JUDICIAL CONDUCT REPORTER

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The 26th National College on Judicial Conduct and Ethics will be Wednesday October 23 through Friday October 25, 2019 in Chicago

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Judicial ethics and jurors by Cynthia Gray

Discourteous treatment of jurors

Jurors are specifically identified in Rule 2.8(B) of the American Bar Association *Model Code of Judicial Conduct* as individuals to whom judges owe a duty to "be patient, dignified, and courteous." Judges have been sanctioned for impolite treatment of jurors, particularly prospective jurors.

The Minnesota Board on Judicial Standards publicly reprimanded a judge for approximately 30 remarks he made during jury selection in a criminal case. ***In the Matter of Spicer***, Public Reprimand (Minnesota Board on Judicial Standards March 26, 2013). For example:

- When a juror stated that she knew the defense attorney because they had shared a hotel room on a school choir trip for their daughters, the judge stated, "Shared a room? . . . I don't want to hear about that. Oh, it was a choir trip?" A few moments later, when a deputy entered the courtroom, the judge stated, "He wants to make sure we're safe. I don't know, we have a couple women sleeping together but besides that everything else is okay."
- When a juror stated she had been a victim of a crime and a defendant in a civil lawsuit, the judge commented, "Interesting life, Jean."
- After hearing some of their answers to selection questions, the judge asked the jurors, "Do you guys have lives?"
- When a juror told the judge that he managed a pizza restaurant, the judge asked, "Do they still taste like cardboard?"
- When a juror said he was unmarried, the judge asked whether he had children and then remarked, "You would be surprised how many times I get 'yes' to that."
- When a juror stated she had a 42-year-old child, the judge responded, "You don't look like you would have a 42-year-old. You don't look that much older than 42 yourself. Wow . . . . Wow. Very good."
- When a juror stated he had worked in an airline stockroom, the judge asked, "is that where they steal all our bags and put them in there?"
- When advised of the consecutive ages of a juror's four children, the judge stated, "Well . . . you weren't shooting blanks. We know that much."

The judge told the Board that he was using humor to make the prospective jurors comfortable in their role. Although it approved humor in the courtroom "when used cautiously, sparingly and respectfully," the Board

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found that the judge's comments were "insensitive and demeaning" and noted that the judge's attempts at humor caused the defendant to believe that the judge did not take his right to a fair trial seriously. *See also In re Moore*, 626 N.W.2d 374 (Michigan 2001) (for no apparent reason, judge asked a potential juror when she had last "smoked a joint or something"); ***Public Admonition of Ott*** (Texas State Commission on Judicial Conduct June 21, 2002) (judge told a potential juror who the judge thought was a "street person" that he looked like a drug user and instructed him, "Stand there straight and just drop your hands to your side and act like you know what you are doing here. Because you don't look like it, just act like it").

Judges have been sanctioned for intemperate reactions to attempts to get out of jury service, for example, scolding prospective jurors or requiring them to stay even after they have been excused. For example:

- A judge told a prospective juror who said she needed to finish a paper for school, "Well, that's nice. I've got lots of things to do, too. My problems are of constitutional proportions, so you are going to have to do that at night." He also berated her when she was late returning from lunch and ordered her to return the next day even though she had already been replaced in the jury box. ***Inquiry Concerning Shaw***, Decision and order (California Commission on Judicial Performance December 21, 2006) (censure for this and other misconduct).
- When a prospective juror did not think that he could sit on a jury because he had memory problems, the judge ridiculed him by mispronouncing his name and joking about whether he could remember his name or where he worked. *In re Moore*, 626 N.W.2d 374 (Michigan 2001) (six-month suspension for this and other misconduct).

Judges have been sanctioned for impolite treatment of jurors, particularly prospective jurors.

In *In the Matter of Pilshaw*, 186 P.3d 708 (Kansas 2008), the Kansas Supreme Court noted that the judge's "failure to control her temper and frustrations and her conduct toward potential members of the jury in open court" not only "greatly detracted from the honor and dignity of the judiciary" but negatively impacted the proper administration of justice in the case.

During voir dire in a multi-count felony trial, one prospective juror said, "I'm completely against the police and the uniform," adding "I won't believe everything they say. That's for sure." After questioning him further, the judge excused the juror for cause but ordered him to sit through the entire trial "so you can get an objective view . . . of how people do testify."

The judge then said to the jury panel: "All right. Anybody else want to mess with me?"

Another potential juror said that she did not want to serve because she was a Jehovah's Witness and did not "feel comfortable judging anyone" and that she felt that "if you're in here, you're guilty of something." The judge responded:

> I believe you don't want to do it [jury service]. I've got quite a few people that don't want to do it either. But you have said the magic words, so you are

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> released from your jury service. And I feel sorry for the next person that ends up going, because I am going to hit the roof, I think.

Another juror had indicated that he had a question but changed his mind after the judge's comment.

During an off-the-record bench conference, defense counsel advised the judge that she was yelling and that members of the jury panel were scared to answer questions. After the bench conference, the judge stated to the jury panel: "No one should be compelled — feel compelled to say anything that's not true, because they're afraid I'm going to yell at them." The judge "offered amnesty to the next two people who had negative things to say," and a juror asked a question. In releasing the jurors for the evening, the judge stated: "If I have been rude and mean today, I apologize very, very, very much so." The defense counsel asked for a mistrial, but the judge denied the motion.

In the appeal of the underlying criminal case, the Court had held that the judge's apology to the jury "purged the taint of the misconduct," so her behavior did not require reversal of the defendant's conviction. In the discipline case, however, the Court concluded that her conduct "amounted to a serious breach of ethics" and censured her.

Harsh and disparaging accusations

When, to defend his discourteous demeanor, a judge cited the reluctance of many citizens to serve as jurors, the California Commission on Judicial Performance responded that, in its view, "jurors are more likely to be willing to serve when treated with dignity and respect."

> For many members of the public, jury service is their only opportunity to witness the justice system at work. How a judge treats jurors can leave a lasting impression, not only of that particular judge, but of the entire judicial institution. . . . Jurors are asked to take time out of their lives as a public service, often at a financial loss. They deserve to be treated with patience, dignity and courtesy.

Inquiry Concerning Clarke, Public admonishment (California Commission on Judicial Performance September 29, 2016). In that case, the judge had demonstrated "a pattern of discourteous and undignified treatment of jurors" during jury selection in a criminal case by "mistreat[ing] and belittle[ing] jurors, us[ing] humor at a juror's expense, and retaliat[ing] against a juror for complaining about his clerk."

