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JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics
Vol 26, No 2 Summer 2004

After an Ex Parte Communication *by Cynthia Gray*

Despite a judge's best efforts to avoid ex parte contact, a judge may inadvertently be exposed to an inappropriate communication concerning a proceeding outside the presence of the parties. Such a communication does not necessarily disqualify the judge from the case although he or she may not consider the communication. The judge should, however, disclose the communication and take steps to ensure that the

breach is not repeated.

An ex parte communication does not automatically result in the disqualification of the judge. A contrary rule 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.

The Alabama judicial ethics advisory committee addressed an inquiry from a judge who had received an ex

parte communication from a relative of a party in a case. *Alabama Advisory Opinion 99-720*. The individual had come to the judge's office and insisted on speaking with him about a hypothetical question. Overhearing the difficulty a staff person was having in getting the person to understand that the judge could not talk, the judge went to tell the person himself. The person im-

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Interim Suspension

Many states have provisions that require or authorize the temporary suspension of a judge with pay while disciplinary or criminal proceedings are pending against that judge.

In several states, a recommendation for the judge's removal from office or other serious sanction automatically triggers a suspension with pay. For example, a provision in Arizona states: "A judge is disqualified from acting as a judge, without loss of salary, while there is pending . . . a recommendation to the supreme court by the commission on judicial conduct for his sus-

pension, removal or retirement." Alaska, California, Connecticut, Indiana, Minnesota, Missouri, Montana, North Dakota, South Dakota, and Washington have similar provisions

In some states, an order of the supreme court is required to suspend a judge following a recommendation of removal. In Nebraska, "upon order of the Supreme Court, a Justice or Judge of the Supreme Court or other judge shall be disqualified" while a recommendation for removal or retirement is pending. In Arkansas, the supreme court "may" suspend a judge with pay while a com-

mission recommendation for removal or voluntary disability retirement or articles of impeachment are pending. In Vermont, the supreme court may suspend a judge when review of a recommendation of suspension for misconduct or disability is pending. In Kansas, a panel of the commission may recommend to the supreme court that a judge be temporarily suspended from performing judicial duties pending final disposition of a recommendation for discipline or compulsory retirement.

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Recent Judicial Advisory Opinions : Disqualification

✦ A judge is disqualified for two years from cases involving the judge's former law firm, but the disqualification ends after two years if there are no continuing financial ties. *Florida Opinion 04-6*.

✦ A judge is disqualified for two years after leaving a law firm whenever the firm appears even in uncontested matters; after two years, the judge should disclose the relationship and consider recusal if a party objects. *New York Opinion 01-6*.

✦ A judge is disqualified from cases in which a former law partner appears while the judge is receiving compensation for concluding a business relationship with the former partner and for two years after the last payment. *New York Opinion 00-67*.

✦ A judge is disqualified from cases in which a party is represented by the law firm that is currently representing the judge and the judge's spouse in a personal injury case, except when the firm represents a non-party hospital from which records are sought in an uncontested subpoena. *New York Opinion 00-89*.

✦ A judge is disqualified from matters involving an attorney who is currently representing the judge in a personal matter even while the matter is inactive, but the disqualification ceases, absent special circumstances, when the matter is resolved and representation ends. *Alabama Opinion 04-840*.

✦ To determine whether to disqualify from a case in which a former client appears as an attorney, a judge should ask whether the relationship is a particularly close one socially or professionally beyond the former attorney-client relationship and whether the relationship prior to appointment might be qualitatively

different from the judge's relationship with other attorneys who now come before the judge. *Massachusetts Opinion 04-1*.

✦ A judge is disqualified from cases involving an attorney or other participant who has submitted an affidavit on the judge's behalf to the judicial conduct commission. *New York Opinion 00-97*.

✦ A judge is disqualified from cases involving attorneys planning a fund-raiser for the judge's campaign (or their partners or associates) during the campaign; when the other party is appearing pro se, the disqualification cannot be remitted. *New York Opinion 01-7*.

✦ A judge who owns an interest in a mutual fund that owns stock in American Express is not disqualified from a shareholders' derivative action brought on behalf of the company. *New York Opinion 01-12*.

✦ Although a judge may adopt a policy disqualifying himself/herself from cases in which a party is represented by the law firm with which the judge's child is affiliated, the judge is not per se disqualified, but should consider the size of the firm, the number and geographic spread of its offices, the nature of the matter, the potential impact on the firm of its client being awarded a large sum or having such an award against it, and the child's involvement, if any, in the matter. *Tennessee Opinion 04-1*.

