because the judge might return, though no one could say when). If the lawyers stayed, they would have to forgo attending to other matters and clients. If they left to attend to other courthouse business, they would risk not being in the courtroom if the respondent returned to the bench, in which case they would have to reschedule the matters in the respondent's court and return to face the same problem another day.

The judge testified there were times she had to get off the bench to take a break, to speak with another judge or a lawyer in chambers, or to greet jurors, and she once had to leave during a jury trial when her mother had to be rushed to the hospital. The Court noted that "judges are permitted to leave the bench for all of these reasons and many more, as taking breaks is a matter within the judge's discretion."

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However, it explained:

> Though a judge need not disclose why she is leaving the bench or what she will be doing while she is gone, common courtesy requires a judge to let those waiting to be heard know whether and when she anticipates returning. By persistently leaving the bench for extended periods of time without communicating this basic information to those in attendance, the respondent showed a lack of consideration for court-goers and thus failed to act with the courtesy expected of a judicial officer. . . .

With respect to other delays and inefficiencies in the judge's courtroom, the Court noted that, "even if the judge's choices produce delays and inefficiencies, the decision to choose one process or procedure over another generally does not constitute a dereliction of judicial duty that subjects the judge to discipline." However, it also stated:

> Lawyers need to be able to explain the legal process and proceedings to their clients and to advise them of the likely costs and timetables of the proceeding. Time estimates aid planning by helping court-goers to form realistic expectations about what is involved in a particular court appearance and about how long it should take so that they can make arrangements with employers, childcare providers, schools, and the like, and ensure transportation to and from the courthouse. This information was not generally available in the respondent's court.

The Court acknowledged that "trial judges are vested with broad discretion to operate their courtrooms" However, it explained:

> [A] judge's discretion does not extend to compromising the administration of justice with persistent and unwarranted delays and wait times that could be diminished or eliminated with basic communication. . . . When a judge persistently fails to communicate, either directly or through staff (such as a court coordinator), and the failure leads to uncertainty and confusion, the public tends to lose confidence in the administration of justice.

Failing to inquire

The Mississippi Supreme Court suspended a chancellor without pay for 30 days, fined him $2,500, and reprimanded him for his "negligence and inattention" in signing ex parte orders that contributed to the mismanagement of a ward's estate. *Commission on Judicial Performance v. Shoemake*, 2016 Miss. LEXIS 155 (Mississippi 2016).

Chancellor Joe Walker approved a medical negligence settlement that funded a conservatorship for Victoria Newsome and ordered that Marilyn Newsome, Victoria's mother, serve as her conservator. Chancellor Walker further ordered that the chancery court's law clerk, Keely McNulty, serve as both the attorney for the conservator (Marilyn) and as guardian ad litem for Victoria.

One of the bids to build a handicapped-accessible house for Victoria from the proceeds of the conservatorship was submitted by a construction company owned by Chancellor Walker's nephew. Therefore, Chancellor Walker transferred the case for the limited purpose of accepting a bid, and McNulty sent Chancellor Shoemake a petition, a proposed order, and the bids. The petition was not sworn and was not signed by the conservator-petitioner, Marilyn Newsome. Chancellor Shoemake approved the bid submitted by Chancellor Walker's nephew, which was the lowest. The order also transferred the case back to Chancellor Walker.

Over the next several months, Chancellor Shoemake signed four additional orders affecting the Newsome conservatorship without petitions sworn to by McNulty as the lawyer and signed by Marilyn Newsome as the conservator, contrary to chancery court rules. One order disbursed $23,000 over the bid amount to the construction company owned by Chancellor Walker's nephew, allegedly as reimbursement for stolen tools. The petition requesting those funds was unsworn and was signed only by McNulty, not Marilyn Newsome. The contractor's affidavit attached to the petition attributed no fault to the conservator or ward and indicated that the tools might never have been delivered to the job site.

Marilyn Newsome filed a complaint with the Commission on Judicial Performance alleging that Chancellor Walker and Chancellor Shoemake had worked in concert to siphon money from the conservatorship, to allow the poor construction of the home, to protect McNulty, and to cover up their own misconduct.

The Court acknowledged that, "in ex parte chancery court proceedings, it is common, and usually legitimate, for attorneys to confer with chancellors concerning the routine management of the business of wards." However, noting that McNulty's signature alone, without additional notarization, was insufficient support, the Court concluded that

"[C]ommon courtesy requires a judge to let those waiting to be heard know whether and when she anticipates returning."