In one instance, a juror had written on her hardship form that she had $25 in her checking account. The judge said to her, "It's an impressive and convincing figure," she thanked him for not sharing it, and he said, "Well, every one of these lawyers spent more than that on lunch today." He excused her and, as she left the courtroom, stated, "She has $25 in her checking account. . . . That's cutting it close." In the Commission proceedings, the juror testified that she had cried while telling a friend what had happened to her in court.

Denying that he intended to demean or embarrass the juror, the judge claimed that the exchange was light-hearted banter, meant humorously.

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The Commission found that, whatever his intent, "joking about a juror's limited financial resources and revealing personal financial information in open court. . . . is manifestly discourteous and undignified. When members of the public give up their time for jury service, they do not expect to have their private financial information disclosed in open court or to be the brunt of jokes about their limited financial resources."

When a second prospective juror wrote on his hardship form that he had $33 in his checking account, the judge said to him, "[You have a] little bit more than the other gal." The judge excused the juror and said, "Good luck on getting paid and being able to bring that number up a little bit better." The Commission concluded that those comments violated the code even though the juror was not humiliated or embarrassed; the Commission explained that whether the judge's comments were demeaning was analyzed using an objective standard, "otherwise, the subjective perception of complainants would determine whether the judge engaged in misconduct and lead to inconsistent commission decisions."

A third prospective juror had written on her form that she worked as a waitress for minimum wage and was planning a wedding in two months and that being in the courthouse was aggravating her severe anxiety. On the verge of a meltdown!" The judge excused her. The juror then said that the clerk who had checked the jurors in had treated everyone disrespectfully, and the judge required her to stay until the end of the day to tell him about her complaint.

Approximately an hour later, the juror was called back into the courtroom, and she apologized for upsetting the judge and his clerk. The judge insisted that she tell him what his "clerk said that caused you to personally go after her like that." The juror explained that, in response to her comment that she was having anxiety, the clerk had said, "Well, I have anxiety too. You guys back up." The judge responded, "So because she didn't respond to your claim of anxiety with appropriate sensitivity, you attacked her in open court in front of a judge with your criticism?" He then lectured her about being the only juror in seven years, out of thousands, to have complained about his clerk.

The Commission found that, in requiring the juror to wait in the hallway, the judge had acted out of anger and in retaliation for her criticism of his clerk and concluded that the "judge's disparaging and retaliatory treatment of a juror who was simply voicing a complaint" was misconduct.

Another juror said that she could not understand English even though she was on a list indicating that she had been found to be English qualified. The judge responded, "Don't try and fool me now, ma'am, you'll be here a lot longer," and, "If you start being honest with me you'll go home." The judge required her to wait in the hallway. When an interpreter arrived, the juror explained to the judge that she felt ashamed "because I am a citizen and I really do need to speak English and I don't know how to speak English." She told the judge that her father had had her naturalized as a citizen when she was two and sent her to Mexico and that she did not return to the U.S. until she was already a grown-up. The judge responded: "Many people come and

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they say they don't understand English, and they actually can. And this has caused me to mistrust you, and now I feel that I should have trusted you more."

The Commission acknowledged that the judge "initially had reason to doubt the juror's language claim" and that "language hardship claims are frequent and difficult to evaluate," but concluded that the judge's "harsh and disparaging" accusations in open court that the juror was being dishonest were not justified.

Making a prospective juror cry by questioning her assertion she did not understand English was grounds for judicial discipline in ***Public Reprimand of Aguilar and Order of Additional Education*** (Texas State Commission on Judicial Conduct November 6, 2017). The judge had told the woman, whose family received disability benefits:

> What I am telling you is that in this great country of American, we take care of the disabled. This – freedom is not free. This is one of the few things this country asked our citizens to do, come up here and pass judgment. And in return, we send you disability checks. And you turn around and come up to me and tell me, I don't want to serve because I do not understand. You understand perfectly. Your English is not problem. Outside in the hallway, ma'am. Now. Now.

During voir dire in a second case, several prospective jurors cited religious grounds when claiming that they could not sit in judgment of a defendant in a capital murder case. The judge responded:

> Did you people understand that question. Because it seems to me you pass judgment on people every single day. Single ladies, let see your hands. Ever been asked out before in your life? Did you not pass judgment? "He's kind of ugly." 'Not my type." "Doesn't have a car." Did you not pass judgment on another human being? Now, look, ladies, I'm not saying it's going to be you know, having Smiling Jack pick you and take you to the bus stop, have a nice dinner, McDonald's, come back home. Did you or did you not pass judgment on him? Did you understand the question? Can you judge another person? Stranger walks up to you, "I don't want to talk to you. I don't want to talk to you." Did you not pass judgment?

Jurors with children

Injudicious reactions to prospective jurors with children have resulted in judicial discipline in several cases. For example, the Texas State Commission on Judicial Conduct publicly admonished a judge who forced a prospective juror to remain in the courtroom after ordering her four-year-old child removed from the courtroom for disrupting jury selection. ***Public Admonition of Ott*** (Texas State Commission on Judicial Conduct June 21, 2002). The juror told the Commission that the judge had treated her rudely and spoke to her and her child in a loud and threatening voice.

In *In the Matter of Walsh*, 587 S.E.2d 356 (South Carolina 2003), a mother who could not find anyone to care for her two young children brought them with her to the courthouse to discuss getting out of jury service. At the

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direction of a court employee, the woman entered the courtroom. The judge loudly and harshly told her she could not bring children into the courtroom, pointed his finger at her, and told her to leave. The juror reported back to the employee and was again instructed to go to the courtroom. When the juror explained that the judge had just told her to leave the courtroom, the employee told the juror to go home.

The judge explained that he had been harsh because the juror was late, she should have brought up the issue of child care prior to the date of jury service, and she should have left the children unattended in the hall before coming into his courtroom. The South Carolina Supreme Court noted that, pursuant to a statute, the juror was entitled to be excused from jury duty, the judge's staff should have advised the juror to provide an affidavit, and the judge should have addressed the issue without embarrassing the potential juror. The Court removed him for this and other misconduct.

The Kansas Commission on Judicial Qualifications publicly admonished a judge for holding a prospective juror in contempt for failing to appear on the second day of jury selection because she had no one to care for her child. ***Inquiry Concerning Magana***, Findings of fact, conclusions of law, and disposition (Kansas Commission on Judicial Qualifications February 15, 2019).

On Monday, Terra McDaniel appeared for jury service and was sent to the judge's division where she remained the rest of the day for jury selection in a criminal case. Jury selection was not completed, and the judge instructed prospective jurors to report the following morning.

On Tuesday morning, McDaniel called the jury coordinator and said that she could not come in because she had no child care, her mother was sick, and she was a single mom. According to the coordinator's notes, when McDaniel was asked for another week when she could come in, McDaniel "started yelling at me and said her situation is not going to change, what are we going to do put her in jail."