✦ A judge is not disqualified when the judge's first cousin appears as an attorney or witness, but the judge should disclose the relationship. *South Carolina Opinion 10-4*.

✦ A judge whose law clerk is a former assistant district attorney is not disqualified from criminal cases

but should disclose any previous involvement by the clerk in a specific case and insulate the clerk from the case. *New York Opinion 00-66*.

✦ A judicial officer is not disqualified from cases in which a personal friend is counsel absent additional circumstances. *Washington Opinion 04-2*.

✦ A judge is disqualified from cases involving an attorney with whom the judge has had a close social relationship for 28 years, who has served and will serve in 2004 as the judge's campaign treasurer, and who represented the judge in a lawsuit 11 years ago; the disqualification also applies to any member of the attorney's law firm. *Florida Opinion 04-1*.

✦ To determine whether a donation to a public service law firm or non-profit organization requires disqualification, a judge should consider whether the donee regularly represents one side of litigation; the size of the donation compared to other contributions made by the judge, to the financial worth of the donee, and to contributions made by other donors; whether the contribution is related to a fund-raising event; the judge's current assignment; whether the organization frequently engages in litigation in the judge's court; and pertinent community standards. *California Opinion 53 (2003)*.

✦ A judge who sits on the board of directors of a charitable foundation is disqualified from cases in which the foundation is a party. *New York Opinion 01-6*.

The Center for Judicial Ethics website has links to judicial ethics advisory committees at www.ajs.org/ethics/eth_advis_comm_links.asp.

A Judge's Participation in a Homeowners' Association

by Cynthia Gray

A judge may, with certain conditions, serve on the board of directors of a not-for-profit cooperative, condominium association, or homeowners' association related to the judge's residence. *Illinois Advisory Opinion 95-13*; *Massachusetts Advisory Opinion 01-6*; *New Hampshire Advisory Opinion 78-1*; *New York Advisory Opinion 88-98*; *Ohio Advisory Opinion 04-3*; *Virginia Advisory Opinion 00-9*; *U.S. Advisory Opinion 29* (revised 1998). *Accord Commentary to Canon 4C(3)*, *California Code of Judicial Conduct* ("Service on the board of a homeowners'

association or a neighborhood protective group is proper if it is related to the protection of the judge's own economic interests"). See also *Arizona Advisory Opinion 95-1* (judge may belong to homeowners' association committee that nominates directors or officers); *New York Advisory Opinion 95-133* (judge may serve on homeowners' association committee that will assist transfer from developer to property owners).

(One state has a contrary rule. The Florida judicial ethics committee has advised that the volume of condominium litigation and the many adverse interests in homeowners' associations prevent a judge from serving on the board of an association. *Florida Advisory Opinion 81-7*; *Florida Advisory Opinion 81-10*; *Florida Advisory Opinion 84-1*; *Florida Advisory Opinion 04-10*.)

The duties of a homeowners' association "relate only to the operation and maintenance of the members' residence facility," and "are those the

judge would find necessary to undertake were he living in a privately owned single-family residence." *U.S. Advisory Opinion 29* (revised 1998).

[S]ervice [as a director for such an association] is not readily to be characterized either as "civic" activity within the permissive reach of Canon [4C] or as a "business dealing," within the prescriptive contemplation of Canon [4D(3)]. It has attributes of both in that, on the one hand, the endeavor possesses certain

Whether a judge may serve on a homeowners' association board should be decided on a case-by-case basis.

commercial features, but on the other hand, closely approximates a real estate investment not forbidden to the judge under Canon [4D(2)]. It is, moreover, directed at the saving of expense and at the wise expenditure of funds rather than to the earning or realization of income.

Whether a judge may serve should be decided on a case-by-case basis, the advisory committee for federal judges concluded. For example, the committee stated, a judge should consider not serving if "the duties entail business-type contacts, substantial in number or character, with outside enterprises particularly of the kind that could result in litigation." Service is more likely to be appropriate, however, the committee noted:

- if the condominium is not large or substantial; and
- if the board's duties are routine and primarily internal (for example, allocating responsibilities; employing maintenance, security, and other personnel; providing for services; and formulating occupancy rules).

Similarly, according to the Massachusetts judicial ethics committee, a judge's duties as a member of a board of directors of a homeowners' association, while in part on behalf of other unit holders, protect the judge's "investment much like the maintenance, protection and preservation activities of a judge living in a single-family residence protects his or her investment therein." *Massachusetts Advisory Opinion 01-6*. Thus, the committee stated that whether a judge may serve as a member of the board of a homeowners' association for the judge's residence depends on:

- the size of the building,
- whether day-to-day operation is delegated to a management company,
- whether the association has been or is likely to be involved in litigation in the judge's court,
- the size of the annual budget,
- the amount of the reserve funds,
- the likelihood of substantial capital improvements, and
- the likelihood of acquisition of abutting property.

