To secure and promote an independent and qualified judiciary and a fair system of justice

JUDICIAL CONDUCT REPORTER

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State Judicial Discipline in 2010

Between 1980 and the end of 2009, approximately 371 state judges had been removed from office as a result of judicial discipline proceedings. In 2010, seven judges or former judges were removed. In addition, pursuant to agreements with judicial conduct commissions that were made public, 18 judges resigned or retired in lieu of discipline and agreed not to serve in judicial office again. One former judge was barred from serving in judicial office.

100 additional judges (or former judges in approximately six cases) received other public sanctions in 2010. (Two judges are counted twice because they were disciplined twice). In approximately half of those cases, the discipline was imposed pursuant to the consent of the judge.

Seventeen judge were suspended without pay, ranging from five days to one year, two of which were stayed in whole or in part with conditions. Nine of those suspensions included a censure, reprimand, fine, or probation.

In addition, 17 judges were publicly censured. One of the censures was "severe," one censured former judge also agreed not to serve again, one censure was based on the judge's agreement to resign, and one censure also barred a former judge from serving in judicial office again.

Conduct commissions publicly reprimanded 42 judges (one reprimand also included a $5,000 fine, and one included a $6,000 fine), publicly admonished 19 judges, and publicly warned one judge. One judge was ordered to pay a $2,400 civil penalty. Three former judges were sanctioned

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Top Judicial Ethics Stories of 2010 *by Cynthia Gray*

Impeachment of Judge Thomas Porteous

For only the eighth time in the country's history (*see* www.fjc.gov/history/home.nsf/page/judges_impeachments.html), a federal judge was removed from office when, on December 8, 2010, the Senate voted that Thomas Porteous, of the Eastern District of Louisiana, was guilty on all four articles of impeachment filed by the House of Representatives. In June 2008, the U.S. Judicial Conference had certified to the House that impeachment "may be warranted" based on findings of the Judicial Council of the 5th Circuit.

Article I related to the judge's denial of a motion to recuse himself from a case despite his corrupt financial relationship with a law firm representing the plaintiff and alleged that he made intentionally misleading statements minimizing the relationship that deprived the 5th Circuit of critical information for its review of his denial of the motion. After the bench trial and while he had the case under advisement, Porteous accepted thousands of dollars in cash from members of the firm. The Senate voted 96-0 to convict Porteous on Article I.

In contrast, the Senate vote was 69-27 on allegations that, while on the state bench, Porteous solicited and accepted things of value for his personal benefit from bail bondsman while taking official actions that benefitted them. Article II was based on information uncovered by the FBI in its "Operation Wrinkled Robe" investigation of Louisiana's 24th Judicial District Court, on which Porteous had served from 1984 until his appointment to the federal bench in 1994.

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Recent Advisory Opinions

As long as the calendars are not established based solely on the needs of the prosecuting attorney or law enforcement officials, a court may establish special calendars that recognize the need to use public resources efficiently, for example, calendars for cases in which either party is represented by counsel or has requested discovery or in which the defendant has requested the presence of the law enforcement officer. A court should develop a protocol for automatically moving cases to a special calendar with neutral criteria that do not favor or appear to favor one party and should apply the criteria to all parties in the same manner. *Washington Opinion 10-4.*

An attorney should not be allowed to display in the court clerk's office for-profit educational materials for pro se litigants in family law matters. *Michigan Opinion JI-135* (2010).

A judge may not allow juveniles to perform their community service hours by participating in a jogging program with him. *Florida Opinion 2010-37.*

A judge may not refer parties to a specific mediator even if the parties ask for suggestions but may refer parties to the roster of mediators maintained by the administrative office of the courts. *Utah Informal Opinion 10-2.*

A judge may not use his official judicial letterhead to invite individuals to attend a Red Mass. *New Mexico Opinion 10-9.*

A judge may use court resources, including staff, equipment, and letterhead, to send a letter to jurors thanking them for their service and asking for input on improving the experience of jury service. *Nevada Opinion JE10-015.*

A judge may answer a survey on "Justices' Perspectives on the Changes in Their Courts" and participate in a follow-up interview. *New York Opinion 10-131.*

A judge may not enter an order requiring a records custodian to produce medical records without the consent of the opposing party or a motion, notice to the opposing party, and an opportunity to be heard. *North Carolina Opinion 2010-8.*

A judge who is retiring prior to the expiration of her term may serve on a committee that will evaluate and recommend to the appointing authority a list of candidates to replace her. *Nevada Opinion JE10-013.*

A judge who was listed as a reference by an attorney who has applied for a judicial position may supply information about the applicant when contacted by the judicial selection commission. *Connecticut Informal Opinion 2011-1.*

A judge may not represent his spouse in negotiations with an insurance company. *Arizona Opinion 10-6*

A judge may serve as an advisor for a bar association conference, moderate a panel, and attend a reception even if the bar association will raise funds from sponsors as long as the judge's name will not be used in connection with fund-raising or as an inducement to potential sponsors. *Massachusetts Opinion 2011-1.*