At approximately 2:15 on Tuesday afternoon, McDaniel and her mother appeared at the jury coordinator's office. At the judge's direction, a clerk told McDaniel to return on Friday for a contempt hearing. When McDaniel asked what a contempt hearing was, the clerk told her it was "to explain why she did not report back to court this morning after order from the Judge."

On Friday, McDaniel appeared, and the judge opened the hearing as "a proceeding for direct criminal contempt." Neither McDaniel nor the clerks testified. The judge did not tell McDaniel that she had a right to be represented by an attorney or that an attorney could be appointed for her if she could not afford one.

During the hearing, the judge noted that McDaniel's juror questionnaire indicated that she wanted to avoid jury service because she is a single, working parent and "the judicial system is against my religious beliefs." The judge referred to protection-from-abuse orders that McDaniel had been involved in to illustrate that McDaniel was familiar with the judicial system and stated that she had used the system for her benefit so she should

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not shirk her duty to serve as a juror. He advised McDaniel that many other juror candidates had more compelling excuses than she did.

The judge then convicted McDaniel of direct criminal contempt and sentenced her to 30 days in jail, beginning that day. The sheriff took McDaniel into custody where she remained for the rest of Friday, all day Saturday, Sunday, and Monday, and most of Tuesday morning.

After being contacted by McDaniel's mother, McDaniel's mother's preacher, and two attorneys, the judge held a hearing on Tuesday, commuted McDaniel's sentence, and ordered that she be released. The Court of Appeals overturned the finding of contempt because the judge had not described the conduct constituting contempt as required by law.

In the discipline proceeding, the judge stated that he had not intended to leave McDaniel in jail for 30 days and meant to release her on Monday but that Monday had been a "blow up day" and he had been very busy. The judge also said that he "believed McDaniel and other jurors deserved 'a lesson' about the critical importance of juror participation in the criminal justice system."

The Commission concluded that the judge failed to accord McDaniel a right to be heard, noting, for example, that he had not referred during the contempt hearing to her right to be represented, had not taken any testimony, and had relied on hearsay evidence and that McDaniel had no idea when she showed up for the hearing that she would end up in jail. Concluding that the 30-day sentence was abusive and unduly harsh, the Commission stated that it was not just that McDaniel spent four days in jail, "but that she *understood* she was going to spend 30 days (including Christmas Day) in jail, being unaware that Respondent never intended for her to serve the full sentence." *See also* ***Inquiry Concerning Platt***, Findings of fact, conclusions of law, and disposition (Kansas Commission on Judicial Qualifications October 27, 1997) (judge had a woman arrested for failing to appear for jury duty without holding a hearing; the woman was confined for approximately 40 days, and an action was commenced against her because she was unable to care for her children while incarcerated).

Deliberating juries

Unless the parties and counsel have been notified and given an opportunity to be present, a judge's communication with a jury while it is deliberating but before it has returned a verdict is an ex parte communication and, therefore, a violation of the code of judicial conduct. *See, e.g.*, ***In the Matter Concerning Symons***, Decision and Order (California Commission on Judicial Performance May 20, 2019) (judge responded in writing to a question from a deliberating jury without the knowledge of the defense); ***Public Admonishment of Coates*** (California Commission on Judicial Performance April 12, 2000) (judge entered the jury room to deny a jury's request for the transcript without notifying the parties' attorneys of the request); ***In the Matter of Halverson***, Findings of fact, conclusions of law, and imposition of discipline (Nevada Commission on

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Judicial Discipline November 17, 2008), *aff'd*, ***Order*** (Nevada Supreme Court January 31, 2011) (judge ate with or chatted with jurors in two cases and answered their law-related and case-related questions ex parte).

Recently, the Texas State Commission on Judicial Conduct publicly warned a judge for telling a deliberating jury that a defendant was innocent, in addition to other misconduct. ***Public Warning of Robison*** (Texas State Commission on Judicial Conduct February 20, 2019). While presiding over the trial of a woman charged with sex trafficking and the sale or purchase of a child, the judge "became increasingly concerned that [he] was witnessing a miscarriage of justice." After learning that the jury had reached a guilty verdict on at least one count, the judge entered the jury room, told the jurors that "any guilty verdict would be a miscarriage of justice," and asked the jurors to "deliberate 10 to 15 minutes more . . . to make certain they were not making a mistake."

The jury found the defendant guilty on a single charge of sex trafficking and imposed a sentence of 25 years in prison.

The judge told the prosecution and defense attorneys about his conversation with the jury. The prosecution asked the judge to recuse himself from sentencing, which he did. Another judge subsequently declared a mistrial in the interest of justice, finding that the judge had not been fair or impartial in his comments and rulings throughout the trial.

The judge filed a self-report with the Commission, and the Commission also received 18 complaints from numerous sources, including two of the jurors, the district attorney's office, and citizens who learned about the incident through media reports. According to the jurors' complaints, the judge had told them he had received a message from God to act because the defendant was innocent. The judge later apologized to the jury and said something to the effect of, "When God tells me I gotta do something, I gotta do it." The jurors stated that the judge's comments did not affect their decision.

In his self-report, the judge said that he realized his comments to the jury were improper immediately after he spoke. He could not remember the details well enough to admit or deny making the specific comments the jurors reported.

Criticism and praise

Rule 2.3(C) of the model code provides: "A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding." A comment explains: "Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case."

Every case underlying a sanction for violating that rule has been a criminal case. For example, a Texas judge shamed and reprimanded jurors for their guilty verdict in a rape case, asking them, according to jurors' accounts, "Did you even discuss the details of the case at all?" and "how

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could we have a good conscience about our decision?" and telling them she "could not believe that "they found the defendant guilty," she "did not believe the victim was raped at all," and, if she had been a juror, "it would have been a hung jury." ***Public Reprimand of Hawthorne*** (Texas State Commission on Judicial Conduct November 9, 2017).

Usually when a judge opines on a verdict, it is to express displeasure with an acquittal or approval of a conviction. *See, e.g., Ohio State Bar Association v. Salerno*, 28 N.E.3d 84 (Ohio 2015) (judge told jurors their not-guilty verdict was wrong and disclosed that the defendant had pending criminal charges not admitted into evidence); ***Letter to Hintz*** (California Commission on Judicial Performance May 29, 1992) (judge criticized jurors for their verdict and required them to sit through a hearing, which appeared intended to punish the jury and to humiliate the defendant); ***In re Goshgarian***, Order (Illinois Courts Commission November 18, 1999) (the day after a criminal trial in which the jury returned a verdict of guilty on two offenses and not guilty on a third, judge said in a raised voice to one of the jurors, who worked in the courthouse, that the jury was "stupid" and "gutless" and that it was the "worst verdict" he had seen in years).

