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Pro se litigants in the code of judicial conduct by Cynthia Gray

Many decisions authorize judges to handle cases involving self-represented litigants differently by, for example, affording self-represented litigants latitude and making allowances, being lenient and solicitous, or giving them every consideration. For example, the West Virginia Supreme Court of Appeals explained:

> The fundamental tenet that the rules of procedure should work to do substantial justice, . . . commands that judges painstakingly strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules. . . . Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not. This "reasonable accommodation" is purposed upon protecting the meaningful exercise of a litigant's constitutional right of access to the courts.

Blair v. Maynard, 324 S.E.2d 391 (West Virginia 1984).

Similarly, a justice of the Arizona Supreme Court argued, albeit in dissent:

> The courts do not treat a litigant fairly when they insist that the litigant — unaided and unable to obtain the services of a lawyer — negotiate a thicket of legal formalities at peril of losing his or her right to be heard. Such a practice manifestly excludes the poor and the unpopular, who may be unable to obtain counsel, from access to justice.
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> Meaningful access requires some tolerance by courts toward litigants unrepresented by counsel. Pro per litigants are by no means exempt from the governing rules of procedure. But neither should courts allow those rules to operate as hidden, lethal traps for those unversed in law. This may require some degree of extra care and effort on the part of trial judges who already labor long and hard at a mushrooming caseload. But the alternative slams the courthouse door

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Legal error as judicial misconduct by Cynthia Gray

Although legal error is not usually grounds for a finding of judicial misconduct, there are exceptions to that rule. In finding an exception, courts and commissions often cite factors that indicate the judge should have known the decision was wrong and suggest the error was negligent or even willful, not a good faith mistake.

For example, the New York State Commission on Judicial Conduct recently found that a judge's sentencing errors could not "be attributed to lack of experience, insufficient training and education, or insufficient resources to assist him in performing his duties." *In the Matter of Piraino*, Determination (New York State Commission on Judicial Conduct July 30, 2014) (http://www.cjc.ny.gov/Determinations/P/Piraino.htm). The judge had imposed fines and/or surcharges in over 94 cases that were above the maximum amounts authorized by law or below the minimum amounts required by law. The Commission noted:

> As a practicing attorney and experienced judge, respondent had more than 20 years of legal experience and had been on the bench for more than a decade at the time the unlawful sentences were imposed. He regularly attended

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Recent advisory opinions

• A judge may use the Internet to conduct legal research for a case or to access public documents that he could properly take judicial notice of if the documents were obtained through traditional means. When facts are available on the Internet that can help the judge decide a factual dispute, the best practice is for the judge to inform the parties of the information and how and when he obtained it and allow the parties to respond. When a judge is taking judicial notice of information on the Internet, he must give notice and an opportunity for parties to object and be heard. *Alaska Opinion 2014-1.*

• Before a legislative body or in consultation with other branches of government or public officials, a judge may comment regarding matters that clearly relate to the administration of justice (for example, the judicial branch's budget, a bond measure for court construction, or a bill to replace court reporters with electronic recording) but may not comment on substantive law except from a purely judicial perspective. *California Opinion 2014-6.*

• Judges, councils of judges, or organizations of judges should not file amicus curiae briefs. *Georgia Opinion 241* (2014).

• A judge whose minor children babysit for an attorney's children is not required to disclose or disqualify when the attorney appears in her court. *New York Opinion 14-59.*

• A judge is not required to disclose or disqualify when a party in a case is married to a judicial colleague. *New York Opinion 14-81.*

• A judge may preside over the criminal case of a defendant who identifies himself as a member of a sovereign citizens group and who has filed a lawsuit against the judge and other public officials and agencies. *New York Opinion 14-105.*

• A judge may continue to preside over the criminal case of a defendant who caused a mistrial by telephoning the court purporting to be a juror, caused a delay in the trial by feigning a heart attack, and indicated he intends to file an action against the judge. *New York Opinion 14-128.*

• A judge may not attend a bar association presentation at which his decision on a novel legal issue will be discussed by an individual associated with one side of the case while the case is pending but may attend if the speakers have no personal or professional involvement with the case and the judge will not preside over any further proceedings. The judge may not write a law review article discussing the decision's rationale and potential impact on future decisions. *New York Opinions 14-9 and 14-26.*

• A judge may provide criminal defendants who resolve their cases at arraignment with information about resources regarding alcohol and drug addiction and a New York Public Library web-site detailing services for finding a job, education, housing, financial assistance, health counseling, family services, and legal services. *New York Opinion 14-87.*

• A judge should not complete a document to certify that individuals submitting an I-918B form to the U.S. Citizenship and Immigration Services of the Department of Homeland Security are victims of certain qualifying criminal activity and are, have been, or are likely to be helpful in the investigation or prosecution of that activity. *North Carolina Opinion 2014-3.*

• A judge may contribute to a non-profit organization that is opposing efforts to alter the Alaska constitution's judiciary article or addressing judicial selection and retention and justice system issues, but the contributions should not be used to actively oppose a ballot proposition. *Alaska Opinion 2014-2.*

• Justices of the supreme court and the administrative office of the courts should not solicit or receive donations for a judicial learning center to match the amount the legislature appropriated contingent on the raising of non-appropriated funds. Third-party entities may accept private donations on behalf of the administrative office, and the justices may participate in meetings with potential donors to explain plans for the center. The supreme court may apply for publicly available competitive grants from private foundations that are concerned with public education on matters related to the law and that are not likely to be involved in litigation. *Wyoming Opinions 2014-3 and 2014-4*.