A judge may not accept an award the Junior League has advertised it will bestow on her at a fund-raising event nor may her spouse or someone else accept it on her behalf. *Florida Opinion 2011-3.*

A judge may not lend her name to a campaign to solicit existing members of a law-related organization to become sustaining members. *Connecticut Informal Opinion 2010-31.*

A judge may not participate in the organization of a blood drive in honor of an attorney who was an accident victim or solicit people to participate in the drive. *Connecticut Informal Opinion 2010-34.*

A judge may give a speech to the League of Women Voters on diversity in the judiciary. *South Carolina Opinion 11-2010.*

A judge may not sit on the board of a charitable foundation whose principal source of funds is the owner of a for-profit rehabilitation program to which the judge routinely directs misdemeanants. *Florida Opinion 2010-38.*

A judge may with a guest attend at no cost a gubernatorial inaugural ball and dinner that will raise funds for a civic organization. *Connecticut Informal Opinion 2010-36.*

The Center for Judicial Ethics has links to the websites of judicial ethics advisory committees at www.ajs.org/ethics/.

State Judicial Discipline in 2010 *(continued from page 1)*

in attorney discipline proceedings for conduct while they were judges.

Removals

The Mississippi Supreme Court removed a former judge following his guilty plea to charges of obstructing and influencing a federal corruption investigation and grand jury proceeding. *Commission on Judicial Performance v. DeLaughter*, 29 So. 3d 750 (Mississippi 2010).

Several of the removal cases related to alternative sentencing programs. For example, the South Carolina Supreme Court removed a judge who had operated a sentencing program that was not approved by the solicitor's office as required by a supreme court order—and shared a hotel suite during a judges' meeting with a 20-year-old female defendant enrolled in the program. *In the Matter of Evans*, 702 S.E.2d 557 (South Carolina 2010). The judge denied any inappropriate sexual conduct but admitted an appearance of impropriety and consented to any sanction authorized by law.

Relationship with probation program

Accepting the recommendation of the Judicial Discipline and Disability Commission, the Arkansas Supreme Court removed a judge for his relationship with probationers and his involvement with a non-profit corporation that ran a probation program. *Judicial Discipline and Disability Commission v. Proctor*, 2010 WL 271343 (Arkansas Supreme Court January 25, 2010).

The Court upheld the Commission's findings that the judge failed to avoid the appearance of impropriety when he sent money to a convicted robber whom he had sentenced; allowed a defendant to live at his residence for over a week and on some weekends; gave rides to eight defendants; collected money from defendants in open court; and ate lunch with defendants and visited with them in chambers and at other meetings. Rejecting the judge's argument that he had pure motives that justified his extra-judicial contacts with probationers, the Court concluded:

> Canon 4A(3)'s plain language requires that a judge conduct his extrajudicial activities so that they do not interfere with the proper performance of his judicial duties. Judge Proctor's continuous, inappropriate conduct with probationers, both inside and outside of the courtroom demonstrates that Judge Proctor puts his personal beliefs above his judicial duties.

The judge started the Cycle Breakers program as part of court probation and subsequently created a non-profit corporation to run the program. The judge testified that 99% of the people in the program were there under his authority. The Court upheld the Commission's findings that the judge lent the prestige of judicial office to advance the private interests of Cycle Breakers, Inc., that his involvement with the organization cast reasonable doubt on his capacity to act impartially, and that he was, at a minimum, a non-legal advisor for an organization engaged in proceedings that would ordinarily come before him.

The judge submitted a "profit & loss" statement for his court to a bank in support of a mortgage application by Cycle Breakers. The judge was involved in Cycle Breakers activities such as counseling, teaching classes, and conducting meetings for probationers. He had computer programs on his official computer for its finances, its bank statements were mailed to his office, and he had access to its blank checks. Its tax returns listed the judge as an officer, director, trustee, and key employee and used his office as the organization's address. Its web-page was identified as the court's web-site. The judge typed board meeting minutes; met with community and church leaders on behalf of the program; recruited volunteers, mentors, and speakers for Cycle Breakers; hired security and catering; paid its bills; and helped to clean the home it ran.

The judge imposed "civil fees" on probationers who had completed their criminal probation, for example, a $100 fee for missing a meeting, drug testing fees, and monitoring fees. The fees were paid to Cycle Breakers, and the judge enforced those fees with jail or the threat of jail. Noting that a trial court may only impose a sentence authorized by statute, the Court concluded that the judge ignored and bypassed sentencing laws by creating civil probation.