Serving as officer

If those criteria are met, not only may a judge serve on the board of directors, but a judge may serve as an officer of a homeowners' association. *Massachusetts Advisory Opinion 01-6*; *New York Advisory Opinion 96-8*; *New York Advisory Opinion 98-2*; *New York Advisory Opinion 98-44*; *New York Advisory Opinion 98-93*; *Virginia Advisory Opinion 00-9*; *U.S. Advisory Opinion 29* (revised 1998).

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Creating Appearance of Bias

The Washington State Commission on Judicial Conduct reprimanded a judge for writing an acronym generally understood to mean “Nail This Guy” on hundreds of judgment and sentence forms. The judge also agreed to participate in ethics training. *In re Burns*, Stipulation, Agreement, and Order of Reprimand (Washington State Commission on Judicial Conduct June 8, 2004) (www.cjc.state.wa.us). The sanction was based on a stipulation and agreement.

In hundreds of cases over several years, the judge wrote “NTG” on defendants’ judgment and sentence forms when he imposed sentence. The judge maintained he intended “NTG” to mean “Note This Guy” (or gal). The judge claimed that he used the initials to remind him which cases deserved closer scrutiny if there was a violation of a sentencing condition, pointing out that his court is a very high volume court.

The judge acknowledged, however, that it was widely rumored among court employees and attorneys that “NTG” meant “Nail This Guy.” Further, the judge admitted that he contributed to that rumor by making statements to others that would cause them to believe the letters stood for “Nail This Guy.”

The agreement noted that the objective evidence did not establish actual bias or that the judge prejudged a particular case. However, the agreement stated that the judge acknowledged that some parties, counsel, and staff could have understood from the initials and rumors that he

had prejudged cases and intended to treat some defendants harshly, cruelly, or inappropriately. The judge also acknowledged that the initials and rumors undermined public confidence in the integrity and impartiality of the judiciary. The agreement stated:

The Code of Judicial Conduct deals not only with subjective intent, but also with appearances. Whatever Respondent may have intended “NTG” to mean, his words and conduct led others to believe “NTG” meant “Nail This Guy.” By writing “NTG” on some defendants’ judgment and sentence forms, generally understood to be an acronym for “Nail This Guy,” Respondent created the appearance he was biased or prejudged against those individuals he intended to “nail.” Public confidence in the integrity and impartiality of the judiciary is under-

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mined when a judge’s conduct creates the perception that a case has been prejudged or that there is a bias against a party, regardless of whether the perceived bias or prejudice exists. Persons who believed Respondent wrote “Nail This Guy” in code on some defendants’ judgments could reasonably conclude that those defendants received, or would receive, disparate or unfair treatment from the court.

The agreement also found that writing “NTG” on court documents “is undignified and disrespectful.”

Gratuitous References to Judicial Position

The New York State Commission on Judicial Conduct censured a judge for making numerous, gratuitous references to his judicial position in a dispute with a snowmobile dealership. *In the Matter of the Dumar*, De-

termination (New York State Commission on Judicial Conduct May 18, 2004) (www.scjc.state.ny.us/Determinations/2004_decisions.htm). The sanction was pursuant to a stipulation and agreement.

Although the judge purchased two snowmobiles on an “as is” basis from Gable Motor Sports, he believed from his discussions with the salesman that the dealership would take care of any problems that arose. The judge subsequently told the salesman that he wanted reimbursement for repairs that had been performed at another establishment. When the salesman replied that he could not reimburse the judge, the judge stated that he was a judge and would take the matter to small claims court.

Thereafter, the judge returned to Gable Motor Sports, complained to a secretary that he would take the matter to court, and gave the secretary his judicial business card. Visiting again to demand reimbursement from the manager, the judge stated repeatedly that he was a judge and said that he did not want to “bad mouth” Gable Motor Sports and that he knew how “the system” worked.” Subsequently, the judge telephoned the residence of the proprietor, identified himself to the proprietor’s wife as “Judge Dumar,” and left a message that he wanted to speak with the proprietor. In at least one subsequent conversation with the proprietor, the judge identified himself as a judge. The judge left one or more voice messages on the answering system at the dealership identifying himself as a judge.