• A judge may participate in the "ice bucket challenge" to raise funds for ALS research but only if it is clear she is acting in a personal capacity. *Maryland Opinion Request 2014-301.*

• A judge may not participate in the "ice bucket challenge" for ALS but may contribute to the organization without personally soliciting funds or otherwise promoting the fund-raiser. *New York Opinion 14-132.*

• A judge need not prohibit the court clerk from engaging in charitable fund-raising on his own time and away from court premises. *New York Opinion 14-68.*

• A judge-appointee who is a member of the state legislature may attend and vote in a session before she takes office. *Florida Opinion 2014-19.*

• After giving notice to the Chief Justice and the Governor of his intention to retire, a judicial officer may, prior to the effective date of his retirement, disclose that he is planning to retire and has arranged to enter private practice as long as he does not disclose the name or location of the firm or the nature of the practice. *Connecticut Emergency Staff Opinion 2014-16.* ★

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

Recent cases

Delegating powers to receiver, disproportionate appointments

The Texas State Commission on Judicial Conduct admonished a judge for (1) granting a receiver non-delegable judicial powers in a divorce case and (2) making a disproportionately high percentage of indigent court appointments to one attorney. *Public Admonition of Gonzalez* (August 26, 2014) (http://www.scjc.state.tx.us/pdf/actions/FY2014-PUBSANC.pdf).

(1) In May 2006, Autin Domit filed for divorce from his wife, Maria. In June 2008, Domit filed a lawsuit to recover damages from the failed Ocean Tower development project in which one of his companies was involved. In November 2008. The judge appointed attorney David Calvillo as receiver over the couple's community property. The judge's order authorized Calvillo to take "charge and possession" of the couple's business entities and to "manage, control, and dispose of the property as he sees fit." In August 2009, while the divorce remained pending, the Domits' company received approximately $3.5 million from the settlement of the Ocean Tower lawsuit. Calvillo immediately took control of the settlement proceeds and placed them in a receivership account. Calvillo also hired Maria's divorce attorneys to represent him in lawsuits related to the Domits' business interests. Subsequently, the judge signed an agreed order that allowed Calvillo to pay himself out of the Ocean Tower settlement proceeds without court oversight or approval.

On November 29, 2011, Ocean Tower's creditors filed a petition that sent Ocean Tower into involuntary bankruptcy. The bankruptcy stayed the divorce case. Records obtained by the bankruptcy trustee showed that, from the settlement proceeds, Calvillo had paid himself approximately $1.2 million and the divorce attorneys approximately $1 million dollars in fees and expenses. The payments were made without a determination of the rights of Ocean Tower creditors to the funds. The trustee asked the bankruptcy court to disgorge the fees. Those claims are still pending.

The Commission found that the judge had granted the receiver non-delegable judicial powers, including the authority to make payments, without any court oversight, to himself and his attorneys from settlement proceeds that had not been subject to a court determination as to the rights of the parties in interest. The Commission concluded that such broad, unfettered receivership powers were beyond the authority contemplated by the Texas Family Code and/or the Texas Civil Practice and Remedies Code.

(2) The Hidalgo County Indigent Defense Plan provides that counsel for indigent defendants are to be appointed from a public rotational list. Under the rules of the Texas Indigent Defense Commission, if the top 10% of appointed attorneys receive more than three times their representative share of appointments, there is a presumption that the appointment system is not fair, neutral, or non-discriminatory.

From January 1, 2008, through December 31, 2013, the judge appointed Jeanne Holmes to represent indigent defendants in approximately 778 cases, or nearly 22% of the 3,568 appointments he made to 192 attorneys. The attorney with the next highest percentage received just over 400 appointments, and the attorney with the third highest percentage received 180 appointments. In total, Holmes and two other attorneys received 38% of all appointments. Of the 192 attorneys on the appointment list, the top 10 received nearly 54% of all appointments, with Holmes receiving 40% of those appointments. The judge also approved fee vouchers for Holmes of approximately $475,000, which was nearly double the amount paid to the attorney with the second highest number of appointments.

The Commission found that the appointment system employed by the judge exceeded the Texas Indigent Defense Commission's threshold for presuming that a court's system is fair, neutral, and non-discriminatory.

Sexual activity in the courthouse

In unrelated cases, pursuant to stipulations for discipline by consent, the California Commission on Judicial Performance censured two judges for engaging in sexual activity in the courthouse and related misconduct. In both cases, the Commission stated:

> Engaging in sexual intercourse in the courthouse is the height of irresponsible and improper behavior by a judge. It reflects an utter disrespect for the dignity and decorum of the court and is seriously at odds with a judge's duty to avoid conduct that tarnishes the esteem of the judicial office in the public's eye.

In addition, the Commission noted, the judges potentially exposed court staff to a hostile work environment.

The Commission censured one judge for (1) engaging in sexual activity in his chambers on multiple occasions with two women; (2) initiating contact with the district attorney's office about the employment application of one of the women; (3) after disqualifying himself from cases in which the second woman appeared, re-assigning the cases to other judges; and (4) failing to disqualify himself from a case in which a close friend was an attorney. *In the Matter Concerning Steiner*, Decision and order (September 2, 2014) (http://cjp.ca.gov/res/docs/censures/Steiner_DO_Censure_09-02-14.pdf).