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Failing to speak up (continued from page 8)

Chancellor Shoemake erred by granting "the relief requested without further investigation into the matters beyond what McNulty presented to him." Citing a 1932 case, the Court noted that, when a ward is involved, it has "emphatically" instructed the chancery court to "take nothing as confessed against [the ward]; . . . make for them every valuable election; . . . rescue them from faithless guardians, designing strangers, and even from unnatural parents, and in general . . . take all necessary steps to conserve and protect the best interest of those wards of the court," noting the chancellor is considered the "ultimate guardian" of a ward. The Court explained:

> For Shoemake to sign orders without further consideration of the facts at hand was a disservice to the ward and conservatorship. That the conservatorship was originally assigned to Walker is beside the point. When Shoemake signed the orders, he affected Victoria's estate. Had Shoemake made a basic inquiry into who was representing the ward's interests, and not just the Conservator's interests, he quickly would have discovered McNulty's dual roles as both Victoria's guardian ad litem and as the attorney for the conservator for the conservatorship.

Walker was indicted in federal court based on his handling of the Newsome conservatorship and eventually resigned and pled guilty to felony obstruction of justice for attempting to influence a witness before the grand jury and attempting to impede the provision of documents by that witness to the grand jury. In 2015, the Mississippi Supreme Court removed him from office. *Commission on Judicial Performance v. Walker*, 172 So. 3d 1165 (Mississippi 2015).

Failing to inform

Based on a stipulation for discipline by consent, the California Commission on Judicial Performance censured a judge for, in addition to other misconduct, failing to make pension payments to his ex-wife for nearly two years and deliberately failing to inform her that he had retired and was receiving his pension. *Inquiry Concerning Trice* (California Commission on Judicial Performance February 4, 2016) (http://cjp.ca.gov/res/docs/censures/Trice_DO_02-04-16.pdf).

Pursuant to a judgment entered in his marital dissolution matter in 1990, the judge, then an attorney, was ordered to pay his ex-wife, Dawna, her interest in his future Air Force retirement and pension benefits "as and when received." On July 2, 2012, the judge's first monthly benefit payment was directly deposited into a savings account at a credit union, and, thereafter, he received a payment monthly.

Instead of paying Dawna her share of the pension benefits each month "as and when received" as required by the dissolution judgment, the judge directed a transfer of a portion of his pension payments from his credit union savings into a separate checking account. The checking account was owned by the judge and his current wife; it was not a trust account, and Dawna was not named as a beneficiary.

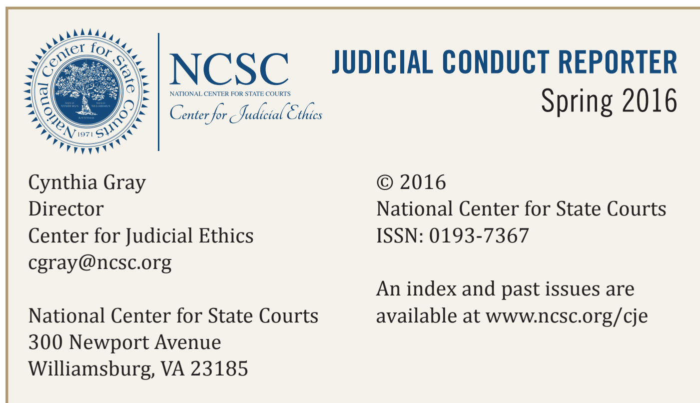
The judge admitted he did not advise Dawna that he had retired from the Air Force and was receiving the pension. The judge stated that he told his adult son and daughter but admitted that he did not want to notify his ex-wife and then have to do the work to get her share to her directly. The judge admitted that he had the means and ability to contact his ex-wife. In addition, in September 2013, when he attended their son's wedding, he interacted with Dawna, but never advised her that he had retired and was receiving the pension benefits.

In April 2013, her former attorney contacted Dawna and asked if she was aware that the judge had retired from the Air Force and if she was receiving her share of his military pension. Dawna retained an attorney and eventually began receiving direct payment of her share of his pension; the judge also paid her the amounts previously due.