Non-lawyer judge

Agreeing with the recommendation of the Judicial Qualifications Commission, the Georgia Supreme Court removed a judge who (1) allowed defendants to "buy out" the community service portions of their sentences and, instead of turning over the money to the county, placed the proceeds into a bank account he controlled; (2) routinely told criminal defendants they had the burden of proving their innocence; (3) insulted parties in court; (4) routinely initiated and considered ex parte communications; (5) disposed of cases in which the defendants were charged with crimes outside the jurisdiction of his court; (6) used the

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prestige of his office to improperly influence a litigant in a matter not properly before his court; (7) issued orders prohibiting the sheriff from awarding "good time" in accordance with a statute; and (8) allowed unqualified persons to serve as court interpreters. *Inquiry Concerning Fowler*, 696 S.E.2d 644 (Georgia 2010). The Court also ordered that the judge be barred from holding judicial office in Georgia.

The judge is not a lawyer, and he argued that his misconduct stemmed "from unintentional mistakes or a lack of legal education." Finding the judge "is simply unwilling to live up to his legal and ethical responsibilities as a judge," the Court held:

> His ignorance of the law is inexcusable, and his abuse of his judicial office unacceptable. Rather than showing any level of competence or fitness to continue to hold his judicial office, Judge Fowler instead has consistently ... "demonstrated judicial incompetence, ... disregarded the law as applied to his own conduct, [taken] actions [that have] eroded public trust and confidence in the judiciary ... engaged in behavior that is inappropriate for a sitting judge, and ... shown a lack of the requisite judicial decorum and temperament."

The Court concluded, "we cannot expect that members of the public will respect the law and remain confident in our judiciary while judges who do not respect and follow the law themselves remain on the bench."

Denial of due process, comments about T-shirt

The New York State Commission on Judicial Conduct determined that removal was the appropriate sanction for a former judge who had deprived defendants in six support cases of their liberty without due process; failed to afford a defendant in an order of protection case the right to counsel; and made sexual comments to a litigant in a treatment court proceeding. *In the Matter of Abramson*, Determination (October 26, 2010) (www.cjc.ny.gov/Determinations/A/Abramson.pdf). The judge had resigned.

The judge stipulated that he failed to afford fundamental rights to six defendants he had summarily ordered incarcerated for non-payment of child support. For example, he failed to advise four defendants of the right to counsel and/or to effectuate that right; three of the defendants served six months or more in jail on their unlawful sentences. Four of the cases occurred only a few months after the Commission sent the judge a letter of dismissal and caution about his failure to afford the right to counsel in two earlier matters.

In a neglect proceeding, Wendy's child had been returned to her conditioned on her participation in treatment court. During a session of treatment court, the judge described an innocuous caricature of a turtle on a T-shirt worn by Wendy as "a penis with a smile on it." After Wendy began blushing and giggling, the judge stated:

> Did you ever see a sad turtle? They're happy to be like – because that turtle, that's a turtle on Viagra. It's erect; it's smiling. And you never see a sad Mrs. Turtle, because they're fully satisfied. . . . But she's going to puke she's laughing so hard. This is like the highlight of my day. . . . She's got the giggles. I'm bringing down the house. It feels good. You can't look at your shirt without feeling aroused.

Afterwards, the treatment court team told the judge that his comments were not a good idea, and he agreed. At an appearance five months later, however, when Wendy wore the same T-shirt, the judge again described the image as "phallic" and "pornographic."

The Commission emphasized that the image on the shirt was "benign and non-sexual." Rejecting the judge's argument that the relative informality in treatment court justified his attempt to put Wendy at ease, the Commission stated that nothing in the special nature of the court excused the judge's gratuitous, ribald, and joking comments to Wendy, which it found were "a significant and unacceptable departure from the proper role of a judge who had been, and would continue to be, the final arbiter of her case."

Softball

Based on the recommendation of the Commission on Judicial Qualifications, the Nebraska Supreme Court removed a judge for interfering in a criminal case against a softball coach and in a juvenile case involving a softball player. *In re Florom*, 784 N.W.2d 897 (Nebraska 2010). The judge admitted his conduct was improper but argued removal was unwarranted. Finding the judge's "course of conduct was clearly, repeatedly contrary to the rules of judicial conduct," the Court concluded that "suspension from office would be insufficient to correct the damage wrought by the respondent's behavior . . . ."

In February 2008, Sharon Kramer, a school teacher and softball coach, asked the judge to be an assistant coach for the youth softball team on which the judge's daughter played. He accepted.

Subsequently, after hearing a rumor that Kramer was about to be arrested, the judge approached the county attorney, Rebecca Harling, who explained that the charge involved theft from the high school booster club. The judge

asked whether, if Kramer paid restitution, the victim would be satisfied. Harling replied that Kramer's recordkeeping was so poor the amount of restitution was not known.

On another occasion, Kramer's attorney, Russ Jones, and a prosecutor (not Harling) were discussing the case between themselves while in the judge's office on other business. Interjecting, the judge asked whether jail time was being sought and whether the case would be dismissed if restitution was paid, saying he would pay the restitution and directing Jones to tell Harling that he would put Kramer on "double secret probation." Jones believed the judge was joking, but conveyed the message. The judge later admitted there had been "no good reason" for him to interrupt the attorneys' conversation. The Court stated that the judge's "claim that he was just 'joking' is not an excuse."