The Commission censured the second judge for engaging in sexual intercourse in the courthouse with a courtroom clerk, exchanging communications of a sexual

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Physical or mental examinations in judicial discipline proceedings

Most judicial conduct commissions have rules or statutory provisions regarding the examination of a judge for a physical or mental disability by an independent medical professional. Depending on the state, the commission may request (Alaska, Connecticut, Michigan, Mississippi, Nevada); order (Arizona, Colorado, Florida, Idaho, Iowa, Kentucky, Maryland, New Mexico, Ohio, Texas, Utah); require (Georgia, Missouri, Nebraska, Pennsylvania, Vermont, Washington, Wisconsin, Wyoming); or direct the judge to get an examination (Oregon, Virginia).

In many states, the rules provide that the authority can be used whenever the physical or mental health of the judge is "involved" or "at issue." In other states, the commission's authority is triggered:

- "If a judge is charged with a disability or raises a disability as an affirmative defense to misconduct" (Alaska).
- "Upon a finding of good cause by seven members of the commission [on judicial performance]" (California).
- "If the preliminary investigation indicates that a Judge may have a physical or mental disability which seriously impairs the performance of judicial duties" (Colorado).
- "Upon receiving information that a judge is suffering a possible physical or mental disability which seriously interferes with the performance of the judge's duties" (Florida).
- "In appropriate cases" (Kentucky).
- "When a complaint alleges, or where an initial inquiry or preliminary investigation reveals, that a judge is or may be incapacitated by reasons of psychological or physical disability, and the [Judicial Standards] Commission finds good cause" (New Mexico).
- "In appropriate situations, such as where a judge is alleged to be mentally or physically unfit to serve, or where the judge's capacity to participate in a hearing is at issue" (New York).
- "Whenever the [Judicial Inquiry and Review] Commission has probable cause to believe that a judge is unable to perform his duties because of excessive use of alcohol or drugs or physical or mental illness" (Virginia).

The Georgia Judicial Qualifications Commission is required to give a judge notice and a hearing before requiring an examination. In California, "no examination by a specialist in psychiatry may be required without the consent of the judge." The rules in Alaska, Arizona, Mississippi, Oregon, and Texas provide that the commissions will pay the costs of the examination.

In some states, a judge's denial of allegations of a disability is treated as a waiver of medical privilege and permits

Sample provisions

Alaska Judicial Conduct Commission, Rule 17(b)(2)
If a judge is charged with a disability or raises a disability as an affirmative defense to misconduct, the commission will, in its discretion, . . . request the judge to submit to a physical or mental examination by an independent medical expert. The medical expert shall report the results of the examination to both the commission and the judge. If the judge refuses to submit to the examination, the commission will decide the issue requiring the examination adversely to the judge.

Arizona Commission on Judicial Conduct, Rule 32
(a) Authority to order. After the institution of a preliminary investigation and before the filing of a notice of formal proceedings, an investigative panel may order a judge, at the commission's expense, to submit to a physical or mental examination by one or more licensed physicians or psychologists appointed by the investigative panel to conduct such an examination.

(b) Use of examination results. The medical practitioners shall examine the judge to determine the judge's mental or physical condition to hold judicial office. The examination may include any laboratory and other tests deemed necessary by the examining medical practitioners. The results of the examinations and tests shall be reported in writing to the investigative panel and copies shall be furnished to the judge, the judge's counsel, or guardian ad litem. These medical reports may be reviewed by an investigative panel in connection with a finding of reasonable cause or may be received in evidence in any subsequent hearing.

(c) Failure or refusal to be examined. The failure or refusal of a judge to submit to a medical examination ordered by the investigative panel shall preclude the judge from presenting evidence of the results of medical examinations done on the judge's behalf. An investigative or hearing panel may consider such a refusal or failure as evidence that the judge has an incapacity that seriously interferes with the performance of judicial duties and is or is likely to become permanent.

Colorado Commission on Judicial Discipline, Rule 15
If the preliminary investigation indicates that a Judge may have a physical or mental disability which seriously impairs the performance of judicial duties, the Commission may order the Judge to submit to one or more independent examinations by physicians or other persons with appropriate professional qualifications to evaluate the Judge's physical and/or mental condition.

Georgia Judicial Qualifications Commission, Rule 18(e)
The Commission shall ... have the authority, after notice to the judge and a hearing, to require that a judge involved in proceedings before the Commission submit to a physical or mental examination, or both, and specify the time, place, manner, conditions and scope of the examination and the physician or physicians by whom it is to be made.

Hawaii Commission on Judicial Conduct, Rule 8.13(c)
(1) If the complaint involves the physical or mental condition

the commission to require an examination. For example, the Arkansas provision states:

> (1) If a complaint or statement of allegation involves the mental or physical health of a judge, a denial of the alleged disability or condition shall constitute a waiver of medical privilege and the judge shall be required to produce his medical records.
>
> (2) In the event of a waiver of medical privilege, the judge shall be deemed to have consented to an examination by a qualified medical practitioner designated by the [Judicial Discipline & Disability] Commission.

Hawaii, Massachusetts, Nevada, and North Carolina have similar provisions.

The effect of a judge's failure to undergo an examination requested or ordered by a commission varies from state to state. (Many rules contain an exception if the failure is due to circumstances beyond the judge's control.) In several states (Arizona, Connecticut, Minnesota, Oregon), the failure to submit to an examination precludes the judge from presenting as evidence the results of medical examinations done on the judge's behalf.