When the judge filed a small claims action (in a town court other than his own), he left his judicial

business card with the court clerk with the paperwork. Prior to the hearing, the judge introduced himself as a judge to one of the justices of the town court although the judge did not know at the time which town justice would be hearing the claim. As it resulted, the other town justice heard the claim and dismissed it. While complaining about Gable Motor Sports to a state consumer protection board representative, the judge identified himself as a judge.

The Commission found that the judge's repeated, pointed references to his judicial status "could well be perceived as intimidating, especially in the context of demanding reimbursement for the repairs, threatening a lawsuit and saying that he knew how 'the system' worked." The Commission concluded, "regardless of his intent, such conduct creates the appearance that he was attempting to use his judicial prestige to further his personal interests, which is prohibited."

Commenting on Pending Cases

Accepting a recommendation by the investigative panel of the Judicial Qualifications Commission pursuant to a stipulation, the Florida Supreme Court publicly reprimanded a judge for making inappropriate statements about the defendant in a tort case in an interview with a reporter. *Inquiry Concerning Andrews*, 875 So.2d 441 (Florida 2004). Pursuant to its usual practice, the court ordered the judge to appear before it for administration of the reprimand.

The judge was presiding over a case involving the drug Parlodel. The

defendant, Novartis Pharmaceuticals Corp., had responded to a discovery request by producing over one million documents. Novartis then claimed that the documents were privileged and requested an in-camera inspection. After the judge appointed a special master to review the documents, at great expense to Novartis, Novartis sought to have the inspection suspended.

In an interview with a reporter, the judge stated that Novartis was trying to bury the plaintiffs in documents and had only itself to blame for developments in the litigation. The judge also commented that Novartis' defense strategy had backfired and that the database being created in the case would provide a national blue-

print for filing suit over the drug.

The Commission found that the judge's statements evidenced a bias against Novartis.

Solicitation of Charitable Contributions

Accepting the decision and recommendation for order of discipline filed by the Judicial Tenure Commission, the Michigan Supreme Court suspended a judge for 90 days without pay for (1) using official court stationery to solicit donations for educational programs; (2) using donated funds to publicize himself; (3) misrepresenting in his solicitations and to the supreme court that the programs had the support of government officials; and (4) demonstrating a lack of candor in the proceedings be-

fore the Commission. *In re Thompson*, 682 N.W.2d 477 (Michigan, 2004). The judge had not filed a petition to reject or modify the Commission's recommendation.

The judge used official court stationery to solicit donations from local businesses to produce and implement anti-bullying programs and to finance events and activities related to the programs. The advertising for a concert to benefit the programs included prominent placement of the judge's name and judicial status, which, the court found, was evidence that the judge had used donated funds to publicize himself.

In his solicitations and to members of the supreme court, the judge purposely misrepresented that the state department of education and the supreme court, acting through the court administrative office and Judicial Institute, had agreed to sponsor his programs. Finally, the judge

refused to provide materials requested by the Commission in its investigation.

The court noted that its adoption of the Commission's conclusions "should not be interpreted in any way as discouraging members of the judiciary from participating in civic and charitable activities" in conformance with the code of judicial conduct.

The Center reports on developments in judicial ethics and discipline in weekly stories posted on its web-site at www.ajs.org/ethics/.

RECENT DECISIONS

Interim Suspension *(continued from page 1)*

Suspensions during discipline proceedings

In some states, a judge may be suspended with pay even before a recommendation is filed, either before or after the initiation of formal proceedings. For example, in Colorado, “the commission may request the Supreme Court to order temporary suspension of a judge, with pay, pending the resolution of preliminary or formal proceedings before the commission.” Florida, Georgia, Louisiana, Michigan, New Mexico, North Carolina, Oregon, and Texas have similar provisions. In Virginia, the commission itself may suspend a judge with pay in any pending investi-

gation or formal hearing. In Hawaii, New Jersey, and Oregon, the supreme courts may suspend a judge with pay without any action by the commission. In West Virginia, the supreme court decides whether a judge should be suspended temporarily based on a report by the disciplinary counsel. In Vermont, the supreme court may act upon recommendation of the commission or on its own motion to suspend a judge pending final determination of any proceeding against the judge. In Alabama, every judge is automatically disqualified when a complaint against the judge is filed by the Judicial Inquiry Commission with the Court of the Judiciary.

In California, Kentucky, and Nevada, the commission itself may suspend a judge but only after the filing of formal charges, while in Mississippi, the commission may recommend a suspension to the supreme court when formal charges are pending, and in Pennsylvania, the Court on Judicial Discipline decides based on a motion by the Judicial Conduct Board after a complaint is filed.