The Commission concluded:

> Judge Trice's course of conduct with respect to complying with the provisions of the judgment requiring him to pay his ex-wife the designated portion of his military retirement benefits "as and when received on the following formula" demonstrated a disregard of the command of the judgment and his legal obligation to abide by it. Setting aside a rough approximation based on incomplete information of the ex-wife's share of the benefit in an account in the judge's name, and under his control, did not reflect a good faith effort to comply with the judgment.

The Commission also concluded that the judge's failure to advise his ex-wife that he was retired and receiving the pension benefit, given the terms of the judgment, violated his fiduciary duties to his ex-wife as set forth in the law. ★



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Misrepresentations about incumbency in judicial election campaigns by Cynthia Gray

Whether a judicial candidate may use the title "judge" in a campaign has been addressed numerous times, suggesting incumbency gives an elective edge or at least that judicial candidates perceive such an advantage. The person currently occupying the bench that is the subject of an election can use the title "judge" in campaign literature. *See, e.g., New Mexico Advisory Opinion* 1992-3. Caselaw and advisory opinions are clear, however, that the incumbent is the only candidate who can call himself or herself "judge," at least without clarification, and that other candidates (including former judges and judges in other positions) must make it clear when they are not the incumbent.

For example, the North Dakota advisory committee stated that advertisements for a judicial candidate other than the current office-holder may not use only the candidate's name and the title of the office being sought without some connective word such as "elect" or "for." *North Dakota Advisory Opinion 2000-1.* The opinion noted that the lettering of the connecting word must be big enough to be clearly visible and that a separate written or oral clarification is not adequate. *See also Florida Advisory Opinion 2000-24* (a judicial candidate who has served as a hearing officer and special master may use the phrase "quasi-judicial experience" in campaign literature as long as the phrase specifically refers to the positions held by the candidate); *Illinois Advisory Opinion 1998-3* (a candidate who is not a judge may not use "judge" in advertising in a way that would make people think he already was a judge, for example, by using his picture and his name followed by "Circuit Judge"); *New Mexico Advisory Opinion 1992-3* (the phrase "for judge" should be used after a non-incumbent candidate's name and the "for" should be in the same or almost the same size type as the name and "judge"); *Pennsylvania Informal Advisory Opinion 99-2-9* (a judicial candidate who is not a judge should not use language that suggests she is a judge); *Tennessee Advisory Opinion 1998-3* (a candidate who is not already a circuit judge should not run an advertisement with "circuit judge" under his name). *See Inquiry Concerning Krause*, 141 So.3d 1197 (Florida 2014) (public reprimand and fine for, in addition to other campaign misconduct, failing to include the word "for" between her name and the office she sought); *Ohio code of judicial conduct, Rule 4.3(D)* (a judicial candidate shall not "[u]se the term 'judge' when the judicial candidate is not a judge unless that term appears after or below the name of the judicial candidate and is accompanied by either or both of the following: (1) The words 'elect' or 'vote,' in prominent lettering, before the judicial candidate's name; (2) The word 'for,' in prominent lettering, between the name of the judicial candidate and the term 'judge'").

Former judges

The rule also applies to former judges. The Ohio Supreme Court publicly reprimanded a judge for wearing a name badge identifying herself as a judge while she was a judicial candidate in 2012 even though she was not the incumbent in 2012. *In re Judicial Campaign Complaint Against O'Toole*, 24 N.E.3d 1114 (Ohio 2014). O'Toole had served on the Court of Appeals but had lost her re-election campaign in 2010. Nevertheless, during the 2012 campaign, she wore a name badge identifying herself as "Colleen Mary O'Toole, Judge, 11th District Court of Appeals." She won that election.

The Court found that, although "[m]embers of the public and the legal community may have continued to refer to her as 'judge' as a matter of courtesy in recognition of her past service, . . . there is no question that she was defeated and that her term ended before her judicial campaign in 2012." The Court rejected the judge's argument "that she was still 'a' judge, just not a 'sitting judge,'" noting that Ohio law makes no distinction and that she no longer had a courtroom, a docket, or any judicial authority and, because she was not retired, she was not even eligible to receive referrals of civil cases or to be appointed to sit by assignment.

The Court held that the reference to the then-former judge as "judge" violated the prohibition in the Ohio code of judicial conduct on candidates distributing information concerning the judicial candidate "knowing the information to be false or with a reckless disregard of whether or not it was false." Emphasizing that "the rule applies to specific communications made by judicial candidates under narrowly defined circumstances," the Court concluded:

> This intentional misrepresentation is not protected speech under the First Amendment. By repeatedly calling herself a judge when she was not, O'Toole undermined public confidence in the judiciary as a whole. Such misconduct injures both the public and the judiciary from the moment the lie is uttered, and that injury cannot be undone with corrective speech.