After hearing a rumor that Jim Paloucek, a member of the school board, was planning to take official action against Kramer as a result of her conviction, the judge asked Jones, a close friend of Paloucek, to pass a message that Paloucek would be "making an enemy" he did not want to make if he took action against Kramer. The judge admitted that he was the "enemy," that he had not been joking, and that he had been angry.

After hearing about the threat, Paloucek and his law partners called the judge. The judge confirmed his threat, although another judge had counseled him that his actions could be construed as trying to influence a public official. The judge told Paloucek to ask him to recuse when the firm's cases were assigned him.

The judge wrote a letter on his judicial letterhead to help Kramer keep her job, commending her contrition and acceptance of responsibility. The judge said that he had intended the letter to be confidential to Kramer, her attorney, and her union representative and that the letter had mistakenly been printed on judicial letterhead because his word processor defaulted to that stationery. Several months later, the judge wrote another letter on behalf of Kramer, this time to the Nebraska Professional Practices Commission regarding her teaching license. That letter was on personal letterhead but did refer to the judge's judicial office.

In October 2007, the judge placed L.W., a juvenile, on probation. L.W. was a player on the softball team for which the judge became the assistant coach in February 2008. When a motion to revoke L.W.'s probation was filed in March 2008, the judge recused himself. Nonetheless, when L.W.'s caseworker appeared on another matter, the judge called her into his chambers and, telling her he was speaking to her "as a softball coach and not as a judge," explained his interest in L.W.'s case, talked about her talent as a player, and asked about placement recommendations.

The judge spoke to the county attorney several times about L.W.'s case while it was pending, asking her to "'take care of [his] shortstop,'" although the judge later said he had just been teasing. He also asked the judge handling the case, one morning, over coffee, whether L.W.'s case had proceeded to disposition, although the other judge had advised Judge Florom that he would not discuss the case.

Misrepresentations

Based on the recommendation of the Judicial Standards Commission, the North Carolina Supreme Court removed a former judge for remaining on the board of directors of a corporation and making intentional misrepresentations during the investigation to mislead the Commission. *In re Belk*, 691 S.E.2d 685 (North Carolina 2010). The Court stated that the judge's resignation did not deprive it of jurisdiction or limit the sanctions available, noting removal would disqualify Belk from holding judicial office and make him ineligible for retirement benefits.

At an education program for new judges he attended after being elected in November 2008, the judge asked whether he could continue to serve as a member of various corporate boards of directors. He was advised that Canon 5C(2) prohibited a judge from serving as an officer, manager, or director of any business. In a subsequent letter to the Commission, the judge argued that his service on the board of Sonic Automotive, Inc. would not conflict with his judicial responsibilities. He had been a member of the board since 1998 and received approximately $143,500 a year in compensation as a board member. In response, the Commission chair informed the judge that the Commission had no authority to waive any provision of the code. The Court denied the judge's request to amend Canon 5C(2).

The judge told Commission investigators that he was continuing to serve as a director because Sonic Automotive provided insurance that covered a pre-existing medical condition. The general counsel for the corporation told the Commission that the corporation did not provide health insurance to the judge.

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The Senate voted 88-8 on Article III, which alleged that, while a federal judge, Porteous knowingly and intentionally made material false statements under penalty of perjury related to his personal bankruptcy filing, using a false name and address to conceal his identity as the debtor, concealing assets, preferential payments to certain creditors, and gambling losses, and incurring new debts in violation of the bankruptcy court's order. Finally, the vote was 90-6 on Article IV, which alleged that Porteous made material false statements about his past to obtain the office of U.S. District Judge.

Disciplinary proceedings against Judge Sharon Keller

To avoid the firestorm of criticism she has faced for three years, which culminated in 2010, Presiding Judge Sharon Keller would not have had to keep the Texas Court of Criminal Appeals clerk's office open late on September 25, 2007, to accept a pleading on behalf a death row inmate scheduled to be executed that day — all she would have had to do is follow the court's protocol and refer the question to the judge assigned to that execution. Instead, when court counsel called Judge Keller at home around 4:45 and asked whether the clerk's office could stay open past 5:00 because Michael Richard's counsel was not ready to file, Judge Keller said something to the effect of, "We close at 5:00 p.m.." At approximately 4:59, Judge Keller called and asked if anything had been filed. In one of the calls, Judge Keller asked counsel why the clerk's staff should remain open after hours for lawyers who cannot get their work done in time.

A court clerk called the Texas Defender Service, Richard's counsel, and said he had been told to say "we close at 5:00 p.m." Because no pleadings were filed in the state court, the U.S. Supreme Court dismissed Richard's request for a stay at 8:01 p.m., and he was executed at 8:23 p.m.

Court staff were not aware that execution-day procedures required that all communications regarding a scheduled execution must be referred first to the judge designated to be in charge of that execution. The procedures were unwritten until November 2007, but it was undisputed that the oral policy in effect on September 25 was identical to the written procedures eventually created.

