JUDICIAL CONDUCT REPORTER

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

National Center for State Courts
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Williamsburg, VA 23185

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Judicial discipline for abuse of the contempt power *by Cynthia Gray*

Introduction

To counter disruptive behavior and restore order in the courtroom when immediate action is necessary, judges have the authority to promptly incarcerate or otherwise sanction someone for criminal contempt without all of the protections that usually proceed court-ordered punishment. However, that authority is not unrestricted, and there are statutes, rules, and caselaw that define when and how judges may exercise the criminal contempt power.

Although courts and judicial conduct commissions are generally reluctant to second-guess a judge's decision to control the courtroom through the contempt power, given the liberty interests at stake, judges have been disciplined for over-reacting and for ignoring the procedures designed to ensure that citizens are not thrown in jail precipitously. Abuse of the contempt power may violate the code of judicial conduct requirements that judges be "patient, dignified, and courteous" and "uphold and apply the law."

The precise procedures, authority, and terminology for criminal contempt vary from jurisdiction-to-jurisdiction, and every judge is required to be familiar with the law in their state. Ignorance of or failure to follow clearly defined contempt procedures can constitute the bad faith or egregiousness that makes appealable legal error also sanctionable judicial misconduct. *See, e.g., Ryan v. Commission on Judicial Performance*, 754 P.2d 724 (California 1988); *In re Sims*, 159 So. 3d 1040 (Louisiana 2015); *Goldman v. Commission on Judicial Discipline*, 830 P.2d 107 (Nevada 1992). The discipline cases involving abuse of the criminal contempt power often note that the judge should have known better based on their judicial experience and training or at least should have researched how to properly exercise their power. (This article will discuss only the criminal contempt power. In civil contempt, a judge can, after following appropriate procedures, incarcerate someone until they comply with a specific court order to, for example, pay child support or comply with discovery requests.)

As some of the cases described below illustrate, abuse of the contempt power may be found even when the judge only threatens contempt, including issuing a rule to show cause, without entering a finding or executing a sanction. The threat of contempt alone may be an oppressive exercise of judicial power because it may discourage a litigant from presenting their case or an attorney from representing their client. Further, even if a judge does not formally hold someone in contempt, detaining or handcuffing them or requiring them to leave the courtroom may be the equivalent of abuse of the contempt power and constitute sanctionable abuse of authority.

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Not the adult equivalent of a time-out

According to merriam-webster.com, the dictionary definition of contempt for everyday use is "the act of despising: the state of mind of one who despises: DISDAIN" or "lack of respect or reverence for something." Similarly, contemptuous is defined as "manifesting, feeling, or expressing deep hatred or disapproval: feeling or showing contempt."

However, for purposes of criminal contempt in the legal sense, "contempt" and "contemptuous" have narrower meanings. More than a feeling, attitude, or even expression of disrespect is necessary to justify jailing or fining someone; there must be some significant obstruction or disruption of court proceedings.

For example, the Ohio Supreme Court emphasized that a woman's scream outside a judge's courtroom was only "a distraction at best or a momentary interruption to the proceedings at worst" and that "the only obstruction to the administration of justice that day occurred" when the judge summarily held the woman in contempt. *Disciplinary Counsel v. Bachman*, 168 N.E.3d 1178 (Ohio 2020) (suspension of former magistrate from the practice of law for six months).

On September 4, 2018, at approximately 7:45 a.m., K.J. arrived at the court to file a petition for a civil protection order. After she completed the paperwork, a clerk's office employee told her that she had missed the 8:10 a.m. filing deadline to be heard that day and that she would have to return the following day.

K.J. went to the magistrate's courtroom, apparently hoping to have her case heard that day. After speaking with the magistrate's clerks in the hallway, K.J. turned away.

As she walked toward the exit, K.J. screamed so loudly that she was heard in the courtroom. The magistrate, who was conducting an asset-forfeiture trial, immediately said, "Okay, time-out," and stopped the trial.

The Court described the video footage of what followed as "revealing and disturbing."

> It shows Bachman exiting the courtroom in his robe and running down the hallway in pursuit of K.J. He accosts her at the elevators and returns her to his courtroom. Once there, Bachman walks her through the crowded courtroom with his hand on her shoulder, places her in a seat in his jury box, and orders her not to move just before summoning the sheriff. Multiple sheriff's deputies soon arrive, and Bachman orders them to take K.J. into custody and to jail her for three days for contempt, causing her to cry and attempt to leave the jury box.

The Court stated that "the next 20 minutes of the video are difficult to watch."

> While K.J. resists being arrested and pleads with Bachman to explain why she is being jailed for three days, she is physically subdued by two deputies, threatened with being tased, and ultimately dragged from the jury box by several deputies. Bachman's only response is to increase her jail sentence to ten days. . . . Bachman then congratulates a deputy on an award the deputy had recently received and resumes the proceeding as

Abuse of the contempt power violates the code of judicial conduct requirements that judges be "patient, dignified, and courteous" and "uphold and apply the law."

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if nothing out of the ordinary has just transpired. Meanwhile, the video footage shows, while K.J. continues protesting her arrest, she is dragged, yanked, pinned to a wall, and handcuffed to a chair. Before the video ends, over 20 deputies and members of the court staff are involved in jailing K.J.—all because of a scream of frustration in the hallway that lasted one second.

Two days later, after watching the video, the administrative judge ordered that K.J. be released from custody.

In the disciplinary proceeding, the Court stated that "the chain of events set in motion" by the magistrate's misconduct physically and emotionally harmed K.J. It noted that the magistrate's conduct also "exposed the sheriff's deputies and other court personnel to harm from a violent and unnecessary arrest on full display in front of a courtroom full of people who have no other choice but to sit silently and witness such a disturbing sight."

The Court found:

> Bachman's sentencing K.J. to ten days in jail for a one-second scream in the hallway as she was leaving his courtroom area and for questioning why she was being jailed is outrageous. The spectacle his conduct created was even more appalling and demonstrates his utter indifference to the harm he caused K.J. and the integrity of the judiciary. . . .
>
> Sending someone to jail is not the adult equivalent to sending a child to his or her room for a time-out. Yet Bachman and other judicial officers who have been sanctioned for similar conduct seem to equate the two. Not only was Bachman's jailing of K.J. unauthorized under the contempt statute, but he exhibited a total disregard for the reason she was at the courthouse in the first place — to get a civil protection order. He also showed a complete indifference to the circumstances of her life (e.g., whether she had children or other family members to care for, employment she might lose, or any other harm she could suffer), to the indignity she endured by being physically restrained in a crowded courtroom, and ultimately, to the loss of her liberty.

In *In re Free*, 199 So. 3d 571 (Louisiana 2016), the judge had held one litigant in contempt for her "attitude" and a second for his "mean muggin'" and failed to follow correct procedures in either case. (The Court suspended the judge for one year without pay for this and other misconduct).

In the first case, after the judge had found Ebonique Minor, a self-represented litigant, guilty of disturbing the peace after a bench trial, he called the next case, but then summoned Minor back, believing that he had heard her say, "this is some stupid s**t." The judge said to Minor, "There you go. You couldn't help yourself. Fifteen days in the parish jail for contempt of court." He explained:

> It's what you say and the way you say it with the attitude you say it with, that's what got you in trouble, okay. That is contemptuous conduct. You know, it's one thing if you just turn around and walk away and I'm sorry that's the way it went — ... but that attitude. . . was just like you dumb a-double-s, and that's contemptuous and I'm sorry.

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The judge did not give Minor the opportunity to defend or mitigate her conduct. She served seven days in jail.