A judge's criticism of two juries who found defendants not guilty was the basis for a finding of misconduct in ***In re Young***, Order (Utah Supreme Court November 7, 2000). In one case, the judge stated to the jury:

> I want to tell you that I am personally disappointed in your verdict in this case and that's all I'm going to say about it. I think that this was a pretty clear case. I don't know how you came out with this result and this is one of the very few times I have criticized a jury for their verdict. Thank you. You may be excused.

In the second case, the judge stated in the courtroom:

> I will tell you from my perspective that the jury and the jurors in normal circumstances err on the side of compassion. This is a case in which they did that. I do not believe the testimony of Mr. Johnson [the defendant]. From my perspective I don't know how the jury does, but I believe that the circumstances, Mr. Johnson, you were not candid in this case, and I think you were very fortunate to have a not guilty verdict.

As that example illustrates, a judge's criticism of a jury does not have to be expressed directly to the jury to violate the code as long as the jury is present to hear it. After announcing a not-guilty verdict, a New Jersey judge said to the defendant while the jury was still in the courtroom:

> You are, sir, a very, very, very lucky man. The evidence was very strong that you were guilty of this offense. I don't know what they [the jurors] were thinking, but they're thinking other than what I was thinking. You have a number of convictions and I'll tell you this: If you find yourself in trouble again, the resolution of the case [will be] other than the windfall you received today, do you understand how lucky you are, Mr. McDaniels? Do you understand that?

Usually when a judge opines on a verdict, it is to express displeasure at an acquittal or approval of a conviction.

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In the Matter of Mathesius, 910 A.2d 594 (New Jersey 2006) (30-day suspension for this and other misconduct).

Words are not the only way judges can inappropriately communicate their opinion of a verdict. An Illinois judge, in the jury's presence, grimaced as he reviewed a not-guilty verdict, shook his head, sighed audibly, and slammed the verdict form on the bench. When the judge announced the verdict, his tone of voice, facial expressions, and body language also displayed his disappointment. The judge dismissed the jurors without thanking them for their service and tore up their certificates of appreciation and threw them into a garbage can, saying, loud enough for others to hear, "They don't deserve these." ***In re Golniewicz***, Order (Illinois Courts Commission November 14, 2004).

Praising a guilty verdict violates the code as clearly as criticizing a not-guilty verdict does. The same New Jersey judge noted above who criticized one jury for acquitting a defendant also praised a different jury for convicting a defendant, saying:

> Once again, ladies and gentlemen, you have vindicated this Court's faith in the jury system. Your verdict has been adequately and amply supported by the evidence. You have deliberated long, and you've deliberated hard. You've overcome disagreements and the strife that necessarily is imposed upon jurors in such critical and difficult decision making. . . . You are the bulwark and the foundation of the jury system in this country and have acquitted it nicely.

In the Matter of Mathesius, 910 A.2d 594 (New Jersey 2006).

A New York judge said to a jury following a conviction:

> Ladies and gentlemen, I'm very happy that you reached that disposition because the Dominican people are just killing us in the courts. They got to try their cases. We got to provide them interpreters, provide them attorneys and there are 54 pending felony cases against them up here. Obviously the drugs are brought up out of New York City and they are brought into here and selling them in here, and they are just killing us, so I am delighted. They are almost insulated as far as prosecution, and you just happened to get lucky to do it, and I appreciate very much the verdict in this case and you're discharged with the thanks of the court. That was a large scale operation.

In the Matter of Cunningham, Determination (New York Commission on Judicial Conduct March 18, 1994).

Similarly, another New York judge, after a guilty verdict in a murder case that had been the subject of press attention, said to the jury:

> I want you all to sleep well tonight because — while my opinion probably isn't worth any more or less than anyone else — I agree with your verdict. I think the verdict you've rendered in this case is consistent with the evidence that I saw from the witnesses and from the documents and from the stipulations.

In the Matter of Dillon, Determination (New York State Commission on Judicial Conduct February 6, 2002). Calling the judge's "commentary" a "gratuitous expression of his personal views," the New York State Commission

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on Judicial Conduct found that his "avowed purpose in making the comments — to allay the apparent emotionalism of jurors after the verdict was delivered — does not justify his inappropriate comments. No matter how stressful the proceedings, a judge must remain neutral in the presence of a jury, and jurors should receive neither criticism for their verdict nor reassurance that they acted correctly."

Post-verdict meetings

Discharged jurors are "naturally" curious about the case in which they participated and "commonly express a desire to speak with the judge" to ask questions and make comments about "uncontroversial, administrative matters (parking, jury accommodations, suggestions for improvement of the jury experience)" and "substantive matters such as trial procedure, evidentiary rulings, possible criminal sentence, and the possibility of an appeal." ***Alaska Advisory Opinion 2009-1***. Noting that a judge will want "to be responsive and accessible" to such requests, the Alaska advisory committee stated that, "dialog [that] contributes to the discharged juror's understanding and respect for the legal system . . . can be positive." In addition, judges may want to speak with discharged jurors about their experience "to discuss ways to improve the process." ***California Judges Association Advisory Opinion 52*** (2002).

A new comment added to the model code in 2007 states: "A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case." Rule 2.8, Comment 3. The reporters' notes explain that the comment reflected "growing recognition that judicial outreach is a valued part of the judicial role and includes outreach to jurors." The notes further state:

> The Comment makes clear that judges can commend jurors for their service and that the prohibition on judges commending or criticizing the jury for their verdict does not foreclose other communications between judges and jurors. To the contrary, the [ABA Joint Commission to Evaluate the Model Code of Judicial Conduct] saw value in creating an opportunity for the judge to learn more about the jury's experience, as long as the merits of the case were not discussed.

However, a "meeting with the jury outside the presence of the parties may undermine public confidence in the openness and fairness of all judicial proceedings" (***Arizona Advisory Opinion 2001-1***) and "may generate questions about what was said." ***Alaska Advisory Opinion 2009-1***. Immediately after a verdict, the case would still be pending, and post-trial motions can be anticipated so parties should be privy to any communication about the case that could influence or appear to influence the judge's post-trial rulings.

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Thus, the "best practice" is for a judge to talk to the jury on the record, in the presence of both counsel (*California Judges Association Advisory Opinion 52* (2002)), and "in open court rather than in the jury room." *Georgia Advisory Opinion 231* (1998). The judge must inform the litigants and their lawyers before speaking with discharged jurors and give them an opportunity to be present or to have the conversation on the record. *Alaska Advisory Opinion 2009-1*; *Arizona Advisory Opinion 2001-1*.