The Alaska rule provides that, "if the judge refuses to submit to the examination, the commission [on judicial conduct] will decide the issue requiring the examination adversely to the judge." Other rules state that such failure "may constitute judicial misconduct" (Michigan) or "shall raise an inference adverse to the judge on the issue" (Mississippi).

In several states (Arizona, Connecticut, Minnesota, Oregon, Pennsylvania, Vermont), the failure may be considered as evidence that the judge has a disability. For example, the Vermont rule states: "The Judicial Officer's unjustified failure to submit to a physical, psychiatric, or psychological examination required by the [Judicial Conduct] Board may be considered as evidence of physical or mental disability." The rule in D.C. states that the failure "may be considered by the Commission [on Judicial Disabilities and Tenure] adversely to the judge." The rules in Indiana, Iowa, Kentucky, and Wyoming provide simply that the failure "may be considered."

In Florida, if a judge fails to submit to an examination ordered by the investigative panel of the Judicial Qualifications Commission, the panel "may recommend to the Supreme Court that the judge be suspended without compensation until such time as the judge complies . . . ." In Texas, the State Commission on Judicial Conduct "may petition a district court for an order compelling the judge to submit to the physical or mental examination." ★

of the judge, a denial of the alleged condition shall constitute a waiver of medical privilege, and the judge shall be required to produce his or her medical records.

(2) If medical privilege is waived, the judge is deemed to have consented to a physical or mental examination by a qualified medical practitioner designated by the Commission. The report of the medical practitioner shall be furnished to the Commission and the judge.

New Mexico Judicial Standards Commission, Rule 10A

When a complaint alleges, or where an initial inquiry or preliminary investigation reveals, that a judge is or may be incapacitated by reasons of psychological or physical disability, and the Commission finds good cause to do so, the Commission may order the judge to undergo any physical or psychological examinations the Commission deems necessary to proceed with its investigation.

Oregon Revised Statutes, 1.425(3)

(a) The commission [on judicial fitness and disability] may direct that a subject judge, prior to a hearing, submit to a physical examination by one, two or three physicians licensed to practice in this state and appointed by the commission to conduct the examination, or submit to a mental evaluation by one, two or three physicians, psychologists or other mental health professionals licensed to practice in this state and appointed by the commission to conduct the evaluation, or submit to both that examination and evaluation. The persons appointed to conduct the examination or evaluation shall report thereon to the commission. A copy of any report to the commission shall be provided by the commission to the subject judge. The costs of the examination, evaluation and reporting shall be paid by the commission.

(b) If a subject judge directed to submit to an examination or evaluation fails to do so, the judge may not present as evidence in the proceeding the results of any medical examination of the judge done at the instance of the judge, and the commission or masters may consider the failure of the judge to submit to examination or evaluation as evidence that the judge has a disability.

Pennsylvania Judicial Conduct Board, Rule 33

The Board may require a physical, psychiatric, or psychological examination of the Judicial Officer, and may appoint one or more professionals to make an examination and prepare a report, a copy of which shall be given to the Judicial Officer. The Judicial Officer's unjustified failure to submit to a physical, psychiatric, or psychological examination required by the Board may be considered as evidence of physical or mental disability.

Wyoming Commission on Judicial Conduct and Ethics, Rule 7(c)

If an investigation indicates the physical or mental health of the judge is in issue, the investigatory panel may require that the judge submit to physical and/or mental examinations by independent examiners. The results of the examination shall be transmitted to the judge and the presiding officer for consideration by the panel. Service of the results of examination shall be in accordance with these rules. The failure of the judge to testify or to submit to an examination ordered by a panel may be considered, unless it appears that such failure was due to circumstances beyond the judge's control.

> in the face of those who may be in greatest need of judicial relief, all for the sake of ease of administration.

White v. Lewis, 804 P.2d 805 (Arizona 1990) (Lankford, J., dissenting). *See also Inquiry Concerning Eriksson*, 36 So. 3d 580 (Florida 2010) (the judge's "unduly rigid and formulaic process" and his "overly technical and rigid approach" in dealing with pro se litigants in domestic violence injunction proceedings impeded their ability to obtain the relief and protection they sought and "penalized pro se petitioners for being unfamiliar with the judicial system").

Those principles were reflected in a change made to the American Bar Association *Model Code of Judicial Conduct* in 2007. Rule 2.2 provides that "a judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." New comment 4 to that rule adds a caveat: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard."

That concept has been readily adopted, with 27 states and the District of Columbia adding a version to their codes of judicial conduct. Even several states (Illinois, Louisiana, and Wisconsin) that have not adopted other revisions in the 2007 model code have added references to pro se litigants to their codes. Only four jurisdictions that have recently adopted new codes (Delaware, Kansas, Oregon, and the federal judiciary) have not included a version of the comment (and as noted below, Delaware has guidelines elsewhere).

The exact language in comment 4 has been adopted by the supreme courts in 13 states — Arizona, Arkansas, Connecticut, Hawaii, Indiana, Minnesota, Nevada, North Dakota, Oklahoma, Tennessee, Utah, Washington, and Wyoming (except that Arizona and Nevada use the term "self-represented" rather than "pro se"). Pennsylvania added "impartially" to the end of the comment so in its version accommodations are "to ensure pro se litigants the opportunity to have their matters heard fairly and impartially."