(The Court did hold that a clause "prohibiting the dissemination of information that 'if true,' 'would be deceiving or misleading to a reasonable person' is unconstitutional because it chills the exercise of legitimate First Amendment rights.")

Judicial ethics committees have also directed former judges not to use "judge" in their campaign materials unless

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the reference makes it clear that the candidate is not currently a judge. For example, the Oklahoma committee stated that a former judge may not refer to herself as "judge" in campaign literature unless her prior judicial service was described by date, type of experience, and specific judicial position. *Oklahoma Advisory Opinion 1998-11*. *See also Arkansas Advisory Opinion 2009-4* (a former judge may not use the title "judge" in campaign materials); *Florida Advisory Opinion 2008-10* (a judicial candidate who has retired from the circuit bench may not use the title "judge" in campaign materials but may use the term "former judge" or "retired judge"); *Florida Advisory Opinion 2008-13* (a judicial candidate who is a retired judge on senior status may not use the title "judge" but may use the term "senior judge"); *Louisiana Advisory Opinion 104* (1993) (a judicial candidate who served as a judge for one term but lost a re-election campaign may not use "judge" in campaign advertising); *New Mexico Advisory Opinion 1992-3* (a former judge may use the title "judge" in a judicial campaign if it is clear that the candidate is not currently a judge); *New York Advisory Opinion 2004-16* (a judicial candidate who formerly was a village justice may use the phrase "Former Village Justice" and appear in photographs with that designation in campaign literature); *New York Advisory Opinion 1997-72* (a candidate for town justice who formerly held that position may not state in campaign literature "Vote for Judge (name)"); *Texas Advisory Opinion 195* (1996) (a candidate who resigned from county court to run for district court may not use the title "judge" in campaign advertisements). *See also Ohio code of judicial conduct*, *Rule 4.3(D)* (a judicial candidate shall not "[u]se the term 'former' or 'retired' immediately preceding the term 'judge' unless the term 'former' or 'retired' appears each time the term 'judge' is used and the term 'former' or 'retired' appears in prominent lettering").

> [C]andidates must make it clear when they are not the incumbent.

Judge running for new position

Further, a candidate who is a judge but is running for a different judicial position may use the term "judge" in the campaign only if her current position is clearly identified and distinguished from the office being sought. For example, a commission of judges in Ohio entered an order requiring a county court judge who was running for probate court to cease and desist from using materials, literature, signs, and buttons that implied that he was the incumbent probate judge. *In re Judicial Campaign Complaint Against Emrich*, 665 N.E.2d 1133 (Ohio 1996). The judge's billboard and yard signs stated "Elect Judge Martin W. Emrich to Probate Court" without specifying the particular court that the judge held. The commission held that the use of the title "judge" in campaign materials without any indication that the candidate is a judge in a different court was misleading.

The New York State Commission on Judicial Conduct admonished a district court judge for implying during his campaign for the supreme court that he was the incumbent judge, in addition to other misconduct. *In the Matter of Mullin*, Determination (New York State Commission on Judicial Conduct September 25, 2000) (http://www.cjc.ny.gov/Determinations/M/Mullin.John.N.2000.09.25.DET.pdf). The judge's campaign literature and advertisements had stated "John N. Mullin Supreme Court Justice," and "Paid for by the Committee to Re-Elect John Mullin." *See also Letter of Admonishment to Robertson* (Arkansas Commission on Judicial Discipline & Disability March 20, 2015) (http://www.arkansas.gov/jddc/pdf/2015/jeannette-robertson.pdf) (admonishment of a part-time small claims magistrate for advertisements in her campaign for the court of appeals in which she wore a judge's robe, sat behind a bench, and discussed her "judicial experience"); *Cf., In re Miller*, 759 A.2d 455 (Pennsylvania Court of Judicial Discipline 2000) (a district justice's representations that he had "judicial experience" and similar statements were not misrepresentations because district justices are judges).