To reduce the chance of an inappropriate communication, a judge should, on the record at the beginning of a meeting with jurors, clearly explain what can be discussed and what topics the judge will have to, politely but firmly, refuse to answer questions about or listen to comments on. The prohibited topics include:

- The merits or substance of the case (*Alaska Advisory Opinion 2009-1*; *Arizona Advisory Opinion 2001-1*; *California Judges Association Advisory Opinion 52* (2002));
- The jurors' favorable or unfavorable opinion of a trial participant or witness (*Alaska Advisory Opinion 2009-1*);
- The judge's opinion about "the performance or credibility of the attorneys or witnesses" (*Alaska Advisory Opinion 2009-1*);
- The jury's deliberations (*Arizona Advisory Opinion 2001-1*);
- The judge's view of the "correctness" of the verdict (*Alaska Advisory Opinion 2009-1*; *California Judges Association Advisory Opinion 52* (2002));
- The jurors' opinions or recommendations about what the sentence should be (*Arizona Advisory Opinion 2001-1*); and
- Pending matters, including a possible sentence or appeal or the judge's probable post-verdict rulings (*Alaska Advisory Opinion 2009-1*).

When meeting with jurors, in addition to expressing appreciation for their service, a judge may answer questions about the trial process, for example, "why the case had eight jurors while others have twelve." *Arizona Advisory Opinion 2001-1*. *Cf.*, *Alaska Advisory Opinion 2009-1* (if a jury has been unable to reach a verdict, a judge should not communicate anything more than appreciation for the jurors' service). Following a guilty verdict in a criminal case, a judge can, for example, tell the jury the statutory range of possible sentences and generally explain the sentencing process but should not allow jurors to offer their opinions or recommendations about the sentence. *Arizona Advisory Opinion 2001-1*. A judge may inform the jury of the date of the sentencing and let them know that they can attend if they choose. *Alaska Advisory Opinion 2009-1*.

Advisory opinions are split on whether a judge may discuss with discharged jurors evidence they did not hear during the trial. The Arizona committee stated that a judge could answer a jury's questions about "why certain evidence was ruled admissible or inadmissible" because that information is a matter of public record and, after the verdict has been returned and the jury has been discharged, jurors "generally have no further role

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or responsibility" and "return to their status as members of the general public." *Arizona Advisory Opinion 2001-1*. Noting that, if a class of high school students attended a trial, the judge could meet with them to answer their questions, the committee explained:

> But for their selection to the jury, individual jurors would have been free to attend any of the hearings in the case, whether before, during or after the trial, and would have been privy to any of the matters discussed in open court from which they were so carefully sheltered while serving on the jury. This would include hearings on discovery, disclosure, evidentiary motions and, in criminal cases, sentencing.

However, the California committee stated that a judge may not disclose to a discharged jury evidence that had been suppressed or information about the defendant's record that was not received during the trial. *California Judges Association Advisory Opinion 52* (2002). The Alaska committee advised that a judge should not volunteer "information about inadmissible, suppressed, confidential, or non-public information," which might inappropriately "bolster[] or undermin[e] a former juror's confidence in the 'correctness' of the verdict," but could "respond to a juror's question about any public matter including suppressed evidence where the answer is an explanation of the evidence rules and court process." *Alaska Advisory Opinion 2009-1*.

To reduce the chance of an inadvertent, inappropriate communication, the Alaska committee advised, a judge "should not engage in a lengthy dialog" with discharged jurors. *Alaska Advisory Opinion 2009-1*. If, notwithstanding a judge's best efforts, a juror volunteers outside the presence of the parties information that a judge should not know, the judge must promptly disclose the information to all parties on the record and give them an opportunity to respond. *Arizona Advisory Opinion 2001-1*. *Accord* *Alaska Advisory Opinion 2009-1*.

Letters of appreciation

Judicial ethics committees advise that judges may send jurors letters expressing appreciation for their service. For example, the Ohio committee approved judges expressing appreciation to jurors with a letter, a certificate, or even a "small but dignified memento, such as a bookmark . . . with the judge's name, picture, and a historic quote regarding jury service." *Ohio Advisory Opinion 2009-10*. *See also* *Arizona Advisory Opinion 2001-1*; *California Judges Association Advisory Opinion 52* (2002); *Florida Advisory Opinion 1985-17*; *New York Advisory Opinion 1995-53*; *Texas Advisory Opinion 69* (1983); *West Virginia Advisory Opinion* (February 7, 1997). *Cf.,* *Texas Advisory Opinion 68* (1983) (judges who participate in a central jury system may send a form letter expressing their appreciation to people who reported for jury duty, including those not selected as jurors, using letterhead with the names of the judges and clerks, with costs borne by the county).

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The Arizona committee noted that "letters to jurors might be improperly used to garner support for a judge's re-election" but concluded that concern is avoided if the judge routinely sends the letters to all jurors in all cases as a matter of policy and the letters express appreciation generally for the "juror's performance of his or her civic duty without reference to the outcome of a particular case." *Arizona Advisory Opinion 2001-1*. *See also Ohio Advisory Opinion 2009-10*; *Texas Advisory Opinion 69* (1983).

A judge may use court resources, including staff, equipment, and letterhead, to prepare and send thank you letters to jurors. *Nevada Advisory Opinion JE2010-015*. *Cf., Alabama Advisory Opinion 1995-552* (letters to jurors should be at the judge's expense unless the letters are authorized by court rule, expressly permitted by the presiding circuit judge, or signed and sent by all judges).

Feedback

Advisory committees have stated that judges may, post-verdict, distribute to jurors court-approved questionnaries that will help the court address administrative concerns. *Alaska Advisory Opinion 2009-1*. A survey to evaluate juror experience should be voluntary and written and may ask questions about, for example, "the quality of juror notebooks, length of voir dire and manner of questioning, presenting depositions versus live testimony, and similar questions." *Arizona Advisory Opinion 2001-1*. *See also California Judges Association Advisory Opinion 52* (2002) (a judge may, with a thank you letter to jurors, solicit "constructive criticism of how the court proceedings are conducted, including having the jurors fill out a questionnaire with comments regarding the proceedings and court personnel").

However, the Washington committee advised that a letter thanking jurors for their service may not also ask for feedback on their experience. *Washington Advisory Opinion 2015-1*. The committee reasoned that inviting feedback creates "a considerable risk" of "ex parte communication with jurors while matters in the case are still pending in an appellate process." Even if there is no risk of ex parte communications, the opinion cautioned, "a judge communicating with a juror about that juror's experience in a case raises an appearance of impropriety and would reduce the public's confidence in the judge's independence, integrity, or impartiality."