Later in the same court session, after a bench trial, the judge found Michael Owens, a self-represented defendant, guilty of a no-seatbelt violation. Owens raised constitutional issues about the seatbelt law, and the judge told him to seek a writ application or "Go ask the Governor why he won't change it. He can veto that seat belt law if he wants to. I can't — I am only one person." Owens responded: "I thought, you know — it was my idea that the courts are the safeguard of the people's rights, the ones that's supposed to turn back the Government when it oversteps its bounds. And I was hoping that you might see your way clear for that, but apparently not." The judge then said:

> Now I find you in contempt of court, sir, and I give you five days in parish jail for that comment. Good luck to you, sir. I tried my very best to help you out, sir, but I don't know why you've got to make a comment like that. That was very disrespectful and contemptuous toward this Court.

Owens was taken into custody, and he served three and a half days in jail.

In the disciplinary proceeding, the judge blamed Owens's "insolent behavior," which he defined as "disrespectful, just impugning the Court's dignity, disruptive of the court, just a number of things." The judge testified that he held Owens in contempt, not for what he said, but for how he said it and his "physical demeanor," which he described as "mean muggin'." He explained:

> He — he had his arms crossed and he was — he wears glasses. And he was kind of looking over his glasses. And he was snarlin' and he was apparently — apparently — well you wouldn't — it was just — it was like I explained later in the thing, it was almost like saying you dumb a-double-s. Either you won't follow my — you wouldn't follow the law because you're stupid to realize it or you just won't follow the law because you're too crooked to do it. That's the way I took it. That was the way he meant it.

Stating it found no support for the judge's defense that Owens was contemptuous because of his facial expressions and overall demeanor, the Court concluded that "Owens's retort may have been unwise" but it was not contemptuous and "certainly did not merit a sentence of five days in jail." In addition, the Court held, the judge failed to strictly follow the proper procedures for holding someone in contempt; the judge had not given Owens an opportunity to defend or mitigate his behavior and had not adequately "render[ed] an order reciting the facts constituting the contempt" in accordance with the code of criminal procedure.

"Inaccurate perception of his role as a judge"

The Nevada Supreme Court emphasized that a judge's abuse of his contempt power in eight instances had resulted from his "inaccurate perception of his role as a judge and from his unwillingness to tolerate actions by others which are not in harmony with his apparent belief that those who do not meet or respond to his demands and expectations are subject

A virtual National College on Judicial Conduct and Ethics will be held via Zoom on Thursday and Friday, October 28 and 29, 2021, from 11 to 2:30 central. There will be three one-hour long sessions each day, with breaks in between. The registration fee will be $95 total for both dates.

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to imprisonment and punishment under the court's contempt power." *Goldman v. Commission on Judicial Discipline*, 830 P.2d 107 (Nevada 1992) (removal). The Court noted that the judge "was an experienced judge who continued to ignore binding precedent reversing his contempt rulings," and the Court emphasized the importance of "strictly adhering to the statutory provisions governing contempt."

Similarly, the Florida Supreme Court stated that a judge must never exercise the contempt power "in a fit of anger, in an arbitrary manner, or for the judge's own sense of justice." *Inquiry Concerning Perry*, 641 So. 2d 366 (Florida 1994) (reprimand for this and other misconduct). In that case, the judge had held six defendants in contempt after they had driven away from the courthouse even though he had cautioned them not to because their licenses were suspended.

The Court held that the judge had clearly failed to follow the statutory procedures for indirect criminal contempt and rejected the judge's contention that his transgressions were nothing more than errors of law that should not be subject to discipline. The Court acknowledged that "one of the most important and essential powers of a court is the authority to protect itself against those who disregard its dignity and authority or disobey its orders." However, it concluded:

> [B]ecause trial judges exercise their power of criminal contempt to punish, it is extremely important that they protect an offender's due process rights, particularly when the punishment results in the imprisonment of the offender. . . . It is also extremely important to recognize that this discretionary power of criminal contempt is not broad or unregulated.

The Court noted that judges are given training in how to exercise the contempt power and are provided with a checklist to follow in holding someone in contempt.

Direct vs. indirect

In general, criminal contempt can be either direct or indirect.

- Indirect criminal contempt is committed outside the presence of the judge and requires a hearing and the presentation of evidence before it can be sanctioned.
- Direct contempt is committed in the presence of the judge and may be punished "summarily" by the judge, that is, without a fact-finding hearing, as the elements are within the judge's personal knowledge.

Even with direct criminal contempt, there are due process requirements. When a judge believes a person has been "contemptuous" in their presence, there are steps the judge must follow if they want to hold that person in contempt.

- The judge must warn the person that, if the conduct continues, the judge will find them in contempt.

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- If the person does not desist, the judge must provide the person an opportunity to explain their conduct.
- If the person does not provide a sufficient explanation and the judge finds the person in contempt and imposes a punishment, the judge must enter an appealable order that reflects that the judge followed the necessary steps and that recites the facts that constitute the offense and justify summary contempt.
- The punishment for criminal contempt must be determinate and unconditional, that is, a specific incarceration term or fine.

In one of the common legal errors constituting abuse of the contempt power, judges inappropriately use the summary, short-cut procedures applicable only to direct crmininal contempt to sanction conduct that did not take place in the judge's presence.

For example, the Kentucky Supreme Court emphasized that a family court judge knew or should have known that she could not summarily hold a husband in contempt based on reports about his conduct outside the courtroom, but that the judge "plow[ed] forward without regard for fundamental rights and with a disregard for the law" because she "was on a mission and nothing was going to stop her, not the law or anybody/anything else." *Gormley v. Judicial Conduct Commission*, 332 S.W.3d 717 (Kentucky 2010) (reprimand and 45-day suspension for this and related misconduct). In the underlying case, a wife had a no-contact provision in a domestic violence order against her husband. A bailiff informed the judge that, according to witnesses, the husband had attempted to convince the wife to leave the courthouse while they were waiting in the hallway for a hearing. Without prior notice to the husband, the judge held an impromptu summary criminal contempt hearing; the judge did not advise the husband that he had the right to counsel, that he did not have to respond to the judge's questions, and that his answers might subject him to criminal contempt sanctions. The judge called one witness, but she did not allow the husband to examine the witness. The judge questioned the husband under oath and learned that he had had contact with his wife the night before and again that day in the hallway. The judge found the husband in contempt of court and sentenced him to six months in jail.

Finding that the judge clearly erred in holding a summary criminal contempt proceeding for indirect criminal contempt, the Court emphasized that "to err is human" but "judicial misconduct is different."

> The Judicial Conduct Commission's review is not focused merely on the judge's findings, conclusions, and ultimate judgment, but on the judge's demeanor, motivation, or conduct in following (or in not following) the law. . . . We believe Judge Gormley's handling of the matter, together with the egregious rulings, displayed a bias or preconception or a predetermined view against the husband so as to impugn the impartiality and open-mindedness necessary to make correct and sound rulings in the case.

Stating that she should have known that she was acting erroneously, the Court noted that the judge had practiced law for at least eight years

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before becoming a family court judge, that "all Kentucky judges are provided with computers and a subscription for online legal research," and that "most, if not all, Family Court judges are given support staff, one of whom is a licensed attorney."