Variations

At least 14 jurisdictions have revised and expanded the model provision. Some versions explain the rationale underlying accommodations for pro se litigants, emphasizing the connection between access to justice and judicial discretion. The version adopted by the Ohio Supreme Court, for example, adds a comment that "the rapid growth in litigation involving self-represented litigants and increasing awareness of the significance of the role of the courts in promoting access to justice have led to additional flexibility by judges and other court officials in order to facilitate a self-represented litigant's ability to be heard." *See also, New Hampshire Code of Judicial Conduct*, Rule 2.2, Comment 4 ("The growth in litigation involving self-represented litigants and the responsibility of courts to promote access to justice warrant reasonable flexibility by judges, consistent with the law and court rules, to ensure that all litigants are fairly heard") The Wisconsin code (in a comment published but not adopted by the state supreme court) states:

> A judge may exercise discretion consistent with the law and court rules to help ensure that all litigants are fairly heard. A judge's responsibility to promote access to justice, combined with the growth in litigation involving self-represented litigants, may warrant more frequent exercise of such discretion using techniques that enhance the process of reaching a fair determination in the case. Although the appropriate scope of such discretion and how it is exercised will vary with the circumstances of each case, a judge's exercise of such discretion will not generally raise a reasonable question about the judge's impartiality.

The Maryland code explains:

> Increasingly, judges have before them self-represented litigants whose lack of knowledge about the law and about judicial procedures and requirements may inhibit their ability to be heard effectively. A judge's obligation under Rule 2.2 to remain fair and impartial does not preclude the judge from making reasonable accommodations to protect a self-represented litigant's right to be heard, so long as those accommodations do not give the self-represented litigant an unfair advantage. This Rule does not require a judge to make any particular accommodation.

In a joint resolution adopted in 2012 (http://tinyurl.com/lqyp4rz), the Conference of Chief Justices and the Conference of State Court Administrators also put the handling of cases involving pro se litigants in the context of "the importance of access to justice for all," noting "access to courts extends both to lawyer-represented and self-represented litigants."

Other codes affirmatively state a judge's ability to accommodate self-represented litigants, rather than use the "it is not a violation" formulation of the model code. The California comment explains that, "when a litigant is self-represented, a judge has the discretion to take reasonable steps, appropriate under the circumstances and consistent with the law and the canons, to enable the litigant to be heard." The Montana version of comment 4 provides: "A judge may make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard." The Missouri comment is the same except that it uses "afford" rather than "ensure."

Some states further emphasize the importance of this exercise of judicial discretion by placing the language in the text, not just in a comment. In its resolution, the Conference of Chief Justices recommended adding "a judge may make reasonable efforts, consistent with the law and court rules, to facilitate the ability of all litigants, including self-represented litigants, to be fairly heard" to the text of the rule. The Louisiana, New Hampshire, and Wisconsin codes have

included that language in the text. In the text of its rule, the Illinois code includes that language but refers only to self-represented litigants, not to "all litigants."

Several jurisdictions (D.C., Louisiana, Maryland, and Nebraska) have modified comment 4 to note that accommodations made by a judge should not give "an unfair advantage" to self-represented litigants. The Nebraska comment also advises that "judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage." The version adopted by the New Mexico Supreme Court prefaces the comment with: "When pro-se litigants appear in court, they should comply with the rules and orders of the court and will not be treated differently from litigants with counsel."

Examples

In Colorado, the District of Columbia, Iowa, Louisiana, Ohio, and Wisconsin, the codes provide further guidance to judges by including a non-exclusive list of examples of reasonable accommodations judges may make in cases involving self-represented litigants or, as the Ohio code puts it, "affirmative, nonprejudicial steps" that "judges have found helpful." The Conference of Chief Justices resolution suggested that "states modify the comments to Rule 2.2 to reflect local rules and practices regarding specific actions judges can take to exercise their discretion in cases involving self-represented litigants." In Colorado, D.C., and Ohio, the lists are in commentary not to Rule 2.2, but to Rule 2.6(A), which requires a judge to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law." (In Wisconsin, the list is in a comment published, but not adopted by the state supreme court.)

For example, the comment adopted by the Iowa Supreme Court states:

> By way of illustration, a judge may: (1) provide brief information about the proceeding; (2) provide information about evidentiary and foundational requirements; (3) modify the traditional order of taking evidence; (4) refrain from using legal jargon; (5) explain the basis for ruling; and (6) make referrals to any resources available to assist the litigant in the preparation of the case.

The most common examples included in the lists are:

- "providing brief information about the proceeding and evidentiary and foundational requirements" (Colorado, D.C., Iowa, Louisiana, Ohio) or "informing litigants what will be happening next in the case and what is expected of them" (Wisconsin);
- "making referrals to any resources available to assist the litigant in preparation of the case" (Colorado, D.C., Iowa, Louisiana, Ohio, Wisconsin);
- "explaining the basis for a ruling" (Colorado, D.C., Iowa, Louisiana, Ohio);
- "modifying the traditional order of taking evidence" (Colorado, D.C., Iowa, Ohio, Wisconsin);
- "refraining from using legal jargon" (D.C., Iowa, Louisiana, Ohio), "attempting to make legal concepts understandable" (Colorado, Louisiana), or explaining "legal concepts in everyday language" (Wisconsin);
- "asking neutral questions to elicit or clarify information" (D.C., Louisiana, Wisconsin); and
- "liberally construing pleadings" (Colorado) or construing "pleadings to facilitate consideration of the issues raised" (Wisconsin).