Judge Cheryl Johnson was the judge assigned to the Richard execution and has said that she would have accepted a late filing if the calls had been referred to her. On September 25, 2007, Judge Johnson and other members of the court were waiting at the courthouse after 5:00, anticipating a filing on behalf of Richard in light of the U.S. Supreme Court grant of *certiorari* that morning in *Baze v. Rees*, a Kentucky case challenging the constitutionality of the three-drug protocol for executions that is also used in Texas. Judge Keller had gone home at 3:45 p.m. to meet a repairman. "I thought there was a dangerous situation with my oven," she reportedly told a newspaper.

At the end of a conference the morning after Richard's execution, the other judges on the court, who were not aware of the communications the day before, discussed their surprise that Richard's lawyers had not filed anything and expressed their belief that the court should allow a late filing if someone called and said they wanted to file something, but could not get it there before 5:00 p.m. Judge Keller was present but did not disclose her communications with court counsel the night before or the call from Richard's counsel requesting to file after 5:00 p.m. Richard was the only person to be executed in the U.S. between the grant of *certiorari* in *Baze* and the decision upholding the constitutionality of the three-drug protocol in April 2008.

Following an investigation, the State Commission on Judicial Conduct filed a notice of formal proceedings against Judge Keller. After conducting a hearing, a special master concluded that Judge Keller's conduct, although "not exemplary," was not "so egregious that she should be removed from office," finding that the Texas Defender Service, which blamed computer problems for its inability to file in time, "bears the bulk of fault . . . ."

Reviewing the special master's findings, however, the Commission found that Judge Keller interfered with Richard's access to court and right to a hearing, failed to comply with the execution day procedures, and failed to assure that staff subject to her direction and control complied with those procedures. Based on those findings, it issued a public warning. *Inquiry Concerning Keller*, Order of Public Warning (July 16, 2010) (www.scjc.state.tx.us/pdf/skeller/CommissionOrder.pdf).

Judge Keller appealed, and the Texas Supreme Court appointed a Special Court of Review, as required by the state constitution. The Special Court dismissed the charges against Judge Keller on a technicality. It held that the Commission could impose a public warning only before filing formal charges and that, because a formal hearing had been held, the Commission could only dismiss the charges or censure or remove Judge Keller. It found that the rule relied on by the Commission to issue the public warning (a rule adopted by the Texas Supreme Court) was inconsistent with constitutional and statutory provisions. *In re Keller*, Opinion (October 11,

2010) (www.supreme.courts.state.tx.us/advisories/KellerFinalOpinion.pdf).

Judge Keller has been quoted in newspapers as believing she has been vindicated by the decision. The Special Court, however, twice wrote in its decision that it was not expressing an opinion on the merits of the accusations.

Pennsylvania "Cash for Kids" scandal

In May 2010, the Pennsylvania Interbranch Commission on Juvenile Justice released a report on the Luzerne County "Cash for Kids" scandal, first exposed in January 2009 when the U.S. Attorney filed an information charging Judge Mark Ciavarella and Judge Michael Conahan with taking $2.67 million in pay-offs for helping a private juvenile detention center earn millions from county contracts (http://www.aopc.org/Links/Public/InterbranchCommissionJuvenileJustice.htm). The Commission had four members appointed by the Chief Justice, three by the Governor, and four by leaders of the House and Senate. It held 11 days of public hearings and took testimony from more than 60 witnesses.

Conahan, in his capacity as president judge, had signed a placement guarantee agreement with PA Child Care and taken official action to remove funding for the county-run juvenile detention facility. As juvenile court judge, Ciavarella ordered out-of-home placements for juveniles ruled delinquent at rates far above the state-wide average, more than double that average in 2007, for example. Similarly, wthout the judge complying with court rules, juveniles waived counsel before Ciavarella at much higher rates than elsewhere in the state, 50.2% in Ciavarella's courtroom in 2003, for example, when the state-wide average was 7.9%. Adopting the recommendations of a special master, the Pennsylvania Supreme Court vacated the sentences for all juveniles (approximately 4,000) who appeared before Ciavarella between January 1, 2003, and May 31, 2008, and expunged their records.

Attributing the problem in the Luzerne County juvenile justice system, not just to the alleged criminality of the two judges, but to "an abuse of power condoned by the community" for over a decade, the Interbranch Commission concluded there had been "a collapse of the rule of law."

> Whether because of intimidation, incompetence, inexperience, indifference or corruption, every source of check and balance on this abuse of power failed to one degree or another, some more than others: The Board of Judges, prosecutors and defense attorneys, probation officers, police, school officials, the Judicial Conduct Board, the Disciplinary Board, community leadership, the electoral process, court administration, county government, the procedural protections afforded by statute and rules of court, and appellate review.

The Commission made over 40 recommendations regarding judicial ethics and discipline; attorney discipline; continuing education; crime victims; juvenile prosecutors, defense lawyers, and probation officers; court hiring practices; county commissioners; and the department of education, as well as practices and procedures in juvenile court. The Commission considered, but ultimately did not endorse, proposals to make juvenile delinquency proceedings presumptively open and to create an office of ombudsman for the juvenile justice system.