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A judge's discretion to report criminal conduct

by Cynthia Gray

Rule 2.5 of the ABA *Model Code of Judicial Conduct* requires a judge to "inform the appropriate authority" or "take appropriate action" in response to judicial or attorney misconduct, the exact response depending on the specific circumstances. However, the code does not cover what a judge should do if the judge learns while presiding over a case about a crime by an individual who is not a judge or an attorney.

Judicial ethics committees advise that a judge who learns of possible criminal conduct by a party or a witness in a case may report that information to law enforcement authorities but is not required to do so except in rare cases. For example, the Ohio committee advised that a judge does not have a duty to report misconduct by those who are not judges or lawyers, but that "a judge should expose obvious and egregious illegal activity where the failure to do so could undermine confidence in the integrity of the judiciary." ***Ohio Advisory Opinion 2017-2***.

Possible tax offenses seem to come to judges' attention most frequently, often in domestic relations cases. For example, an administrative judge asked the Pennsylvania advisory committee, on behalf of all the judges on a large metropolitan family court, "What, if any, is the responsibility of a trial judge to report suspected tax evasion to the appropriate tax authority?" ***Pennsylvania Formal Advisory Opinion 1999-2***. The committee responded that the code "does not mandate reports of suspected tax evasion" but that, a "judge should decide on a case-by-case basis when a case of tax fraud is so obvious and egregious that failure to report it may undermine confidence in the judiciary."

Similarly, other committees have advised that a judge has the discretion but not the duty to report:

- When a party in a domestic relations matter testifies to having intentionally omitted substantial amounts of money he earned from federal income tax returns filed by the parties (***Florida Advisory Opinion 1978-4***);
- When the parties in a divorce proceeding blame each other for failing to report a substantial amount of business income (***Michigan Advisory Opinion CI-1177*** (1988));
- When a litigant testifies in a family court case that he under-reported his income on tax documents (***South Carolina Advisory Opinion 17-2006***);
- When an employee in a mechanic's lien trial testified that he filed W-2 forms understating his income with the Internal Revenue Service to reduce his child support payments (***Illinois Advisory Opinion 2002-1***);

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- When a litigant testifies in court that she has failed to pay income taxes (*Arizona Advisory Opinion 1992-15*); or
- When a witness admits to a violation of the Internal Revenue Code (*Georgia Advisory Opinion 166* (1992)).

See also New York Joint Opinion 1988-85-1988-103; *Washington Advisory Opinion 1993-11*; *Washington Advisory Opinion 2002-9*.

Similarly, with respect to non-tax offenses, judicial ethics committees have advised that a judge is not required to report, but is not prohibited from doing so. For example, when a judge asked whether to "alert an appropriate government agency" that a litigant repeatedly violated landlord-tenant statutes and building codes, the Arizona committee responded that the "judge may report suspected violations, or decline to report them, as his or her judgment and conscience dictate. It is a matter within the judge's sound discretion." *Arizona Advisory Opinion 1992-15*. *See also New York Advisory Opinion 2016-154* (reporting issues of habitability revealed in landlord and tenant matter to local code enforcement officer). Other committees have given similar advice regarding violations of truth-in-lending statutes (*Illinois Advisory Opinion 1996-13*) or laws relating to vehicle registration (*New York Advisory Opinion 2003-110*).

The New York committee stated that a judge is not required to report apparent probation violations by the relative of a child in a neglect case (*New York Advisory Opinion 2015-153*) or a litigant's testimony about violating probation in an unrelated case (*New York Advisory Opinion 2008-155*), but may do so. The committee also advised that a judge is not required to report an apparent incident of statutory rape that came to the judge's attention when a 15-year-old pregnant female filed a petition seeking authorization to marry, but may do so. *New York Advisory Opinion 2005-84*. *See also Florida Advisory Opinion 2012-11* (judge learns in a hearing regarding an unborn child that the parents are 16 and 21 years old); *Florida Advisory Opinion 1997-18* (judge receives a petition to issue a marriage license to a pregnant minor and a 24-year-old man).

The discretion has also been applied:

- When a litigant files an affidavit admitting she is in the country illegally (*New York Advisory Opinion 2005-30*);
- When a judge learns about a witness's illegal drug trafficking (*Alaska Formal Ethics Opinion 17* (1993));
- When in domestic relations or juvenile court matters, parties or witnesses admit to fornication, a violation of state law (*Utah Informal Advisory Opinion 2000-3*);
- When there are allegations of apparent sexual assaults disclosed during a hearing on an application for a restraining order (*Connecticut Formal Advisory Opinion 2017-12*);
- When a litigant testifies to improperly receiving federal social security disability benefits (*New York Advisory Opinion 2008-155*);

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- When a notary public may have improperly notarized a signature on a document (*Florida Advisory Opinion 2005-16*);
- When a physician who is a witness in a case admits altering medical records (*New York Joint Opinion 88-85 & 88-103*);
- When a judge learns during a child custody proceeding that a physician may have over-prescribed drugs (*Virginia Advisory Opinion 2001-1*);
- When a doctor who is a party to a divorce action tests positive for drugs (*New York Advisory Opinion 2006-13*);
- When a licensed practical nurse pleads guilty to a crime (*Pennsylvania Informal Advisory Opinion 1/13/2009*);
- When parties may have spent their children's proceeds from a personal injury case in violation of a court order (*West Virginia Advisory Opinion* (February 23, 2012)); and
- When the plaintiff in a matrimonial action describes conduct by the defendant that, while in and of itself is not criminal, is similar to actions by others who thereafter committed an act of terrorism (*New York Advisory Opinion 2010-50*).

Even possible crimes committed in the litigation over which the judge is presiding are within a judge's discretion to report or not. Thus, a judge is permitted but not required to report when a litigant offers a false instrument for filing (*New York Advisory Opinion 2009-171*) or may have committed perjury (*Florida Advisory Opinion 2005-16*) or falsely claimed that he knows the judge socially (*New York Advisory Opinion 2018-150*).

Rationale

Requiring a judge to report "every incident of past or present marijuana use, building code violations, tax violations, bad checks, consumer fraud, or any of the other myriad of criminal violations a judge may become aware of would immerse the judge in side issues, take time away from the judicial function and likely compromise the judge's appearance of impartiality." *Illinois Advisory Opinion 2002-1*. Imposing "a blanket duty" to report "every act of adultery divulged in divorce cases" and "every violation of the traffic laws revealed in motor vehicle tort actions" would unduly burden the judge "with no assurance of a corresponding public benefit from the report." *Maryland Opinion Request 2004-7*.