The Wisconsin list also includes "permitting narrative testimony" and "allowing litigants to adopt their pleadings as their sworn testimony."

Other states have adopted lengthier guidelines separate from the code of judicial conduct. For example, judicial guidelines for civil hearings involving self-represented litigants have been adopted by the Delaware Supreme Court (http://courts.delaware.gov/Supreme/AdmDir/ad178guidelines.pdf) and the Massachusetts courts (http://www.mass.gov/courts/court-info/trial-court/exec-office/ocm/jud-institute/jg-self-rep.html). The two states' guidelines are similar but not identical. Both include general practices and guidelines for pre-hearing interaction, conducting hearings, and post-hearing interaction. Specific topics in either or both include plain English, language barriers, legal representation, application of the law, materials and services for self-represented litigants, opportunity to be heard, managing the case, preparation, trial process, brevity and consistency, burden of production and proof, ex parte communications, the judge as fact-finder, right of self-representation, settlement, approval of settlement agreements, alternative dispute resolution, courtroom decorum, stress, evidence, issuing the decision, and appeals.

The Delaware guidelines explain:

> It is proper that Judges exercise their discretion to assume more than a passive role in assuring that during litigation the merits of a case are adequately presented through testimony and other evidence. While doing this, Judges shall remain neutral in the consideration of the merits and in ruling on the matter. ★

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> all required judicial training and education sessions; he had access to and was familiar with the pertinent statutes; and at the hearing, he acknowledged that all of the resources needed to determine the appropriate sentences were readily available to him.

Noting that "this is not an area of law that involves complicated legal issues," the Commission emphasized that the judge could have determined whether a fine or surcharge was within the authorized range by "simply consulting the sentencing provisions in the Vehicle and Traffic Law or the sentencing charts available to him . . . ." *See also Office of Disciplinary Counsel v. Karto*, 760 N.E.2d 412 (Ohio 2002) (the theft of a new version of a rule book did not excuse a judge from "abiding by his responsibility to keep himself apprised of changes in the law and to sentence an individual accordingly," and his use of an out-dated rule book was a clear violation of the requirement that a judge be faithful to the law and maintain professional competence").

> If a judge continues to commit a legal error after the mistake has been drawn to the judge's attention, the judge commits judicial misconduct as well as legal error.

Training and available resources were also emphasized by the Kentucky Supreme Court when it found that a judge's contempt decision went beyond legal error and "displayed a bias or preconception or a predetermined view . . . so as to impugn the impartiality and open-mindedness necessary to make correct and sound rulings in the case." *Gormley v. Judicial Conduct Commission*, 332 S.W.3d 717 (Kentucky 2010). In a domestic violence case, the judge had, based on ex parte information, summarily held the husband in contempt of court for actions that occurred outside of her perception. The Court noted:

> A Family Court judge must not only graduate from law school, but pass the bar examination, and have practiced law for at least eight years before becoming a Family Court judge. All Kentucky judges are provided with computers and a subscription for online legal research. Most, if not all, Family Court judges are given support staff, one of whom is a licensed attorney.

The Court concluded: "Judge Gormley knew, or should have known, that she was acting erroneously in this case, but proceeded to plow forward without regard for fundamental rights and with a disregard for the law."

Similarly, in *Woolbright*, 12-051, Order (Arizona Commission Judicial Conduct August 21, 2012) (http://www.azcourts.gov/azcjc/PublicDecisions.aspx), the Arizona Commission on Judicial Conduct noted that, in the orientation sessions the judge had attended twice in two years, new judges were trained how to conduct initial appearances and arraignments and that "there are scripts available to new judges" to protect the rights of litigants. The Commission found that "the judge failed to avail himself of these scripts, disregarded his orientation training, and failed to accept responsibility for his actions in doing so by choosing instead to lay blame for his failures on others." The Commission reprimanded the judge for improperly conducting initial appearances, treating civil and criminal matters interchangeably, and failing to review defendants' constitutional rights.

On notice

If a judge continues to commit a legal error after the mistake has been drawn to the judge's attention, the judge commits judicial misconduct as well as legal error. For example, in *In the Matter of Burke*, Determination (New York State Commission on Judicial Conduct (April 21, 2014) (http://www.cjc.ny.gov/Determinations/B/Burke.Edward.D.htm), the judge imposed $150 fines on defendants who pled guilty to parking violations even after the court clerk informed all the judges on the court that she had learned at a training conference that the maximum fine was $150. Despite that notice, the judge continued, for over two years and in over 200 cases, to impose fines greater than $150.

The New York Commission stated, that even if the judge "was not required to accept the clerk's advice at face value, her comments put him on notice of an important issue and should have prompted him to make sure he was acting in compliance with the law." Instead, the Committee noted, he "took no action to determine whether the clerk's information was correct, but simply began to ask defendants to waive the maximum fine amount in exchange for the plea bargain . . . ." The Commission stated it was not an excuse that, in some cases, the district attorney recommended the wrong amount "or that other judges may have been imposing similar, unlawful sentences. . . ."