The Commission recommended that the Pennsylvania Supreme Court examine the code of judicial conduct, which had been adopted in 1973. The code had been a focal point in the testimony, the Commission noted, and it was "glaringly apparent . . . that the aspirational goals and mandatory prohibitions contained in the code were not a deterrent . . . ." According to news reports, the Court has created a code review committee, which had its first meeting in November.

The Interbranch Commission report criticized the Judicial Conduct Board, particularly its failure to pursue an anonymous complaint filed against Conahan in 2006, which fell through cracks in the Board's procedures. The Commission concluded that the Board "lacks sufficient oversight to assure that it is fulfilling its constitutional duties" and that the existing confidentiality provisions "prohibit any meaningful oversight and accountability."

The Commission proposed the creation of a task force to assist the Board "review its internal operating procedures to

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assure that the shortcomings evident in the Luzerne County corruption scandal are eradicated," particularly the role of chief counsel in investigating, deferring, referring, or resolving complaints. The Commission also recommended creation of a group to determine what constitutional amendments are necessary, regarding, for example, confidentiality, review of dismissal of complaints, and the creation of an outside administrator to audit the Board's performance.

Even before the Interbranch Commission report, the Board had revised its internal operating procedures. Further, in September 2010, the Board announced that the American Bar Association Standing Committee on Professional Discipline will lead a review of the Board's practices and make recommendations.

Reform should continue in 2011. On February 18, 2011, a federal jury found Ciavarella guilty on 12 counts of racketeering, racketeering conspiracy, mail fraud, money laundering conspiracy, conspiracy to defraud the U.S., and filing false tax returns. He was found not guilty of bribery, wire fraud, extortion, and money laundering. The defense said it will appeal. Conahan agreed to plead guilty to a charge of racketeering in April 2010.

Judicial demeanor

The requirement in the code of judicial conduct that a judge be "patient, dignified, and courteous" reflects the consensus of thousands of judges that respectful judicial demeanor is the most effective way to run a courtroom and the surest way to engender respect for judicial decisions. Several judicial discipline cases in 2010 involved judges who lost sight of the importance of a dignified judge in the administration of justice and tried to play other roles in the courtroom.

A judge in Washington, for example, conceived of herself as a "vice principal," and from a "desire to too-rigidly control proceedings in her courtroom," derided the intelligence of pro se litigants who appeared before her and rudely and impatiently interrupted them. *In the Matter of Eiler*, 236 P.3d 873 (Washington 2010). The Washington Supreme Court rejected the judge's free speech argument, holding that "judges do not have a [First Amendment] right to use rude, demeaning, and condescending speech toward litigants. . . . Such limitations are certainly narrowly tailored to achieve the compelling interest of preserving respect for, and the integrity of, the judicial system." The Court suspended the judge for five days without pay in August; voters refused to re-elect her in November.

The California Commission on Judicial Performance censured a judge who "failed to appreciate that 'a courtroom is not the Improv and the presider's role model is not Judge Judy.'" The judge allowed herself to be videotaped while conducting proceedings in her courtroom to promote herself for a role in a potential television program and, during filming and on other dates, made demeaning and discourteous remarks regarding litigants, court staff, attorneys, and others. *Inquiry Concerning Salcido* (November 10, 2010) (http://cjp.ca.gov./). The judge consented to the censure and agreed to resign.

The Commission acknowledged "that each judge has his or her own style, and that 'a modest injection of humor at the appropriate time' can have a place in the courtroom," but concluded, "judges are expected to administer justice and resolve serious issues, not to provide entertainment." The Commission found that the 39 instances of misconduct the judge admitted demonstrate "a temperament ill-suited for judicial office."

> While the cameras were rolling, the proceedings took on the atmosphere of a game show. Defendants were asked if they wanted to use "a life line," and "which door" they wanted to walk out. Another defendant was told "we're doing double or nothing now," and asked if he was prepared to "double down." The judge repeatedly solicited audience participation and even polled the audience: "Can I get a woo, woo?"; "Does he need to call the lifeline?"; asking the audience to repeat the slogan, "Do or do not, there is no try."; "What should he do? Take the deal, take the deal, take the deal." In response, the audience laughed and "wooed" without admonishment from the court.
>
> It is self-evident that crude comments and sexually suggestive jokes from a judge have no place in a courtroom. Yet, Judge Salcido made manifestly inappropriate remarks of a lewd nature in an open courtroom as the proceedings were being filmed. For instance, she ordered a defendant charged with exposing himself in public to stay away from a certain location because "they'll recognize you in more ways than one." When a defendant smiled, she remarked to him that "they might like your smile in jail." In a particularly offensive instance, she told a defendant that he would be "screwed" if he violated his probation and "we don't offer Vaseline for that."
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> * * *
>
> . . . Members of the public observing the proceedings on the day the producer was filming could not help but wonder if they were in a courtroom or on the set of a reality television program. On other occasions, her courtroom took on a comedy show atmosphere. She told the courtroom audience that they had no sense of humor, stating: "God, you guys are dead, you guys are like, dead. I'm like, God, I need a warm up, I need a warm up comedian before I come out. Okay,

> Yes, sir. Are you ready? You're volunteering? … We're getting fun back in the courthouse. Fun, courthouse, they don't have to be separate."