The Washington State Commission on Judicial Conduct concluded that a judge who summarily held a domestic violence complainant in contempt after she recanted her statement to police committed misconduct because the retraction had not taken place in the courtroom and had not been directed at the court or judge and jailing the complainant overnight was not necessary to preserve order or to protect the authority and dignity of the court. ***In re Shelton*, Stipulation, agreement, and order of reprimand** (Washington State Commission on Judicial Conduct July 8, 2011). In addition, the Commission found that the judge had not complied with the statutory procedural requirements by failing to give the complainant an opportunity to speak in mitigation and failing to issue a written order. *See also Inquiry Concerning Collins*, 195 So. 3d 1129 (Florida 2016) (public reprimand of a judge who found the victim in a domestic violence case in contempt for failing to respond to the prosecution's subpoena to testify at trial).

Conduct in the clerk's office

In several cases, judges have been found to have committed misconduct when they used the contempt power to retaliate against litigants for allegedly disrespectful conduct toward court staff or in the clerk's office.

For example, in a discipline case, the Ohio Supreme Court found that a judge had used the contempt power "to intimidate and demean" a man who had told the court cashier that "judges can be crooks, too" when he paid his nephew's fines and costs. *Disciplinary Counsel v. Cox*, 862 N.E.2d 514 (Ohio 2007) (former judge indefinitely suspended from the practice of law for this and other misconduct.). After the cashier had reported James Portis's remark to the judge, the judge instructed police officers to arrest Portis. The officers took Portis into custody for approximately three hours before taking him to the judge's courtroom.

Portis stated several times that he did not understand why he had been arrested. He eventually indicated that he understood after the judge explained: "For what you said when you were at the window. What you said in this young lady's presence. When you said the Judge was a crook. That's why you're standing there." The judge further stated:

> That's defamation. You shouldn't go around calling people something that they're not, unless you can prove it. You can't defame my character in front of other people and say I'm a crook, unless you can prove it. That's defamation. You don't have any right to say those things about me, or anybody. Now, if you're too dense to understand that, maybe your lawyer will be able to explain it to you. Do you understand?

At the end of the proceeding, Portis pleaded no contest and was fined $500 and assessed $69 in costs.

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The New Jersey Supreme Court sanctioned a judge who had held a defendant in contempt for writing "a**holes" on the memo line of a check mailed to the court to pay a fine for a parking summons. *In the Matter of Gordon*, 924 A.2d 512 (New Jersey 2007) (admonishment of a former judge for this and other misconduct). The judge held a summary contempt proceeding and fined the defendant $500, but then reduced the fine to $100. In its presentment, the Advisory Committee on Judicial Conduct found that the judge had violated an administrative directive that specifically instructs judges that summary contempt proceedings are not appropriate in response to remarks written on checks sent to pay fines.

Other examples:

- A judge held a defendant in contempt without notice, an opportunity to be heard, or counsel because, even after law enforcement escorted him out of the clerk's office, the defendant repeatedly returned to the counter and was allegedly argumentative when staff were unable to explain a discrepancy in the amount he owed. ***Riggs*, Order** (Arizona Commission on Judicial Conduct March 17, 2020) (reprimand).
- A judge found a woman in contempt and ordered her to serve 24 hours in jail, without notice, a hearing, or the opportunity to have counsel present, after the woman called the judge a "b***h" in the clerk's office when she was told that the judge had increased the bond she was there to post. ***In re Prewitt*** (Kentucky Judicial Conduct Commission July 10, 2015) (seven-day suspension).
- A judge sanctioned an attorney $500 for contempt of court without a rule to show cause or adequate basis after the attorney allegedly made threatening statements to court staff, which the attorney denied. *In the Matter of Sasso*, 970 A.2d 1039 (New Jersey 2009) (60-day suspension).
- A judge ordered police officers to arrest a woman for contempt of court after his staff had reported that she was being "rude" to them and using vulgar language. ***Public Reprimand of Garza and Order of Additional Education*** (Texas State Commission on Judicial Conduct March 30, 2010).

Targeting court staff

Judges have been disciplined for holding court clerks or other staff in contempt without adequate cause or due process, turning typical workplace aggravations into supposedly jailable offenses.

For example, in *Goldman v. Commission on Judicial Discipline*, 830 P.2d 107 (Nevada 1992), four of the eight instances of abuse of the contempt power that led to the judge's removal involved court staff.

- The judge held the superintendent of the maintenance department in direct contempt of court because of noise from construction on the courthouse roof.

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- The judge directed the district court clerk to appear to show cause why she should not be held in contempt after the judge became confused because a deputy clerk had transposed the first and the last names of the plaintiff in a case on the calendar.
- The judge held the district court clerk in contempt of court because a deputy court clerk had accepted a motion to dismiss in a civil action the day after a default had been entered in the case; the judge sentenced the clerk to 20 days in jail and fined her $500.
- The judge directed the district court clerk to appear before him to show cause why she should not be held in contempt because a plaintiff's motion for judgment against a defaulting garnishee had not been taken off the calendar after a stipulation for judgment and order had been entered.

In *Commission on Judicial Performance v. Willard*, 788 So. 2d 736 (Mississippi 2001), the judge had abused his contempt power by holding the court clerk in contempt three times without due process.

- In one incident, the judge advised the court clerk in a letter that she was being held in contempt for many alleged administrative irregularities and ordered her to appear before him.
- In a second incident, while a deputy clerk was in the courtroom performing her duties, the judge called her to testify as a witness or be charged with contempt; he did not advise the clerk of her rights or ask whether she wanted an attorney present.
- In a third incident, the judge ordered the clerk arrested when she refused to get files for him at 11:15 p.m. The clerk and her deputy clerk had been at work since 8:00 a.m., and she told the judge she would get the files to him the next morning. When the clerk was released on bond, the judge ordered her arrested again.

The Court removed the judge for this and other misconduct.

In ***In the Matter of Johnston*, Order** (New Mexico Supreme Court October 23, 2017), summarized in **2018 annual report**, the judge had had several disputes with the presiding judge about court procedures. When one of the court clerks complained about feeling threatened by the judge, the presiding judge ordered that there always be two clerks in the courtroom with the judge during proceedings.

One day, the judge ordered one of the two clerks out of the courtroom and then "willfully and maliciously" held her in contempt when she stayed to perform her duties as directed by the presiding judge. The judge ordered the clerk's immediate arrest and sentenced her to 30 days in jail "without giving her an adequate opportunity to defend or explain her conduct." The New Mexico Supreme Court removed the judge for this and other misconduct.

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In *In re Jefferson*, 753 So. 2d 181 (Louisiana 2000), the judge summoned the city court clerk, Carol Powell Lexing, to his office because she had not distributed paychecks to him and his staff at noon as usual, but after she returned from lunch. When the judge's secretary loudly and disparagingly reprimanded her, Powell Lexing walked out, ignoring the judge's plea that she remain.

On the following afternoon, without any notice to Powell Lexing, the judge had a deputy marshal escort her to his courtroom where he questioned her belligerently about the checks and other matters. At some point during the hearing, Powell Lexing refused to answer.

The judge ordered Powell Lexing jailed until she answered his questions, finding her in contempt of court. After Powell Lexing was transported to the police station to be booked, the judge ordered that she be returned to the courtroom and interrogated her further.

In the disciplinary proceeding, the Louisiana Supreme Court concluded that the judge's conduct amounted to an abuse of power intended only to intimidate and demean Powell Lexing. The Court also found that the judge ignored the procedural protections afforded individuals charged with contempt. The Court removed the judge for this and other misconduct.