The Commission concluded, "it is inconsistent with the Rules [Governing Judicial Conduct] that, having been put on notice that he was regularly imposing fines that were contrary to law, respondent took no action to ensure that the fines he imposed were in accordance with the statute." The Commission acknowledged that, "not every mistake of law, or even repeated errors will rise to the level of judicial misconduct." But, it concluded, "where, as here, respondent persisted in the conduct for many months even after he was on notice that he was transgressing the limits of the law,

such error constitutes misconduct." *See also Commission on Judicial Performance v. Boland*, 998 So.2d 380 (Mississippi 2008) (rejecting the judge's argument that the peace bond statute under which she had repeatedly incarcerated a man was confusing; the man's attorney had pointed out her mistake, but the judge sent the defendant to jail again); *In the Matter of Shults*, Determination (New York State Commission on Judicial Conduct July 7, 2011) (www.cjc.ny.gov/Determinations/S/shults.htm) (stating it was inexplicable that an attorney's request he recuse failed to bring to the judge's "attention that he should not be presiding, or even to create a doubt in his mind sufficient to check the Advisory Opinions or other relevant law").

Advisory opinions that put a judge on notice that disqualification is necessary under certain circumstances can support a finding of misconduct if the judge fails to disqualify in those circumstances. In *In the Matter of Doyle,* 17 N.E. 3d 1127 (New York 2014), the New York Court of Appeals removed a surrogate judge for presiding over nine matters involving a lawyer who was her close friend and personal attorney, a lawyer who was or had been her campaign manager, and a lawyer who had been her personal attorney. The judge asserted that she made a good faith error of law in concluding that, given the unique nature of surrogate's court practice, she could hear those matters because they were uncontested and non-discretionary.

However, the Court stated, "a judge's obligation to disqualify herself based on the appearance of impropriety has long been in place and has not been dependent on the nature of the proceeding." The Court noted a 1982 decision in which a surrogate was removed for, in addition to other misconduct, sitting on matters brought by an attorney who was a close friend, business associate, and personal attorney. Moreover, the Court stated, "the clear thrust of the judicial ethics opinions since at least 1994 has been that a Surrogate should recuse from 'routine, non-contested or administrative' matters involving attorneys with whom he or she has a relationship that could give rise to an appearance of impropriety or raise a question as to the judge's impartiality . . . . It is only by an overly restrictive interpretation of her ethical obligations that petitioner reached a different conclusion."

Legal error can also be equated with judicial misconduct if the judge committed the error after being reversed on the same grounds in a previous case. In *Goldman v. Commission on Judicial Discipline*, 830 P.2d 107 (Nevada 1992), the Nevada Supreme Court removed a judge for his abuse of the contempt power in six cases. Holding that an experienced trial judge's ignorance of proper contempt procedures can constitute the Advisory opinions that put a judge on notice that disqualification is necessary under certain circumstances can support a finding of misconduct if the judge fails to disqualify in those circumstances. The Court noted that the judge had ignored binding precedent reversing his contempt rulings. *See also In the Matter of Jung*, 899 N.E.2d 925 (New York 2008) (noting that three writs of habeas corpus granted by the appellate division from his orders jailing parents failed to impress on the judge the importance of due process rights in family court).

A private warning about a legal error from a conduct commission can also support a finding of misconduct if the judge repeats the error. In *In the Matter of Temperato*, Determination (New York State Commission on Judicial Conduct March 20, 2013) (www.cjc.ny.gov/Determinations/T/Temperato.htm), the New York Commission publicly admonished a non-lawyer judge who had issued a warrant and judgment in an eviction proceeding that did not comply with statutory requirements — a month after being privately cautioned for issuing a judgment that was inconsistent with the same statute. The Commission concluded:

> While an isolated or inadvertent legal error might not ordinarily rise to the level of judicial misconduct, respondent's lapse . . . cannot be overlooked in view of his receipt of a cautionary letter, only a month earlier, for rendering a judgment which was inconsistent with the same statute. The Letter of Dismissal and Caution should have prompted respondent to review the statute and ensure that his handling of such matters in the future was in strict compliance with the statutory requirements.

When it publicly reprimanded a judge for failing to comply with legal requirements in advising defendants of their constitutional rights, the Arizona Commission noted that the judge had previously received a letter from the Commission advising her to ensure she is familiar with the procedural rules governing her cases. *Quezada*, 13-210, Order (Arizona Commission on Judicial Conduct December 12, 2013) (http://www.azcourts.gov/azcjc/PublicDecisions.aspx). The Commission also noted that the judge had served on the bench for 30 years and that limited jurisdiction court judges in Arizona "are provided with 'Bench Books' that provide specific guidance in presiding over guilty plea proceedings" to avoid the type of errors the judge had committed.

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Legal error as judicial misconduct continued from page 9

Ignorance of the law

Legal error attributable to a failure to read or research the law is not accorded the usual deference given to judicial decision-making in disciplinary hearings. In *In the Matter of Feinberg*, 833 N.E.2d 1204 (New York 2005), the New York Court of Appeals removed a surrogate judge for his systematic failure to apply statutory requirements when he awarded legal fees to the counsel for the public administrator, in addition to other misconduct. In his defense, the judge explained that he had "'just read through sections' or 'skimmed' the [Surrogate's Court Procedure Act], and that his failure — over a period of more than five years — to know of and adhere to the single paragraph requiring affidavits of legal services and individualized consideration of fee requests was an 'oversight.'" Rejecting that argument, the Court emphasized that the judge had been obligated to familiarize himself with the Act "whether voluminous or not." The Court also found that the judge's "explanation demonstrated a shocking disregard for the very law that imbued him with judicial authority." The Court concluded that the judge's "consistent disregard for fundamental statutory requirements of office demonstrates an unacceptable incompetence in the law."

> Advisory opinions that put a judge on notice that disqualification is necessary under certain circumstances can support a finding of misconduct if the judge fails to disqualify in those circumstances.