Caperton fallout

The flood of disqualification motions predicted by the dissenting justices does not appear to have materialized in the 18 months since the U.S. Supreme Court held, in *Caperton v. A. T. Massey Coal Co.* 729 S.Ct. 2252 (2009), that due process required the disqualification of a judge if there was "serious risk of actual bias—based on objective and reasonable perceptions—[because] a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." Disqualification arguments in general and those based on campaign contributions in particular were a common part of a lawyer's arsenal even before *Caperton*, and any uptick is more likely attributable to the increase in spending and vitriol in judicial campaigns than to the decision. *Caperton* only created a federal due process failsafe in "exceptional," "extraordinary," and "extreme" cases where a judge does not acknowledge or recognize that the state non-constitutional standard disqualifying a judge when his or her impartiality might reasonably be questioned has been met.

The supreme courts in Michigan, Missouri, Iowa, Oklahoma, and Washington have adopted rules designed to prevent future *Capertons*. For example, the rule in the Washington code provides:

> A judge may disqualify himself or herself if the judge learns by means of a timely motion by a party that an adverse party has provided financial support for any of the judge's judicial election campaigns within the last six years in an amount that causes the judge to conclude that his or her impartiality might reasonably be questioned. In making this determination the judge should consider: (1) the total amount of financial support provided by the party relative to the total amount of the financial support for the judge's election, (2) the timing between the financial support and the pendency of the matter, and (3) any additional circumstances pertaining to disqualification.

In contrast, the Wisconsin Supreme Court adopted new rules that appear to ignore the lessons of *Caperton*. Those rules provide that "a judge shall not be required to recuse himself or herself in a proceeding based solely on" "the judge's campaign committee's receipt of a lawful campaign contribution, including a campaign contribution from an individual or entity involved in the proceeding," "the sponsorship of an independent expenditure or issue advocacy communication . . . by an individual or entity involved in the proceeding," an endorsement, or "a donation to an organization that sponsors an independent communication by an individual or entity involved in the proceeding."

The Center for Judicial Ethics keeps track of states' rules requiring disqualification based on campaign contributions at www.ajs.org/ethics/eth_disqualification.asp.

The argument that disqualification based on campaign conduct violates the First Amendment was rejected by the U.S. Court of Appeals for the 7th Circuit in *Bauer v. Shepard*, 620 F.3d 704 (7th Circuit 2010), *petition for certiorari filed.*

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The Court held that "the recusal clause does not present a constitutional issue at all," because it "applies to a judge in his role as public employee, not his role as candidate."

Free speech

In 2010, the U.S. Courts of Appeals for the 6th and 7th Circuits issued decisions in three of the many challenges to restrictions on campaign and political conduct by judges and judicial candidates filed in the wake of the 2002 U.S. Supreme Court decision that judicial candidates had a First Amendment right to announce their views on disputed legal and political issues in *Republican Party of Minnesota v. White*. For more information, *see* www.ajs.org/ethics/pdfs/CaselawafterWhite.pdf. The post-*White* caselaw will continue to evolve in 2011; for example, the 8th Circuit sitting en banc heard re-argument in January on challenges to several restrictions in Minnesota. To keep up with developments, follow AJS on Twitter at http://twitter.com/ajs_org.

The First Amendment was also an issue in state disciplinary proceedings alleging that then-judge Michael Gableman approved an advertisement that contained false statements about then-justice Louis Butler in a 2008 campaign for a seat on the Wisconsin Supreme Court. Gableman won the election. The Judicial Commission discontinued disciplinary proceedings against him after the Court split three/three (with Justice Gableman recusing) on whether the complaint against him should be dismissed. *In the Matter of Gableman*, 784 N.W.2d 605 & 784 N.W.2d 631 (Wisconsin 2010). (There are two citations because the three justices who voted to dismiss the complaint did not, according to the other justices, wish "their separate writing to have the same public domain citation as our writing — a complete break from our usual practice.")

The full narration of the advertisement at issue was:

> Unbelievable. Shadowy special interests supporting Louis Butler are attacking Judge Michael Gableman. It's not true!
>
> Judge, District Attorney, Michael Gableman has committed his life to locking up criminals to keep families safe-putting child molesters behind bars for over 100 years.
>
> Louis Butler worked to put criminals on the street.
>
> Like Reuben Lee Mitchell, who raped an 11-year-old girl with learning disabilities. Butler found a loophole. Mitchell went on to molest another child.
>
> Can Wisconsin families feel safe with Louis Butler on the Supreme Court?