A Mississippi judicial discipline case arose from a dispute about who was the senior circuit court judge. *Commission on Judicial Performance v. Sanders*, 749 So. 2d 1062 (Mississippi 1999) (removal for this and other misconduct). Judge Sanders had posted an order setting the court term, but the circuit clerk, Fred Ferguson, removed it and replaced it with one from Judge Johnson, based on an opinion from the attorney general and his conversation with Judge Johnson. When Ferguson explained on the phone why he had taken her order down, Judge Sanders became irate. Ferguson hung up. The judge issued a warrant for Ferguson's arrest on a contempt charge. When Ferguson was arrested and brought before the judge, he was not advised of his right to counsel or allowed to obtain counsel. Ferguson explained again why he had taken Judge Sanders's order down but then refused to answer any more questions and, arguably, turned away from the judge. The judge had Ferguson taken to jail and imposed a $500,000 cash appeal bond.

Attorneys

Judges using the contempt power to stop attorneys from pressing their arguments has been held to constitute judicial misconduct in several cases, particularly as that abuse can deprive defendants of their constitutional right to counsel.

As the New York State Commission on Judicial Conduct explained, "an attorney has a right to attempt to assert his client's interests in an appropriate manner, and it would be improper for a judge to use the contempt power to punish him for doing so." ***In the Matter of Van Slyke*, Determination** (New York State Commission on Judicial Conduct December 18, 2006) (admonition). In that case, during a bench trial in which the defendant was charged with harassment, the judge had summarily found the defendant in contempt for

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

Other examples:

- When defense counsel repeatedly asked a judge to clarify his sentencing proposal in an assault case, the judge held him in contempt and immediately sentenced him to one day in jail, although he later reversed his order. ***Chiles*, Order** (Arizona Supreme Court May 25, 2011) (censure).
- When a public defender continued to argue for leniency in sentencing for her client, the judge ordered his bailiff to handcuff her and seat her in a chair next to the jury box, so that the defendant was sentenced without the benefit of counsel. ***In the Matter of Hafen*, Stipulation and order of consent** (Nevada Commission on Judicial Discipline February 27, 2017) (censure).
- A judge held an attorney in contempt and immediately incarcerated him for objecting to the judge's failure to afford him an opportunity to fully advance sentencing options. ***In the Matter Concerning Espinosa*, Decision and order** (California Commission on Judicial Performance February 9, 2006) (admonishment).
- A judge deprived a drug court participant of her right to counsel of her choosing by not allowing her attorney to speak on her behalf and threatening to hold the attorney in contempt if she did not sit down. *Commission on Judicial Performance v. Thompson*, 169 So. 3d 857 (Mississippi 2015) (removal for this and other misconduct).
- A judge threatened a prosecutor, "if you talk any more, it's an Order that you don't open your mouth anymore until I invite you to do so, and if you do I'm gonna hold you in contempt." *In re Wright*, 694 So. 2d 734 (Florida 1997) (reprimand).

Judges have also been disciplined for summarily holding attorneys in contempt for refusing to comply with improper directions from the judge.

In *In re Jefferson*, 753 So. 2d 181 (Louisiana 2000), the judge twice held the city prosecutor, James Pierre, in contempt. First, when Pierre would not attend a meeting about a non-emergency matter scheduled at the judge's "whim," the judge ordered the deputy marshal to bring Pierre to his courtroom where he found him in direct contempt of court, sentencing him to 30 days in jail and fining him $500. Pierre was handcuffed and detained for several hours in a holding cell adjacent to the courtroom, although the judge rescinded his order after realizing that the sentence was inappropriate.

Stating that the contempt laws did not apply to Pierre's conduct, the Louisiana Supreme Court concluded that the judge had clearly abused his

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authority. Moreover, the Court stated that, even if the judge mistakenly believed contempt was appropriate, he did not follow any of the procedures for punishment of contempt: he had failed to provide Pierre an opportunity to be heard in defense or mitigation, failed to render an order reciting the facts constituting the contempt, and imposed a sentence that far exceeded the punishment permitted by law.

In the second incident, the judge held Pierre in contempt for failing to request permission before leaving the courtroom to console a witness who was disappointed with the outcome of a case and for turning his back on the judge while the judge was explaining why his behavior was unacceptable. Without affording Pierre the opportunity to explain his actions, the judge sentenced him to 24 hours in jail and ordered him to be immediately taken to jail. Pierre was handcuffed, booked, and detained at the city jail for several hours. Subsequently, the judge stayed the proceedings and the execution of the contempt order.

Explaining that it was not determining whether Pierre's actions were contemptuous, the Court held that the judge's complete failure to follow the requisite procedures constituted an abuse of the contempt power. Furthermore, the Court stated that the judge's treatment of Pierre disrupted court proceedings, prevented the orderly administration of justice, and brought the judiciary into disrepute when the judge's actions were widely reported in the local media. The Court removed him for this and other misconduct.

The Louisiana Supreme Court held that a second judge had also committed bad faith legal errors by holding an assistant prosecutor in contempt for refusing to meet with the judge, conduct that was not contemptuous. *In re Sims*, 159 So. 3d 1040 (Louisiana 2015) (30-day suspension). The judge and Katherine Gilmer, an assistant city prosecutor, had been opposing counsel in several cases prior to the judge taking the bench. After she became a judge, the judge felt that Gilmer did not respect her judicial authority, and Gilmer disagreed with the judge's handling of driver's license forfeitures.

One day several months after she became a judge, when Gilmer appeared in the judge's courtroom to handle a docket, the judge sent a deputy to tell Gilmer to meet with the judge in chambers. When, at the direction of the city prosecutor, Gilmer refused, the judge went into the courtroom and onto the bench and told Gilmer, "You're held in contempt at this time. All cases are dismissed."

Although the judge did not issue an order finding Gilmer guilty of contempt and did not impose punishment other than the dismissal of 15 criminal cases, the Court concluded that the judge clearly found on the record that Gilmer's conduct amounted to direct contempt without giving her an opportunity to be heard in defense or mitigation as required and without issuing an order, which effectively left Gilmer without a legal remedy. The Court also found that the judge made the legal errors in bad faith, solely due to her "personal frustration" with Gilmer.

Other examples:

- A judge held an attorney in contempt for refusing to disclose the address of the domestic violence shelter where her client was

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residing, without warning the attorney, giving her a reasonable opportunity to make a statement in extenuation, or issuing a written order in support of his contempt ruling. ***In the Matter of Singer,* Determination** (New York State Commission on Judicial Conduct July 1, 2009) (admonition).

- A judge held lead counsel for the state in a suit brought by oyster fishermen in contempt four times for refusing to answer a question that would have disclosed attorney-client privileged information. *In re Cresap*, 940 So. 2d 624 (Louisiana 2006) (30-day suspension for this and related misconduct).
- A judge ordered that an attorney be incarcerated for criminal contempt after the attorney refused to recite the pledge of allegiance in open court. *Commission on Judicial Performance v. Littlejohn*, 62 So. 3d 968 (Mississippi 2011) (reprimand).
- A judge held the county district attorney's office in contempt because, due to an oversight, a deputy district attorney was unable to announce at a calendar call whether the state would be ready to try a criminal case as previously scheduled. *Goldman v. Commission on Judicial Discipline*, 830 P.2d 107 (Nevada 1992) (removal for this and other abuses of the contempt power).
- Without complying with the requirements for summary contempt, a judge excluded one legal aid attorney from the courtroom for declining a plea offer because she had not had enough time to discuss the offer with her client and excluded a second legal aid attorney for attempting to correct a misrepresentation by the prosecution on an issue that the judge believed was irrelevant. ***In the Matter of Recant,* Determination** (New York State Commission on Judicial Conduct November 19, 2001) (censure for this and other misconduct).
- In a driving under the influence case, a judge jailed defense counsel immediately, with no hearing or written order of contempt, after the attorney objected when the judge spoke directly to his client. ***Letter to Vassie*** (California Commission on Judicial Performance February 28, 1995) (reproval).
- After a deputy prosecuting attorney presented an agreement to dispose of the charges in a case, a judge had the attorney arrested and held him in contempt for refusing to continue the prosecution by arresting a state trooper who was a key witness. ***In re Junke,* Commission decision** (Washington State Commission on Judicial Conduct June 4, 1993) (reprimand).
- When a plaintiff's attorney attempted to explain discovery issues in a civil case, a judge became hostile, raised his voice, and directed the attorney to have a seat; did not allow her to make any statements other than answering "yes" or "no" to his questions; ordered his bailiff to handcuff her; found her in contempt; and sentenced her to 72 hours in the detention center for refusing to answer a question,