In Vermont, the administrative judge for trial courts may suspend a judge pending an investigation of misconduct. In Illinois, a chief judge may temporarily assign a judge to restricted duties or duties other than judicial duties when a complaint has

Sample Provisions

Arkansas Code, § 16-10-409

A judge may be suspended by the Supreme Court with pay: (1) While an indictment or information charging him or her in any court in the United States with a crime punishable as a felony under the laws of Arkansas or the United States is pending; (2) While a recommendation to the Supreme Court by the commission for his or her removal, or involuntary disability retirement is pending; or (3) When articles of impeachment have been voted by the House of Representatives.

Connecticut General Statutes, § 51-51s

A judge, compensation commissioner or family support magistrate is disqualified from acting as a judge, compensation commissioner or family support magistrate, as the case may be, while there is pending (1) a charge

against him for a crime punishable as a felony under the laws of this state or federal law, or a charge against him in another jurisdiction which would be punishable as a felony under Connecticut or federal law, or (2) a charge against him for a crime under the law of any jurisdiction which involves moral turpitude under Connecticut law, or (3) a recommendation to the supreme court or the governor, as the case may be, by the Judicial Review Council for his suspension or removal.

Florida Judicial Qualifications Commission Rules, Rule 8

Before or after the filing of a Notice of Formal Charges, the Investigative Panel may, in its discretion, issue its order directed to the judge ordering the judge to show cause before it why the panel should not recommend to the Supreme Court that the judge be suspended from office, either with

compensation or without compensation, while the inquiry is pending. The order to show cause shall be returnable before the Investigative Panel at a designated place and at a time certain, at which place and time the Investigative Panel shall consider the question of suspension and any action thereto. Thereafter, and upon the filing of a Notice of Formal Charges with the Supreme Court, the Investigative Panel, not less than two-thirds of its members concurring, may recommend to the Supreme Court that the judge be suspended from performing the duties of office, either with or without compensation, pending final determination of the inquiry. If the Investigative Panel recommends suspension, such recommendation shall have incorporated therein a record of the proceedings of the Investigative Panel in relation to the order to show cause.

been filed with the Courts Commission by the Judicial Inquiry Board. In addition, in Illinois, a chief judge may temporarily assign a judge to restricted duties or duties other than judicial duties when “the judge has allegedly committed a violation of the Code of Judicial Conduct which involves fraud or moral turpitude or threatens irreparable injury to the public, to the judicial branch of government, or to the orderly administration of justice,” or “the judge has been publicly implicated in conduct which, if true, would constitute impropriety or an appearance of impropriety which involves moral turpitude or threatens irreparable injury to the public, to the judicial branch of government, or to the orderly administration of justice.”

Several other state provisions also

describe the circumstances that justify an interim suspension. Those circumstances include when the continued service of the judge “is causing immediate, irreparable, and continuing public harm” (California); “poses a substantial threat of serious harm to the public or the administration of justice” (Louisiana, Nevada); or “is causing immediate and substantial public harm and an erosion of public confidence in the orderly administration of justice” (Georgia, New Mexico). Other descriptions of the appropriate circumstances for an interim suspension include when “the integrity of the legal system has been placed into question by virtue of a judge’s . . . having engaged in or currently engaging in a serious violation of the Code of Judicial Conduct; or . . . inability or

unwillingness to perform his or her official duties” (West Virginia).

In Florida, New Jersey, Pennsylvania, and West Virginia, the court has the option of ordering that the suspension be without pay.

In California and Michigan, when a temporary disqualification or interim suspension is imposed, the formal proceedings “shall be accelerated and the formal proceedings shall proceed without appreciable delay” (California) or “the processing of the case shall be expedited in the commission and in the Supreme Court” (Michigan).

Suspensions pending criminal proceedings

If a judge is indicted, pending the out-

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Michigan Court Rules, Rule 9.219

(A) Petition.

(1) After a complaint is filed, the commission may petition the Supreme Court for an order suspending a judge from acting as a judge until final adjudication of the complaint.

(2) In extraordinary circumstances, the commission may petition the Supreme Court for an order suspending a judge from acting as a judge in response to a request for investigation, pending a decision by the commission regarding the filing of a complaint. In such a circumstance, the documents filed with the Court must be kept under seal unless the petition is granted.

Whenever a petition for interim suspension is granted, the processing of the case shall be expedited in the commission and in the Supreme Court. The commission shall set forth in the petition an approximate date for submitting a final recommendation to the Court.