Further, a reporting requirement would force a judge "to assume a law enforcement role in a trial" that could impair "the effectiveness of the trial process to lead to a truthful exposition of the facts." *Maine Advisory Opinion 2001-1*. A reporting requirement could dissuade witnesses "from telling the whole truth" or allow litigants to use the threat of possible criminal proceedings to pressure another litigant "for settlement purposes or otherwise." *New York Joint Opinions 88-85 & 88-103*. Because "judges are exposed

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daily to allegations of significant wrongdoing that may or may not have a solid basis in fact," the code's mandate that judges maintain the integrity and impartiality of the judiciary precludes "the judicial function from devolving into an investigatory, accusatory, or prosecutorial exercise of power." *Massachusetts Advisory Opinion 2005-7*.

On the other hand, a "blanket" prohibition on judges reporting criminal activity could undermine public confidence in the integrity of the judiciary if a judge's failure to report a particular criminal activity would be "contrary to the moral obligation of a law-abiding citizen . . . ." *Maryland Opinion Request 2004-7*. "A courtroom is not a 'duty free zone' in which serious crimes may be admitted with impunity. A blanket judicial attitude of 'hear no evil, see no evil, report no evil' does not inspire public confidence." *Arizona Advisory Opinion 1992-15*. The Arizona committee explained:

> Surely, a judge has no duty to report each and every witness who has admitted to having once smoked marijuana. On the other hand, a judge is under an obvious imperative to notify the police of a witness who, in court, admitted committing recent, unsolved serial murders.
>
> Between these two extremes lies the twilight zone of discretion. It is the nature of discretion that it can be abused both by action and inaction.

Factors

According to the Massachusetts committee, there are "rare cases" when a judge is required to report information to authorities if:

- The wrongdoing is significant and clearly established,
- The judge has no power to issue corrective or ameliorative orders, and
- Absent a report from the judge, the wrongdoing is not likely to come to the attention of any person or agency empowered to take remedial action.

Massachusetts Advisory Opinion 2005-7.

Several other committees have also listed factors to guide judges in exercising their reporting discretion. Some factors stress the nature of the possible offense:

- The severity, magnitude, seriousness, or egregiousness of the offense (*Arizona Advisory Opinion 1992-15*; *Illinois Advisory Opinion 2002-1*; *Maine Advisory Opinion 2001-1*; *Maryland Opinion Request 2004-7*; *Minnesota Advisory Opinions* (2009); *Pennsylvania Formal Advisory Opinion 1999-2*);
- Whether there is a danger to the community (*Illinois Advisory Opinion 2002-1*; *Minnesota Advisory Opinion* (2009));
- Whether there is a danger to the public trust (*Minnesota Advisory Opinion* (2009));

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- Whether the public interest would be served if the judge were to make a report (*Illinois Advisory Opinion 2002-1*; *Maine Advisory Opinion 2001-1*); and
- Whether reporting would affect the appearance of the judge's impartiality or public confidence in the judiciary (*Maine Advisory Opinion 2001-1*; *Minnesota Advisory Opinions* (2009)).

The timing of the offense and how much the judge knows are also relevant, including:

- How recently the offense occurred (*Arizona Advisory Opinion 1992-15*; *Maryland Advisory Opinion 2004-7*; *Illinois Advisory Opinion 2002-1*);
- Whether the offense is continuing (*Illinois Advisory Opinion 2002-1*);
- The likelihood of injury if the conduct is not reported (*New York Advisory Opinion 2008-155*);
- How conclusive and sufficient the judge's information is (*Illinois Advisory Opinion 2002-1*; *Minnesota Advisory Opinion* (2009)); and
- How obvious the crime is (*Pennsylvania Formal Advisory Opinion 1999-2*).

Another consideration is whether authorities are likely to learn of the offense absent a report by the judge, that is:

- Whether the offense has a victim who is able to report the crime without interference (*Illinois Advisory Opinion 2002-1*; *Minnesota Advisory Opinion* (2009));
- Whether a prosecutor or other lawyer representing a governmental or law enforcement authority was present when the offense was disclosed (*Minnesota Advisory Opinion* (2009); *Illinois Advisory Opinion 2002-1*); and
- Whether other persons or entities are aware of it (*Maine Advisory Opinion 2001-1*; *Minnesota Advisory Opinion* (2009)).

The circumstances of the litigation in which the judge became aware of the possible offense are also relevant. For example:

- Whether one party disclosed another party's offense to cause embarrassment or gain an advantage in the lawsuit extraneous from the merits (*Arizona Advisory Opinion 1992-15*);
- Whether reporting would violate confidentiality requirements for the proceedings (*Massachusetts Advisory Opinion 2005-7*); and
- Whether reporting would violate the prohibition on ex parte communications (*Massachusetts Advisory Opinion 2005-7*).

If a judge decides to make a report to the authorities, the judge should "simply report the facts without judgement." *Pennsylvania Formal Advisory Opinion 1999-2*. *See also* *Connecticut Formal Advisory Opinion 2017-12* (if a judge

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decides to report to the state's attorney allegations of sexual assaults disclosed during a hearing on an application for a restraining order, the judge should do so by sending a signed transcript). If a judge does make report to law enforcement official, the judge should not preside over any proceeding arising from the report. ***New York Advisory Opinion 2016-154***.

See also ***New York Advisory Opinion 2019-10*** (a judge has no duty to report that his former housekeeper disclosed a continuing medical fraud to him); ***New York Advisory Opinion 2008-99*** (a judge must report evidence that court personnel have engaged in misconduct to the administrative judge and may, but is not obliged to, report to other authorities, including the district attorney, other municipal officials, or the police); ***New York Advisory Opinion 2013-35*** (a judge who learned in an interview that a prospective tenant has an open bench warrant is not required to report the individual to the police); ***New York Advisory Opinion 2007-144*** (a judge who learned from an acquaintance that she stole money from her employer is under no obligation to report the acquaintance to any authority, but may do so in his discretion).

Recent judicial discipline cases

Ex parte e-mails

Adopting stipulated findings, the Michigan Supreme Court publicly censured a judge for providing caselaw to prosecutors and then expressing his displeasure when the prosecutors disclosed his ex parte communications to defense counsel *In re Filip*, 923 N.W.2d 282 (Michigan 2019).

In June 2017, the judge sent Assistant Prosecuting Attorney Jeremiah Smith an e-mail with the subject "Adkins OWIs," referring to a case over which he was presiding. The e-mail stated: "Take a read of People v Solmonson, 261 MA 657 (2004), cited in People Rassoull Omari Janes, COA Unpublished June 15, 2017 (I have a copy)." The cases he cited were relevant to an issue in the Adkins case. The judge did not provide defense counsel a copy of the e-mail, but Smith did.