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refusing to confer with her client, and continuing to argue with him. *In the Matter of Potter*, Findings of fact, conclusions of law, and imposition of discipline (Nevada Commission on Judicial Discipline November 22, 2017) (60-day suspension and $5,000 fine for this and other misconduct).

Judges have also been disciplined for summarily holding attorneys in contempt for failing to appear at hearings.

- A judge held in contempt an attorney who was not present in the judge's courtroom when she called his case because, while waiting for the judge to call his case, he had been summoned by another judge to a nearby courtroom for a delinquency case, which took longer than expected. *In re Younge*, Opinion and order (December 1, 2020), Opinion and order (Pennsylvania Court of Judicial Discipline June 2, 2021) (six-month suspension for this and other misconduct).
- A judge failed to comply with the law before holding an attorney in contempt for failing to appear for a trial in a traffic case. *Public Admonition of Richter and Order of Additional Education* (Texas State Commission on Judicial Conduct October 28, 2020).

Compelling conduct

It is judicial misconduct for a judge to address problems other than disruption of court proceedings by using the contempt power to detain someone without a hearing.

For example, in *In the Matter of Adames*, 222 A.3d 636 (New Jersey 2020), in a disorderly persons charge related to a landlord-tenant dispute, the judge had incarcerated a pro se litigant for contempt to make sure she would be in court for the next hearing. In an earlier hearing, the judge had expressed his belief that the litigant, Linda Lacey, may "have some mental condition" and told her that, if he felt that she was disrespecting the court, he would hold "her in contempt . . . send [her] to the county . . . and have them do an evaluation . . . ."

In a subsequent proceeding, the judge ordered Lacey detained pending a contempt hearing and psychological evaluation based on her disrespectful "tone, her demeanor, her body language." The judge set bail of $10,000 with a $1,000 release option. Lacey did not pay the bail, was remanded to custody, and was held for 23 days without a hearing or psychological evaluation.

In the disciplinary proceeding, the judge explained that he had been concerned that Lacey would not attend the hearing because she had failed to appear or been late on previous occasions, she had a disrespectful attitude toward the court, and her "whereabouts" would not be known after the eviction, which appeared certain. In its presentment (https://tinyurl.com/47jfabn7), the New Jersey Advisory Committee on Judicial Conduct found that the judge's conduct was egregious.

Judges have also been disciplined for summarily holding attorneys in contempt for refusing to comply with improper directions from the judge.

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> In complete disregard for the appropriate courtroom procedures, Respondent misused his power to incarcerate Ms. Lacey as a means to ensure her future appearance before him, contravened the contempt procedures and Ms. Lacey's due process rights, involuntarily committed her in the county jail without adhering to the appropriate civil commitment procedures and detained her for 23 days without just cause and without the benefit of counsel . . . .

The Committee rejected the judge's defense that "he misunderstood how to apply the contempt of court power," emphasizing that "by virtue of his judicial office, Respondent was duty-bound and expected to adequately know and properly adhere his conduct to the rules and statutes that govern the municipal court, especially those that govern contempt proceedings." *See also* ***In re Miniard*, Agreed order of suspension** (Kentucky Judicial Conduct Commission September 2, 2016) (based on testimony from law enforcement officers that a material witness in a criminal case may have been attempting to evade service, the judge issued a warrant for her arrest for contempt of court; the witness was incarcerated for over two months without the judge holding a hearing on the contempt charge, setting bond, or appointing an attorney to represent her).

The North Carolina Supreme Court publicly censured a judge who had used detention as a "cooling off period" for the mother in a visitation dispute in which 15-year-old twins refused to see their father. *In re Foster*, 832 S.E.2d 684 (North Carolina 2019). The judge had had the mother handcuffed and escorted out of the courtroom without an opportunity to be heard and without any contemptuous behavior. After the boys relented and agreed to visit their father, the judge had the mother brought back into the courtroom.

The judge argued that her actions "were appropriate to deescalate an unfortunate situation and resolve the visitation issues without further involving the Court." She explained that she had "previously placed litigants in temporary custody for a short 'cooling-off period' without an opportunity to be heard and found that practice to be successful in getting litigants to comply with the Court's directives," after which she would offer "the litigant an opportunity to apologize to the Court in lieu of facing a contempt hearing and a jail sentence."

The Judicial Standards Commission had emphasized that it was not reviewing whether the judge may have properly held the mother in contempt, noting that the judge "admits that she purposely avoided any legal ruling on the contempt issues before her and continued the hearing to a later date." The Commission found:

> The facts establish that Respondent acted with the specific intent to avoid what Respondent referred to as a "full-blown hearing," which Respondent admitted could not properly go forward because of inadequate notice. The facts also establish that this conduct was not a mere "error of judgment or mere lack of diligence" but was intentional and part of Respondent's admitted pattern of ordering litigants into temporary custody to achieve compliance with her directives without resort to the contempt power.

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The Commission had concluded that the judge "acted in bad faith because she had '[a] specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of [her] authority.'"

Cases in which a judge's use of the contempt power has been reversed on appeal but held not to constitute judicial misconduct in discipline proceedings often involve a single instance in which the judge was faced with unique circumstances for which there was no precedent. *See, e.g., In the Matter of Curda*, 49 3d 255 (Alaska 2002) (although the judge had committed legal errors in incarcerating a witness who was intoxicated when she appeared in court to testify against her former domestic companion, which had led to reversal of the defendant's conviction on assault and kidnapping charges, it was not misconduct because the judge "committed a single deprivation of an individual's constitutional rights, motivated by good faith concerns for orderly trial proceedings and the affected individual's well-being, in the face of a unique situation for which there was no available legal template"); *Inquiry Concerning Locatelli*, 161 P.3d 252 (New Mexico 2007) (although the judge committed legal error when he issued criminal contempt complaints to two attorneys for their role in an appeal from his court, that error in addressing the "novel question" of what a judge can do if he believed attorneys were mispresenting his actions on review was not willful misconduct).

Remedy for an ex parte communication

Disclosure

A judge who receives an unsolicited ex parte communication should promptly notify all parties and counsel in the case, particularly if the communication includes substantive information or is an attempt to influence the judge's decision.

The Illinois judicial ethics committee addressed an inquiry from a judge to whom a self-represented litigant had sent "extensive and substantive information" relevant to an upcoming hearing in an email that had not been copied to opposing counsel. ***Illinois Advisory Opinion 2020-1***. The litigant had learned the judge's email address when the judge scheduled virtual hearings by email.