(B) Contents; Affidavit or Tran-

script. The petition must be accompanied by a sworn affidavit or court transcript, and state facts in support of the allegations and the assertion that immediate suspension is necessary for the proper administration of justice.

(C) Service; Answer. A copy of the petition and supporting documents must be served on the respondent, who may file an answer to the petition within 14 days after service of the petition. The commission must be served with a copy of the answer.

Nevada Rules for the Commission on Judicial Discipline, Rule 10

1. The commission must suspend a respondent from the exercise of the office without loss of salary: (a) While there is pending an indictment or information charging respondent in any court in the United States with a crime punishable as a felony under the laws of Nevada or the United States; or (b) When respondent has been adjudged insane

or mentally incompetent.

* * *

3. The commission may suspend a respondent from the exercise of judicial office without loss of salary upon receipt of sufficient clear and convincing evidence demonstrating that a judge poses a substantial threat of serious harm to the public or to the administration of justice, pending a final determination in any proceeding under these rules.

4. A judge suspended under these rules may apply to the highest court for reconsideration of the order.

5. A suspension may be imposed only after notifying the respondent of his right to be heard in opposition, on not less than 7 days’ written notice.

6. The commission must promptly file a certified copy of the notice of suspension with the clerk of the supreme court who must promptly transmit copies to the appropriate appointing and disbursing officers and to the clerk and the chief judge of the district.

After an Ex Parte Communication *(continued from page 1)*

mediately blurted out an allegation of fact relevant to the case. The judge disclosed the incident on the record in the case. The judge told the advisory committee he felt no bias toward or against either party as a result of the incident.

The committee stated that actions toward or statements to a judge by a party or a party's relative during a judicial proceeding "do not cause the judge to be disqualified unless the judge is actually influenced and develops a personal bias or prejudice as a result." 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."

Therefore, a judge is not disqualified following:

- A letter or inquiry from a legislator on behalf of a constituent (*Virginia Advisory Opinion 00-7*).
- A communication from a non-party who is a friend of the judge (*U.S. Compendium of Selected Opinions*, § 3.9-2 (2001)).
- An ex parte contact authorized by the Domestic Abuse Act (*Nebraska Advisory Opinion 98-1*).
- An attorney's attempt to make an ex parte communication, which the judge's quick response prevented (*Illinois Advisory Opinion 93-1*).
- A councilman's unsuccessful attempt to speak privately with the judge on behalf of a party (*New York Advisory Opinion 92-81*).

Disqualification

Disqualification may be required following an ex parte communication,

however, if additional circumstances give rise to an appearance of bias. A judge's initiation of an ex parte communication, for example, may indicate a bias that requires disqualification.

For example, the Florida Court of Appeal prohibited a trial judge from further participation in custody proceedings based on the judge's ex parte communication with the father. During a hearing on the father's contempt motion regarding visitation, the trial judge had the parties removed from the courtroom while he spoke to the child. The judge met with the father

Even when a judge is not required to disqualify, a judge should disclose to the parties any ex parte communications.

and child without the attorneys or the mother present. The judge then held the mother in contempt.

Stating that "because of its effect on the appearance of impartiality . . . an allegation of an ex parte communication is legally sufficient to require recusal," the court concluded that the mother's allegation of an ex parte communication alone adequately established a reasonable basis to fear that she would not receive a fair hearing in subsequent proceedings. The court also noted the trial judge's expressed desire to "punish" the mother with a change of custody. *Pearson v. Pearson*, 870 So. 2d 248 (Florida Court of Appeal 2nd District 2004). *See also State v. Leslie*, 666 P.2d 1072 (Arizona 1983) (new trial required when trial judge in murder case solicited contact with relatives of the victim after

jury returned guilty verdict and made telephone contact with two relatives before pre-sentence hearing); *Fletcher v. Commission on Judicial Performance*, 968 P.2d 958 (California 1998) (where judge admitted personal feelings about propriety of granting diversion based on ex parte communications with defendant's family and defendant's comment that diversion was "a done deal," judge should have disqualified from sentencing decision, not just disclosed communications); *In re Disqualification of Calabrese*, 798 N.E.2d 10 (Ohio 2002) (allegation of ex parte communication supported by something more than hearsay constitutes grounds for disqualification if communication was initiated by judge or addressed substantive matters).

Disclosure

Even when a judge is not required to disqualify, a judge should disclose to the parties any ex parte or other improper communications. For example, the Washington ethics advisory committee addressed an inquiry from a judge who had read a leaflet that was placed on the windshields of all the cars in the courthouse parking lot about a case concerning the death of a child by a drunk driver over which the judge was presiding. The committee advised that "to avoid the appearance of impropriety the judicial officer should provide all parties with a copy of the leaflet." *Washington Advisory Opinion 96-12*.