In July 2017, after a preliminary examination in *People v. Rama Tyson*, the judge asked the parties to brief the sufficiency of the evidence related to the charge of maintaining a drug house and the execution of the search warrant. Several days later, the judge sent an e-mail to Smith with "Rama Tyson – Maintaining" as the subject and with a citation to a case from Washington State that was relevant to the issues the parties were briefing. The judge did not provide defense counsel with the citations or the e-mail. Smith told his supervisor, Kati Rezmierski, about the e-mail, and Rezmierski gave a copy to Tyson's defense counsel.

The defense filed a motion to disqualify the judge from the Tyson case based on the e-mail. During a hearing on the motion, the judge stated that

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Smith "handled himself in in [sic] a completely unprofessional manner, never notified me of his concerns" and "Mr. Smith is a fool that I suffered." He also twice referred to Rezmierski as a "cancer" in the prosecuting attorney's office.

Inappropriate e-mail

Accepting her resignation, the Colorado Supreme Court publicly censured a former court of appeals judge for (1) disclosing to an intimate, non-spousal partner the vote of a court of appeals division on a case prior to the issuance of the decision and (2) using inappropriate racial epithets in communications with that intimate partner. ***In the Matter of Booras*** (Colorado Supreme Court March 11, 2019).

In 2007, the judge began a 10-year relationship with a man whom she met online ("J.S."). J.S. told the judge that he was divorced and living in Denver, although the judge later learned that he was married and living in California. They did not see each other frequently, but they communicated often, and the judge described their relationship as "intimate" and believed they would get married some day.

By early 2017, however, "the relationship was deteriorating, and Judge Booras had good reason to distrust J.S."

On February 21, 2017, the judge and other members of a division of the court of appeals heard oral argument in a case about the extent to which a state commission was required to consider public health and the environment in deciding whether to grant permits for oil and gas development. The next morning, the judge sent an e-mail to J.S. that said:

> We had an oral argument yesterday re: fracking ban where there was standing room only and a hundred people in our overflow video room. The little Mexican is going to write in favor of the Plaintiffs and it looks like I am dissenting in favor of the Oil and Gas Commission. You and Sid [a colleague of J.S.] will be so disappointed.

"The little Mexican" was a reference to one of Judge Booras's colleagues, "a Latina who would ultimately write the opinion for the majority in that case." Judge Booras wrote the dissent.

At some point in 2018, J.S.'s wife contacted the judge, and the judge told her about the affair. Shortly thereafter, J.S. provided *The Denver Post*, the chief judge of the Court of Appeals, the governor, the Commission on Judicial Discipline, and counsel for the plaintiffs in the case several communications to him from the judge.

The Court found that the judge had disclosed confidential information — the court's vote in the case — to a third party. The Court also found that the judge "had used an inappropriate racial epithet in communicating with J.S.," noting that it was not the first time because she had referred to her ex-husband's new wife, a woman of Navajo descent, as "the squaw" in an e-mail to J.S a year earlier.

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The judge argued that "a judge's communications with an intimate partner should be given First Amendment protection unless the speech 'violates a specific narrowly-tailored rule of judicial conduct or falls within an ordinary exception to the First Amendment.'" Rejecting that argument, the Court held that "inappropriate racial epithets and derogatory remarks are not matters of legitimate public concern warranting First Amendment protection." The Court also concluded that any First Amendment interests "are outweighed by the state's countervailing interests."

The Court held that the judge's "use of an inappropriate racial epithet directed at one of her colleagues" and "her improper disclosure of confidential information to an intimate, non-spousal partner whom Judge Booras had reason to distrust, obviously impaired harmony and trust among her co-workers . . . ." The Court emphasized that the judge's "relationship with the colleague at whom her 'little Mexican' comment was directed" was particularly affected, noting that the other judge had been "justifiably shocked and deeply hurt by Judge Booras's comments" and that a close working relationships with other judges on the court of appeals is "integral to a collaborative decision-making body like that court." The Court also explained:

> Judge Booras's misconduct may have implicated her ability to hear cases involving parties of diverse backgrounds. The knowledge of Judge Booras's racially inappropriate comments could understandably have caused concern among parties of diverse backgrounds, and particularly those of Latino and Native American ancestry, who inevitably would have appeared before Judge Booras were she to have returned to the court of appeals. The judicial system cannot function properly if public confidence in a court is eroded in this way.

Sleep deprivation

The Nevada Commission on Judicial Discipline publicly censured a judge for using an alternate judge whenever it was his turn to be the on-call search warrant judge and failing to comply with the chief judges' directives about his duties. ***In the Matter of Hastings***, Findings of fact, conclusions of law, and imposition of discipline (Nevada Commission on Judicial Discipline March 6, 2019).

Following a U.S. Supreme Court decision that police officers had to obtain a warrant for blood tests during drunk-driving stops, all of the judges on the Las Vegas Municipal Court agreed that each judge would be on-call to review telephonic search warrant requests for 24-hours, for one week, once every six weeks. Despite agreeing to that procedure, Judge Hastings used an alternate to perform on-call duties every time it was his turn in the rotation so that he did not perform those duties "*even one time*" in approximately four years.

Three chief judges repeatedly corresponded and met with Judge Hastings about his failure to perform his duties as on-call search warrant judge; one chief judge even pleaded with him to, "'please, just do it once.'" The judge ignored them.

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The Commission emphasized the testimony of four other judges on the court that they were all "significantly affected" by sleep deprivation when performing on-call duties but that Judge Hastings was the only judge who used alternates. The Commission found that the judge's excuse that he wakes up "cranky" and cannot get back to sleep after receiving a call about a warrant was shared by all of the judges but concluded that "a judge cannot shirk his or her assigned duties based simply upon a dislike for such duties." Although the judge was willing to pay the costs of an alternate himself, the Commission found that a judge "cannot simply pay someone else to consistently perform assigned" but undesirable judicial duties, stating that the judge had been elected to perform all the duties of a judge on the municipal court.

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The College provides a forum for judicial conduct commission members and staff, judges, judicial ethics advisory committees, and others to discuss professional standards for judges and current issues in judicial discipline. There is a complete description of sessions and moderators on-line. The session topics are:

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- International and U.S. Regulation of Judges' Use of Social Media
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- Introduction to Judicial Ethics and Discipline for New Members of Judicial Conduct Commissions
- The Role of Public Members

There is a link from the College registration site to the hotel reservation site. If you have any questions about registration, contract Alisa Kim at *akim@ncsc.org* or (303) 308-4340.

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