The committee stated that the judge's first step should be "to ensure that the ex parte communication is disclosed to the other party." Noting that the rules require a judge to disclose permitted ex parte communications such as those for scheduling purposes, the committee concluded that disclosing an impermissible ex parte communication would be even more

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important. The committee cited the express provision in Rule 2.9(B) of the 2007 *American Bar Association Model Code of Judicial Conduct* that, "if a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond," although the committee explained that Illinois has not adopted that language.

The Illinois opinion noted that an ex parte communication received by email can be disclosed verbatim, which "diminishes the opposing party's concern about whether it knows the full substance of the communication made to the judge." The committee also suggested that judges may "wish to insulate themselves, to the extent possible," from ex parte communications, for example, "by issuing a standing order to make clear to non-lawyers that such communications are not allowed."

Disclosure is required even if the ex parte communication does not come from a party or attorney in the case. The Washington ethics committee advised that a judge should provide all the parties in a case with a copy of a leaflet about the case that the judge had read after it had been placed on the windshields of all the cars in the courthouse parking lot. *Washington Advisory Opinion 1996-12*. The California committee stated that a judge must disclose to the parties in a case a letter to the judge from an out-of-state judge seeking leniency for a criminal defendant or a letter to the judge from a bar association about a pending proceeding. *California Judges Association Advisory Opinion 45* (1997). The New York committee explained that a judge should notify both parties about a councilman's unsuccessful attempt to speak to the judge privately on behalf of a party in a custody case. *New York Advisory Opinion 1992-81*.

Some opinions suggest that disclosure is not required under all circumstances. *See Illinois Advisory Opinion 1993-1* ("while it might be nice" for a judge to disclose an attorney's attempted ex parte communication, which the judge's quick response prevented, disclosure is not required); *New York Advisory Opinion 2008-23* (if a judge believes that disclosing an ex parte communication to a defendant may endanger an innocent individual and the judge can decide pending issues without considering the communication, the judge need not disclose it to the parties or counsel); *New York Advisory Opinion 2020-195* (a judge is not required to disclose a prosecutor's ex parte communication asking if the judge would honor a grand jury subpoena concerning a related but concluded case when the communication contained no information about the merits of the pending matter); *New York Advisory Opinion 2015-106* (a judge need not disclose a brief and non-substantive conversation at a bar association function with counsel in a pending case); *West Virginia Advisory Opinion 2020-1* (a letter sent by a government agency informing a judge of a criminal investigation of a party in a domestic violence case is an ex parte communication, but the judge cannot disclose it to the parties because the investigation is confidential and must recuse themself from the case).

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Dissuasion

In addition to disclosure, some advisory committees suggest that a judge who receives an ex parte communication should warn the speaker or writer not to try again, although no additional response is permitted and all parties must be included in the warning. For example, the Virginia advisory committee stated that, after receiving an ex parte letter from a prisoner, a judge should inform the prisoner in writing (by a form letter, for example) that the letter was improper, such communication should cease, the judge will take no action in response to the letter, and a copy of the letter has been sent to the prosecuting attorney and defense counsel. ***Virginia Advisory Opinion 1999-5***. *Accord* ***Texas Advisory Opinion 154*** **(1993)**.

Similarly, the Washington judicial ethics committee stated that a judge may respond to an ex parte letter from an unrepresented criminal defendant with a form letter, sent by the court clerk, advising the defendant that the judge cannot answer their questions and that the defendant should contact a lawyer or schedule a hearing in accordance with the court rules if they want the court to take some action. ***Washington Advisory Opinion 2002-14***. A similar form reply may be sent in response to an ex parte communication from a defendant's spouse, parent, or other relative or friend, according to the opinion. If a judge receives a communication from a defendant who is represented, the opinion explained, the judge may advise the defendant to contact their lawyer. Copies of both the defendant's letter and the judge's response should be kept in the court file and given to counsel. *See also* ***Massachusetts Advisory Opinion 2003-17*** (in response to a letter from the complaining witness about the progress of a criminal case over which a judge presided, the judge may tell the writer how to find out what has happened, with copies of both letters sent to the prosecutor and defense counsel); ***Pennsylvania Informal Advisory Opinion 3/24/2011*** (if a judge receives an ex parte request for a continuance from a pro se parent in a child custody case, the judge should return the letter and inform the parent that the judge cannot accept ex parte communications and that, if there is any further attempt, the judge will place a copy in the court file and send a copy to opposing counsel).

The Virginia committee stated that a judge may not respond to a legislator's ex parte written or oral inquiry on behalf of a constituent about a pending case other than to inform the legislator that the judge cannot permit or consider such a communication. ***Virginia Advisory Opinion 2000-7***. The opinion noted that "legislators are often asked by their constituents to contact government agencies either to seek a favorable decision or to expedite the decision-making process" and that, "because many legislators are not lawyers, they may not know that such contacts, which they may view as constituent services, are improper . . . regardless of whether the legislator is attempting to influence litigation or merely inquiring about the status of litigation . . . ." The committee noted that a judge should not even respond "to a legislator's inquiry about the status of a case or the date when a decision may be forthcoming because to do so creates the appearance that the legislator is able to influence the judge to expedite a decision and thereby

A judge who receives an unsolicited ex parte communication should promptly notify all parties and counsel in the case, particularly if the communication includes substantive information or is an attempt to influence the judge's decision.

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obtain preferential consideration for a litigant." Thus, the committee stated that a judge must immediately stop talking with or stop reading a letter from a legislator as soon as it is clear that the legislator is contacting the judge about a pending or impending matter. If the legislator's inquiry is in writing, the committee stated, the judge should have a copy "placed in the file and should notify all counsel or unrepresented parties of the improper or attempted improper communication."

Disqualification

An ex parte communication instigated by a judge may require disqualification because taking the initiative to solicit information outside normal channels creates at least the appearance that the judge may have become injudiciously embroiled in the case and may lack the neutrality expected of judges. *See* ***Illinois Advisory Opinion 2020-1*** (a judge's initiation of an ex parte communication may give rise to an appearance of bias).

However, a judge is not necessarily disqualified from a case after receiving an *unsolicited* ex parte communication if the judge halts the communication as soon as possible, disregards it, and promptly advises all parties. As the Illinois committee explained, "the action of another does not implicitly create any inference about the judge's impartiality." ***Illinois Advisory Opinion 2020-1***. The committee also noted that a rule requiring recusal following an unsolicited ex parte communication "'would allow a party to remove a judge from a case by initiating an ex parte contact, which would encourage unethical ploys and allow manipulation of the judicial process.'"

According to the Illinois committee, although disqualification is not automatically required, a judge still should determine whether the unsolicited ex parte communication affected the judge's neutrality; "in other words, has the judge become actually biased based on what was learned?" However, the committee emphasized that usually a judge can "compartmentalize" information they may consider from information they may not, noting that the "inquiring judge did not feel that receipt of the communication affected their neutrality."

The committee further advised that the judge should analyze whether the ex parte communication raised reasonable questions about their impartiality. However, an ex parte communication is unlikely to require recusal under that test, the committee explained, if the judge did not initiate it and "shut[] it down" when they recognized it and promptly disclosed the communication to the other side.