Similarly, a judge must disclose an unsolicited letter from an out-of-state judge seeking leniency for a criminal defendant about to be sentenced and a

letter written to a judge by a bar association concerning a pending proceeding. *California Advisory Opinion 45* (1997).

Several advisory committees have described the appropriate procedure when a judge receives a letter from an unrepresented litigant or a prisoner. The Virginia advisory committee stated that after receiving a prisoner's letter attempting to communicate privately, a judge may:

- Give the letter to the court clerk to be file-marked and retained in the file,
- Send a copy to the prosecuting attorney and retained or court-appointed defense counsel, and
- Read the letter to determine whether it is a proper or improper ex parte communication (in other words, whether it falls within one of the exceptions to the prohibition on ex parte communications).

Virginia Advisory Opinion 99-5. If the communication is proper, the judge should disclose it and allow the parties

to respond. If it is improper, the judge should communicate in writing (which may be a form letter) to the prisoner, with a copy filed with the clerk and sent to the prosecuting attorney and defense counsel. The judge's response should state 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.

Accord Texas Advisory Opinion 154 (1993) (copies of correspondence should be sent to counsel and any pro se litigants).

Similarly, the Washington judicial ethics committee stated that a judge may respond to a letter or other written communications from an unrepresented criminal defendant with a form letter, sent by the court clerk. *Washington Advisory Opinion 02-14*. The

form letter would advise the defendant that the judge cannot respond to questions and that the defendant should contact a lawyer or schedule a hearing in accordance with the court rules. If a judge receives a communication from a defendant who is represented, the judge may advise the defendant to contact his or her lawyer. Copies of both the defendant's letter and the judge's response should be retained in the court file and given to counsel.

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. *Washington Advisory Opinion 02-14*. See also *Massachusetts Advisory Opinion 03-17* (in response to letter stating complaining witness in criminal complaint over which judge had presided had heard nothing about progress of case, judge may tell writer where he may learn what has happened but should send copies of both letters to prosecutor and to defense counsel). 

Interim Suspension *(continued from page 7)*

come of criminal proceedings, many states have provisions automatically suspending the judge with pay or authorizing the court or commission to order the judge's disqualification with pay.

Those states in which disqualification is automatic include Alabama, Alaska, Arizona, California, Connecticut, Minnesota, Missouri, Montana, North Dakota, Ohio, Rhode Island, and South Dakota. Following criminal charges, in Nevada, the commission "shall" suspend the judge, while in Hawaii, Indiana, and Nebraska, the supreme court "shall" order the suspension of a judge immediately without necessity of commission action. In other states, the supreme court "may" suspend the judge following a recommendation by the conduct commission (Arkansas, Kentucky, Louisiana) or

without commission action (New York, South Carolina, Tennessee) or the commission may suspend the judge (Georgia, Kentucky, Texas, Vermont, Wyoming). In Utah, an indicted judge is placed on administrative leave without pay by a member of the supreme court. In West Virginia, disciplinary counsel may make a report regarding temporary suspension to the supreme court of appeals. In Pennsylvania, the Judicial Conduct Board makes a motion for an interim suspension with the Court on Judicial Discipline. In Illinois, a chief judge may temporarily assign a judge to restricted duties or duties other than judicial duties when the judge has been formally charged with a crime that involves moral turpitude or reflects adversely upon the judge's fitness to serve.

In most states, the suspension results from an indictment or an infor-

mation charging the judge in the United States with a crime punishable as a felony under a state or federal law. Additional crimes may also result in suspension in Arkansas and Hawaii (misdemeanor charges that adversely affect the judge's ability to perform the duties of office), Connecticut and Wyoming (a crime involving moral turpitude), Louisiana ("any other lesser crime that reflects adversely on the judge's honesty, trustworthiness or fitness as judge"); South Carolina ("a serious crime"), Texas (a "misdemeanor involving an act relating to a judicial office or a misdemeanor involving an act involving moral turpitude"), Utah ("class A misdemeanor"), and West Virginia ("a serious offence"). 



19th National College on Judicial Conduct and Ethics

October 21-23, 2004

Chicago, Illinois

The Center for Judicial Ethics will hold its **19th National College on Judicial Conduct and Ethics** on October 21-23, 2004, at the Embassy Suites Downtown Lakefront in Chicago. The National College provides a forum for judicial conduct commission members and staff, judges, and judicial educators to learn about and discuss professional standards for judges and current issues in judicial discipline. The Colorado Supreme Court Board of Continuing Legal and Judicial Education has accredited the College for 13 general continuing legal education credits including 7 ethics credits.