The advertisement referred to Butler's representation of Mitchell when he was an appellate state public defender in an appeal from a conviction for sexual assault of a child. Gableman knew that, although the Wisconsin Supreme Court agreed with Butler's argument that the trial court had erroneously admitted evidence against Mitchell, the Court had declared the error harmless and that Mitchell remained in prison until released according to the terms of his sentence for the charge on which Butler had represented him. Gableman personally reviewed and approved the advertisement before its release.

The Commission charged Justice Gableman with violating the prohibition in the Wisconsin code of judicial conduct that provided: "A candidate for a judicial office shall not knowingly or with reckless disregard for the statement's truth or falsity misrepresent the identity, qualifications,

22nd National College on Judicial Conduct and Ethics

The Center for Judicial Ethics will hold its 22nd National College on Judicial Conduct and Ethics on Wednesday October 26 through Friday October 28, 2011, at the Wyndham Chicago. Registration information will be in the spring issue of the *Judicial Conduct Reporter* and at www.ajs.org/ethics/college.asp in June.

present position, or other fact concerning the candidate or an opponent."

On review, three justices stated:

> [T]he four sentences at issue must be understood in the context in which they were offered, spoken in series in a matter of 10-15 seconds. Each sentence takes meaning from the sentence before and gives meaning to the sentence that follows. Accepting this common and necessary approach, ... the advertisement communicated an objectively false statement.
>
> The advertisement can reasonably be viewed only as communicating that Louis Butler's actions in representing Mitchell and finding a "loophole" led to Mitchell's release and his commitment of another crime. No other reasonable interpretation of the advertisement has been suggested. The message communicated was that Butler facilitated Mitchell's release and later crime. This message is objectively false.

Those justices rejected Justice Gableman's position that, because each sentence in the ad was literally true, the ad did not contain any false statements. They concluded that approach "ignore[d] the normal way that people speak, read, and listen, the way in which people express meaning through language, and the way people understand not just words but sentences, and ultimately meaning," and treated "the Code of Judicial Conduct in the manner of wordplay and linguistic gamesmanship, rather than as an embodiment of substantive ethical standards." That interpretation, they argued, would allow "speakers to knowingly convey false information, so long as they are fastidious in their punctuation, clever in the use of omitting a word, and tactical in using as few words as possible" and would invite "future judicial candidates to push and distort the content of advertising in judicial campaigns as far past truthful communication as the creative use of language may allow." Relying on defamation cases, those three justices concluded that "several literally true sentences can be strung together to communicate an objectively false statement" and that the First Amendment does not protect a false statement made "with knowledge that it was false or with reckless disregard of whether it was false or not."

In contrast, three other justices voted to dismiss the complaint, concluding that each statement was objectively true and, therefore, the advertisement, although "distasteful," did not violate the code of judicial conduct and was protected by the First Amendment. They stated that the Commission was trying "to punish speech not because the statements were untrue but because they 'implied' or 'intended to convey' a particular message. To do what the Commission attempts is constitutionally impermissible; it is prohibited by the First Amendment."

Social networks

A Florida advisory opinion from 2009 stating that judges may not "friend" attorneys who appear before them on Facebook and other social networks (*Florida Advisory Opinion 2009-20* (www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html)) and several reports of judges' posting foolishly demonstrated a curiosity and concern about the subject that continued in 2010. In August, the New Media Committee of the Conference of Court Public Information Officers published a report called *New Media and the Courts: The Current Status and a Look at the Future* (www.ccpio.org/newmediareport.htm). The Florida advisory committee re-affirmed its apparently controversial advice. *Florida Advisory Opinion 2010-6* (www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html). The Kentucky advisory committee, however, gave a "Qualified 'Yes'" to an inquiry from a judge about friending attorneys, stressing, however, that judges should be "extremely cautious." *Kentucky Advisory Opinion JE-119* (2010) (courts.ky.gov/NR/rdonlyres/FA22C251-1987-4AD9-999BA326794CD62E/0/JE119.pdf).

In December, the Ohio judicial ethics committee also issued an opinion that stated a judge may be a "friend" on a social networking site with a lawyer who appears before the judge but added numerous conditions to ensure that a judges' interactions with individuals and organizations on those sites are prudent and do not erode confidence in the independence of judicial decision-making. *Ohio Advisory Opinion 2010-7* (www.supremecourt.ohio.gov/PIO/news/2010/BOCadvisoryOp_120810.asp). The committee directed judges to be familiar with a social networking site's policies and privacy controls and aware of the contents of their own pages, maintaining "dignity in every comment, photograph, and other information shared." The opinion also warned judges not to comment about a pending or impending matter before them "— not to a party, not to a counsel for a party, not to anyone —" and not to view a party's or witnesses' pages or use sites to obtain information regarding a matter. The committee advised judges to reveal on the record any ex parte communication received via a social networking site and to disqualify when a social networking relationship with a lawyer creates bias or prejudice.

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