Similarly, the Alabama judicial ethics advisory committee stated that ex parte statements to a judge by a party or a party's relative "do not cause the judge to be disqualified unless the judge is actually influenced and develops a personal bias or prejudice as a result." ***Alabama Advisory Opinion 1999-720***. To hold otherwise, the committee reasoned, "would allow litigants and their friends and relatives to control judicial proceedings whenever dissatisfied with the course of the proceeding." A relative of a party in a case had gone to the inquiring judge's office and insisted on speaking with him about a hypothetical question. Overhearing a staff person struggling

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to get the relative to understand that the judge could not talk to them, the judge went to tell the relative himself. The relative immediately blurted out an allegation relevant to the case. The judge disclosed the incident on the record and, he told the advisory committee, felt no bias toward or against either party as a result of the ex parte communication. *See also* ***New York Advisory Opinion 2015-178*** (if a judge believes they cannot be fair and impartial after reviewing a particular ex parte communication, disqualification is required); ***New York Advisory Opinion 1992-81*** (a judge need not disqualify themself from a case after a councilman attempted unsuccessfully to speak privately with the judge on behalf of a party, but should notify both parties about the meeting and use discretion about disqualification if either party objects); ***Virginia Advisory Opinion 2000-7*** ("depending upon the nature of the inquiry and what has been communicated to the judge, a judge is not required to recuse himself or herself unless the nature of the communication has caused the judge to be biased or prejudiced in the case or unless, in the judgement of the judge, such communication may give the appearance that it is improper for the judge to continue in the case").

There are cases in which judges have been disciplined for failing to disclose ex parte comminications or to disqualify themselves from cases in which ex parte communications produced personal bias or created the appearance of partiality. *See* ***Segal*, Order** (Arizona Commission on Judicial Conduct February 27, 2013) (public reprimand of judge for failing to disclose an ex parte communication from court security about a criminal defendant and imposing a sentence that appeared to be related solely to the defendant's alleged conduct with court security and not to the underlying charge); *Fletcher v. Commission on Judicial Performance*, 968 P.2d 958 (California 1998) (removal of a judge for, in addition to other misconduct, failing to disqualify himself from a sentencing decision even though he admitted having personal feelings about granting diversion based on an ex parte telephone call from the defendant's mother and the defendant's comment that diversion was "a done deal"); ***In the Matter of Ramich*, Determination** (New York State Commission on Judicial Conduct December 27, 2002) (censure of a judge who, in addition to other misconduct, presided over two cases after obtaining personal information in an ex parte communication with the defendants' mother and making follow-up calls to the district attorney); ***In the Matter of Curran*, Determination** (New York State Commission on Judicial Conduct November 14, 2017) (public admonishment of a judge who, after arraigning a defendant and entering an order of protection, received unsolicited ex parte information from two sources claiming that the defendant had violated the order of protection; the judge failed to disclose the communications, repeated the information as fact during a pre-trial conference, and reiterated the accusations when he accepted a plea agreement, sentenced the defendant, and issued a six-month order of protection); ***In the Matter of Porter*, Determination** (New York State Commission on Judicial Conduct November 13, 2018) (public admonishment of a judge for failing to disqualify himself from three matters arising out of a boundary dispute involving his neighbor's daughter that he had discussed ex

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

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parte with the neighbor); *Disciplinary Counsel v. Porzio*, 153 N.E.3d 70 (Ohio 2020), adopting findings and recommendation (six-month suspension of former magistrate from the practice of law, stayed conditionally, for failing to disqualify herself from a case following a lengthy ex parte conversation with one party when the other party left the courtroom following a hearing in which she discussed the evidence in the case, expressed her personal views of the other party's integrity, indicated how she intended to rule, made inappropriate comments about the parties' religions, and used profanity).

Screening

Noting it believed that judges "often are inadvertently exposed to ex parte communications," the New York committee recommended that "judges implement a procedure to avoid such an occurrence . . . ." *New York Advisory Opinion 2008-23*. The committee suggested:

> A judge should have his/her law clerk, court attorney, court clerk or other appropriate member of his/her staff review all correspondence addressed to the judge before the judge sees it to screen for any ex parte communication. In this way, any ex parte communication can be dealt with appropriately, without necessitating either disclosure of sensitive information or the judge's disqualification. For example, the judge's staff member can return an ex parte communication to the sender, advising him/her that the judge cannot consider the information conveyed without notice to all the parties to the proceeding and suggesting that any relevant and necessary information be introduced in the proceeding according to the applicable laws of evidence and procedure.

See also *New York Advisory Opinion 2015-178* ("housing court judges who repeatedly receive attempted ex parte communications from elected officials on behalf of their tenant-constituents should set up a screening procedure if possible, so that staff members can return communications to the sender without exposing the judge to the substance," which eliminates the necessity of disclosure); *Virginia Advisory Opinion 2000-7* ("ideally," a secretary, clerk, or someone else should "identify improper telephone calls or screen correspondence from legislators and insulate the judge from receiving the improper inquiry in the first instance").

Recent cases

Judicial touching

Recently, two judges were sanctioned for touching people in the courthouse.

The West Virginia Judicial Investigation Commission unequivocally held: "Unwanted touching is harassment. Therefore, a judge should never intentionally touch someone without first asking permission." *In the Matter*

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of Cole, Public admonishment (West Virginia Judicial Investigation Commission April 29, 2021). The Commission explained:

> A common phrase used by almost everyone is "don't invade my personal space!" What does it mean and should society be cognizant of the phrase when dealing with other people? The Merriam Webster Dictionary defines "personal space" as "the distance from another person at which one feels comfortable when talking to or being next to that other person." It's the physical distance between two people in a social, family or work environment. As the author Robert Sommer said, "Personal space refers to an area with invisible boundaries surrounding a person's body into which intruders may not come."
>
> The study of personal space is called proxemics. There are four distinct personal space zones: intimate (0-2 feet); personal (2-4 ft.); social (4-12 ft.) and public (more than 12 ft). Deference for a person's space is a sign of respect for the person. No one should ever invade someone's personal space in a work setting without permission. Consequently, no one should intentionally touch someone in a work setting without permission or even in jest. As noted by Anthropologist Jane Goodall once said, "You have to realize that touching is a real violation of personal space."

Thus, based on an agreement that included the magistrate's resignation, the Commission publicly admonished a now-former magistrate for coming up behind a court employee at work and placing his hands on her hips. The touching was unwelcome and made the employee uncomfortable, but she did not say anything to the magistrate because of his position. The employee did report the incident to her immediate supervisor, who contacted the chief magistrate, who reported it to the administrative office, which investigated and filed the complaint.

The magistrate said that he had no memory of the incident although he did not deny that it happened, acknowledging that he had always found the employee truthful and had no reason to believe that she made up the incident.

The magistrate admitted that, during a birthday celebration at the courthouse in 2017, he had swatted the same employee on her rear end approximately nine times. The magistrate said he stopped when the employee asked him to and that everyone in the room had laughed in a good-natured way. The employee had been embarrassed but said nothing because of the magistrate's status.

The Commission found:

> Respondent considers himself a jokester. Respondent said he often liked to sneak up behind the same employee and make a loud noise or touch her back in an effort to startle her. Respondent said the employee would jump and they would both laugh. Respondent acknowledged engaging in such activity with other employees. Under repeated questioning, Respondent refused to admit that his actions were improper. Instead, he claimed that he was just being spontaneous, that his actions were intended to be humorous and that he was trying to have some fun. . . . Respondent declined to acknowledge that any unwelcome touch is an

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unwarranted touch or that an uneven balance of power would cause an employee to refrain from complaining about an unwanted touch.

The magistrate agreed to stop spanking employees but "saw no need to stop touching people in an effort to scare them . . . ."

The Commission concluded that touching the employee "clearly constituted harassment . . . . There is no place in the judiciary for a judge who has no respect for boundaries. By his actions, Respondent cast shame on the whole judiciary and no longer deserves the title of judge."