The topics for the sessions at the College are:

- The Appearance of Impartiality and Community Activities
- Attending Seminars
- Developments following *Republican Party of Minnesota v. White*
- Determining the Appropriate Sanction
- Disciplinary Responsibilities
- Disqualification
- Ethical Issues for Appellate Judges
- Ethics for Court Staff
- Issues for New Members of Judicial Conduct Commissions.
- Judicial Ethics and Problem-Solving Courts
- The Role of Public Members
- Writing Judicial Discipline Decisions

**Approved for
CLE credits**

The sessions will be facilitated by judges and judicial ethics experts. In addition, during the College, the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct will hold a round-table discussion to obtain comments and suggestions relating to the code.

The College will begin Thursday October 21 with registration and a reception. Friday through Saturday morning, there will be six sessions with several concurrent workshops offered during each time slot. The College will end Saturday October 23 at noon. Registration for the College will be \$250. The rate for rooms will be \$169 a night (for single occupancy; \$189 a night for double occupancy), plus tax. **The deadline for getting the group rate at the hotel is September 18.**

For registration materials or to register on-line, www.ajs.org/http://www.ajs.org/ethics/eth_natl_college.asp or contact Stacey Nay at 515-21-2284.

ABA Evaluation of the Model Code

Inviting interested organizations and individuals to file comments, the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct has issued two partial draft revisions of the model code. The drafts are posted on its web site (www.abanet.org/judicialethics), which also includes comments filed with the Joint Commission.

The first partial draft, issued on May 11, contained proposals regarding a judge's conduct in general and impartial and diligent performance of judicial duties. The second partial draft, issued on July 19, contained proposals

regarding a judge's personal conduct (using the judicial office for personal purposes, use of non-public information, affiliation with discriminatory organizations) and extra-judicial activities (appearance before governmental bodies, civic or charitable activities, appointments to fiduciary positions, testifying as a character witness, financial activities, remunerative activities, and business activities). Still to come are draft proposals regarding gifts and a political activities.

The partial drafts reflect a reorganization of the model code and include memoranda outlining issues that were prominent in the Joint Commission's

discussions and on which comment would be helpful. The Joint Commission noted that the draft provisions "represent only the current thinking of the Commission and its advisors" and "will be reconsidered following receipt of public comments."

The American Judicature Society made proposals for the revision of the model code at the beginning of the Joint Commission's evaluation, filed comments on the first partial draft revision, and plans to file comments on subsequent drafts. The AJS submissions may be found on the ABA site or at www.ajs.org/ethics/eth_ABA_commission.asp.

A Judge's Participation in a Homeowners' Association (continued from page 3)

But see West Virginia Advisory Opinion (March 16, 1999) (judge may not serve as president of homeowners' association where association will inevitably have to take action that may result in adversary proceeding pursued in judge's court).

However, while serving on a board or as an officer, the judge may not:

- give investment advice to the board (*New York Advisory Opinion* 88-98; *Massachusetts Advi-*

sory Opinion 01-6);

- give legal advice or serve on the association's legal committee (*Illinois Advisory Opinion* 95-13; *Massachusetts Advisory Opinion* 01-6; *New York Advisory Opinion* 89-133; *Virginia Advisory Opinion* 00-9);
- participate in any decision that is likely to lead to litigation (*New York Advisory Opinion* 89-133);
- act as a mediator or arbitrator as

part of the board's efforts to resolve disputes between unit owners (*Massachusetts Advisory Opinion* 01-6);

- vote on the approval of prospective purchasers (*New York Advisory Opinion* 88-98);
- engage in fund-raising (*Illinois Advisory Opinion* 95-13; *Virginia Advisory Opinion* 00-9); or
- receive compensation (*New Hampshire Advisory Opinion* 78-1).

But see U.S. Advisory Opinion 29 (revised 1998) (passing on prospective occupants is allowable duty of judge serving on homeowners' association board); *New York Advisory Opinion* 94-8 (judge may receive nominal compensation for serving as member of board of homeowners' association).

Judicial Conduct Reporter Summer 2004

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Published quarterly,
\$32 per year; single copy \$9

© 2004
American Judicature Society
ISSN: 0193-7367

To subscribe or if you have a change of address or questions about your subscription, contact 515-271-2285 or llieurance@ajs.org

An index to the *Judicial Conduct Reporter* is available on the AJS web site at www.ajs.org.



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