Judicial ethics committees have given similar advice. For example, the Ohio committee stated that a magistrate who is running for judge may use the term or title "magistrate" as long as she identifies the court and division on which she serves on each campaign sign or billboard. *Ohio Advisory Opinion 2004-4*. In other campaign materials, the committee advised, as long as the magistrate clearly indicates the court and division once, the name of the court and division do not have to be repeated with every use. *See also Alabama Advisory Opinion 1998-718* (a district judge may use the title "judge" in his campaign for circuit judge as long as he identifies his current judicial position or indicates that he is not the incumbent in the current race); *Georgia Advisory Opinion 211* (1996) (a candidate for probate court judge may not use the designation "judge" in advertising without clearly designating the judicial position he currently holds); *New Mexico Advisory Opinion 2002-1* (a probate court judge

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who is running for the magistrate court should not advertise himself as a judge without identifying the court position that he currently holds); *New Mexico Advisory Opinion 1992-3* (a judge seeking election to a higher court may use her title in campaign advertising if it is clear what court she is currently serving on); *Oklahoma Advisory Opinion 1998-12* (a judicial candidate who is a judge in a different office may refer to herself in campaign literature as "judge" as long as she makes clear her current judicial position and that she is not an incumbent in the office sought); *West Virginia Advisory Opinion* (December 21, 2007) (a family court judge may use the term "judge" when running for circuit court as long as he clearly identifies the position that he currently holds).

Robes and "re-election"

A judge candidate may be pictured in a robe in campaign materials if he or she is the incumbent for the position. *See, e.g., New Mexico Advisory Opinion 1992-3.* Because wearing a robe indicates judicial experience, however, some advisory committees have given the same advice regarding use of a picture of the candidate in robes as regarding the use of "judge:" a judicial candidate who is not and never has been a judge may not be pictured in robes in campaign materials, but a former judge or a judge running for a different office may do so if it is otherwise clear that the candidate is not the incumbent for the office being sought. *New Mexico Advisory Opinion 1992-3* (a judicial candidate who was formerly but is not currently a judge may be pictured in robes in campaign materials if it is clear what judicial position the candidate has held and the dates served); *Ohio Advisory Opinion 2003-8* (a magistrate who is a judicial candidate may appear in a judicial robe in a photograph used in campaign advertising if the photograph accurately identifies the candidate as a magistrate of the court on which she serves). *But see Arkansas Advisory Opinion 2006-4* (a judicial candidate who is a former judge may not be pictured in a judge's robe or seated at a judge's bench in campaign materials); *Nevada Advisory Opinion JE2008-6* (a candidate who has served as an alternate municipal court judge may not wear a judicial robe in campaign materials).

A non-incumbent candidate may not use the term "re-elect" in campaign materials even if the candidate is a former judge or holds a different judicial position. *See Louisiana Advisory Opinion 104* (1993) (a judicial candidate who was elected for one term but was then defeated in a re-election campaign may not use "re-elect" in campaign advertising); *Nevada Advisory Opinion JE2008-6* (a candidate for a district court seat may refer to his service as an alternate municipal judge in campaign materials but may not use "retain," "retention," "re-elect," or "re-election"); *New Mexico Advisory Opinion 1994-2* (a judge who is seeking election to a judicial position other than the one he currently holds may not use the word "re-elect" in campaign literature unless the literature clearly identifies his present position and the new office he is seeking).

[A] non-incumbent candidate may not use the term "re-elect" in campaign materials even if the candidate is a former judge or holds a different judicial position.

Finally, a judge who was appointed to the bench may not use the term "re-elect" in a subsequent campaign. For example, the Florida committee advised that a judge who is in a contested election immediately after being appointed by the governor may not use the word "re-elect" in campaign advertisements because that use "could mislead others into believing that the candidate was previously elected to this position thereby giving a false impression." *Florida Advisory Opinion 2002-7*. However, the committee stated that the candidate could use the term "retain." *See also New Mexico Advisory Opinion 1992-3* (only incumbents who have been elected to the office, not those who were appointed, may use the term "re-elect"); *New York Advisory Opinion 1997-18* (a judge who had been defeated for re-election and was then appointed to fill a one-year term in the same court may not use the word "re-elect" in her campaign for election to the same office). *See also Ohio code of judicial conduct, Rule 4.3(D),* (a judicial candidate shall not "[u]se the term "re-elect" . . . (1) When the judicial candidate has never been elected at a general or special election to the office for which he or she is a judicial candidate; [or] (2) When the judicial candidate is not the current occupant of the office for which he or she is a judicial candidate"). ★

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