* * *

A Texas judge was admonished for approaching a legal assistant in his courtroom, touching her on the arm or shoulder, and rebuking her for sitting in a section of the courtroom reserved for attorneys. ***In re Wilson*** (Texas Special Court of Review May 4, 2021). The Court also ordered the judge to complete two hours of instruction about decorum.

One day, Sarai Garza, a legal assistant for an attorney, was seated on the first bench in the judge's courtroom, where, she testified, she had always sat with attorneys, interpreters, and other legal assistants in her 11 years as a legal assistant. On that day, the judge apparently mistook Garza for the interpreter, saying, "Lady interpreter, are you ready?" Noting that he was looking at her, Garza introduced herself and said that she was not the interpreter but that she would be "more than glad to help." Garza said that "everyone in the courtroom started laughing."

The interpreter, Blasa Lopez, then entered the courtroom. The judge left the bench, walked toward Lopez, and grabbed her arm. Garza walked toward them to clear up the confusion about who the interpreter was. Then, Garza testified, the judge grabbed and "jiggl[ed]" her right arm and told her in an "angry" and "very upset" voice that she could not sit where she had been sitting. Garza said that his touch was painful, and she cried as she left the courtroom. According to Garza, the judge grabbed her arm so hard that it was bruised. Approximately two days later, a medical examination indicated that Garza had "mild swelling with tenderness" in her right biceps and triceps.

In the disciplinary proceeding, Lopez and an attorney who had been in the courtroom testified that they saw the judge grab Garza by the shoulder or arm. An attorney called by the judge as a witness testified that the judge "came off the bench" in a packed courtroom of "probably 300 people," "touched [Garza] on the elbow" like he was trying to get her attention, and told her that she could not be on that side of the courtroom.

Lopez texted her supervisor to report the incident; the presiding judge filed the complaint with the Commission. The incident generated a great deal of media attention. Police investigated, but a grand jury declined to indict the judge.

The judge denied touching or grabbing Garza or at most admitted to lightly touching her elbow or shoulder. When asked if it was ever appropriate for a judge to touch a person in open court without their consent,

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the judge replied, "When a judge gently touches someone . . . it is not sexual harassment, it is not objectionable."

The Texas Special Court of Review concluded that, "although Judge Wilson claims to not remember touching Garza, every other witness who was present . . . testified that Judge Wilson touched Garza in some way." The Court stated that it did not need to resolve whether the judge "forcefully touched or grabbed Garza because it is uncontested that the touching was without Garza's permission." The Court also concluded that the judge's conduct was willful because he had intended to touch Garza without her consent and to publicly admonish her in his crowded courtroom. The Court found that the judge had failed "to treat Garza with patience, dignity, and courtesy" as required by the code of judicial conduct.

"Salty"

Affirming the findings of fact and conclusions of law of a panel of the Commission on Judicial Conduct following a hearing, the Kansas Supreme Court suspended a judge without pay for one year for (1) offensive conduct in the courthouse, including frequently using the word "f**k" and its derivatives; (2) using derogatory terms when referring to women; and (3) using the phrase "Kansas boy" to describe a young black male defendant. *In the Matter of Cullins*, 481 P.3d 774 (Kansas 2021). Several months later, the Court approved the judge's plan for training and counseling and granted the judge's motion to stay the remainder of his suspension.

(1) The Court held that the use of "f**k" "is unprofessional and—almost always—undignified for a judge," violating the rule requiring a judge to treat everyone with patience, dignity, and courtesy. In response to the panel's finding that the judge had also violated the rule requiring a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary," the judge argued that the F-word is ubiquitous "in the current culture's vernacular" and "cussing is so common in Southeast Kansas" that it does not reflect negatively on a judge's character. The Court concluded that the judge's "offensive conduct went far beyond any undignified and unprofessional use of the word 'f**k'" and that his "aggressiveness; his reference to a female litigant as 'crazy'; his overt and public humiliation" of the chief clerk; and "his loud, angry, and expletive-filled reprimand" of a court clerk "*collectively*" violated the rule.

The judge also argued that his profanity could not have undermined public confidence in the judiciary because the incidents "did not occur in a public forum." However, the Court noted that at least two of the incidents had occurred or could be heard in a hallway near members of the public. Further, the Court explained that the judge's conduct would certainly have been discussed in the community by the people who witnessed it.

The judge also argued in his defense that he was often fair to court staff. The Court stated that, "while that may be true, good behavior on some—even most—occasions does not disprove misbehavior on other occasions." Further, it emphasized that good behavior did not "override" code violations,

The Court explained: "Frankly, good behavior, while commendable in a judge, is also expected."

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but at most was relevant as mitigation for discipline. It explained: "Frankly, good behavior, while commendable in a judge, is also expected."

(2) The panel had concluded that the judge's "use of derogatory words," particularly "b***ch" and "c**t," to describe women manifested a clear bias based upon sex and "was hostile toward the individuals about whom he was speaking. . . . Intentionally gender-based derogatory references toward women have no place in the administration of justice, and have no place in a judge's vernacular."

The judge asserted that his statements did not violate the code because he did not make them while performing judicial duties, that is, "during or in relation to any matter he was adjudicating" or while performing administrative duties. The Court rejected that argument:

> Respondent interprets "judicial duties," including his administrative duties, too narrowly. While in the courthouse—when court business of every kind was being addressed—Respondent was present in his official capacity as a district judge, and sometimes also as chief judge. A judge does not lose his mantle of authority when he steps out of his chambers into a hallway. A judge's performance of "judicial duties" occurs constantly in the courthouse during the course of any given day. . . . Those duties include the times a judge presides over hearings, completes administrative reports, and evaluates employees, but they also include those occasions when a judge discusses employee performance with attorneys and other staff; admonishes persons waiting in the hall to be quieter so as not to disrupt court proceedings; offers to assist a wandering law enforcement officer who needs an application for search warrant reviewed; directs a member of the public to the right courtroom; addresses a complaint; and deals with innumerable other things that require a judge's professional attention, judgment, and decision throughout the day.

(3) During a bond hearing for a young Black male student at a local college, the judge asked, "Can I assume you're not even a Kansas boy?" There was a second bond hearing also involving a young Black male student immediately afterward.

The judge testified that he did not intend the term "boy" to have any racial connotation, that he considers himself a "Chautauqua County boy," and that his reference to the young man as "a Kansas boy" was similar. The Court emphasized that the judge's claims that "he meant no racial bias were accepted by the panel and are not contested by either party." However, stating that "words and phrases . . . are important," the Court concluded that the judge's conduct "during these bond hearings created a *reasonable perception* of racial bias," "regardless of inflection, tone, or local custom." It explained:

> Specifically, two adult Black men appeared before the judge during a bond hearing, both presumed innocent of their criminal charges. A reasonable individual might perceive that the following may have shown racial bias:
> - Something about the defendants' appearance caused the judge to believe they were athletes;
> - Something about their appearance caused the judge to assume they were not from the area;

(continued)

- Something about their appearance caused the judge to question—even disbelieve—one defendant's assertion that he had no felony record; and
- During the judge's comments he used a term—"boy"—that has been used at times in the past as a common and well-known slur against Black men.

The Court held that, "when taken altogether and in context, a reasonable perception of bias cannot be denied."

In mitigation, the judge stated that he is efficient, fair in his hearings, and "does not mean to hurt or harm" but "is just 'salty.'" The Court found that the judge's conduct was "quite troubling. He has intimidated and publicly humiliated court employees. He has shown bias and the appearance of bias by his insulting and careless remarks, even while on the bench and presiding over hearings. By his coarse language in the courthouse, he has sullied the dignity and propriety of the judiciary."

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