In *Inquiry Concerning O'Flaherty*, Decision and order (California Commission on Judicial Performance September 29, 2004) (cjp.ca.gov/pubdisc.htm), the California Commission on Judicial Performance publicly admonished a judge for telling potential jurors in two criminal cases that, if for racial reasons they would not be able to give the defendant a fair trial, they should lie during voir dire. The Commission noted that the judge had not consulted other judges regarding the propriety of the instruction, had not heard of any other judge giving a similar instruction, and was unaware of any cases, statutes, or other authority that allowed a potential juror to make up an excuse to be dismissed from the jury. The Commission also noted that telling jurors to lie had never been suggested at any judicial education class the judge had attended, that the established practice in the county and throughout California was to have jurors answer all questions truthfully during voir dire, and that there was clear law from the California Supreme Court on the proper way to get bias out of the courtroom. The Commission concluded that, even though the judge was not aware he was violating that law when he implemented his own procedures, the judge's "generalized and serious lack of awareness or concern that the consequences" of his conduct constituted an intentional disregard of the law.

The standard has also been applied to non-lawyer judges. The Mississippi Supreme Court privately reprimanded a non-lawyer judge for accepting a plea agreement that did not comply with mandatory sentencing required by statute. *Commission on Judicial Performance v. Justice Court Judge T.T.*, 922 So. 2d 781 (Mississippi 2006). The Court found it was apparent that the judge had not read the applicable statutes, relying exclusively and blindly on the county prosecutor's advice. Noting that all judges inevitably make some mistakes, the Court concluded that the judge's failure to read and be familiar with the applicable statutes in a matter before him was an inexcusable mistake. The Court held: "Judges are required to research, read, know and apply the pertinent statutes and case law. Judges should never rely solely on attorneys to inform them of the appropriate law to be applied in each case under consideration."

In *Commission on Judicial Performance v. Britton*, 936 So.2d 898 (Mississippi 2006), the Court publicly reprimanded a non-lawyer judge and suspended him from office for 30 days without pay for setting aside orders handed down by another judge following an ex parte communication. The Court noted that the judge did not argue that he misread relevant statutes or controlling precedent and freely admitted that ex parte conversations were covered at several judicial conferences he attended, that he had been provided reading materials at these conferences that he had not read, and that he had not fully read relevant precedent. The Court concluded that the judge's "judicial errors were not based on faulty analysis and misjudgment but rather on basic ignorance of the law."

The Court distinguished a previous case in which it had dismissed with prejudice a complaint by the Commission on Judicial Performance that a judge had twice denied a defendant the right to bail. *Commission on Judicial Performance v. Martin*, 921 So. 2d 1258 (Mississippi 2005). In *Britton*, the Court noted that Judge Martin had identified two statutes and rules that led her to conclude that she could deny bail and that the specific topic that Judge Martin misunderstood had never been covered at any training session she attended. (A dissenting justice in *Britton*, however, argued that, although there may be a slight difference in circumstances between the two cases, "it is insufficient to justify such disparate treatment.") ★

nature with her during court proceedings, and misleading court administration and his superior judicial officers in an effort to prevent the clerk's re-assignment. *In the Matter Concerning Woodward*, Decision and order (September 2, 2014) (http://cjp.ca.gov/res/docs/censures/Woodward_DO_Censure_09-02-14.pdf).

The Commission found that the judge's misconduct was aggravated by the fact that the sexual activity "took place with a member of his court staff," noting "the clerk's overly familiar and flirtatious behavior" towards him and the rumors that something was going on between them. The Commission stated his conduct "placed the court administration and his presiding judges in the uncomfortable position of having to bring these concerns to his attention."

The Commission also stated that the judge's "misconduct in misleading court administration and his superior judicial officers in an effort to prevent the clerk's reassignment is as egregious as his misconduct related to his libidinous activities with his clerk."

> Court officials and supervising and presiding judges must be able to rely on the integrity and honesty of judicial officers in the performance of their duties. . . . This requires more than the avoidance of outright untruths; it demands that judges avoid material omissions in fulfilling their duty to cooperate fully with court officials and other judges in the administration of court business. By misleading the court as to the nature of his relationship with his clerk and opposing her reassignment, Judge Woodward impeded administrative efforts to appropriately respond to complaints and concerns about the clerk's inappropriate personal interactions with the judge. Not only should Judge Woodward have acceded to the recommended reassignment of the clerk, he should himself have requested her transfer as soon as the intimate relationship began.

Failure to appoint interpreter

Based on an agreed statement of facts and recommendation, the New York State Commission on Judicial Conduct admonished a judge for failing to appoint an interpreter for a Spanish-speaking tenant in a summary eviction proceeding. *In the Matter of Merino*, Determination (October 2, 2014) (http://www.cjc.ny.gov/Determinations/M/Merino.htm).

The Commission noted that a "party's right to be heard according to law . . . and to participate in court proceedings is meaningless when, because of the party's limited proficiency in English, the proceeding is incomprehensible to him." It found:

> Although respondent initially declared several times that he would adjourn the matter so that an interpreter could be provided, the transcript suggests that he changed his mind after Mr. Santana gave rudimentary responses to some simple questions about his family, schooling and employment. As respondent should have recognized, Mr. Santana's minimal responses demonstrated his limited English proficiency, not the ability to understand and meaningfully participate in a court proceeding where his family was facing eviction from their home. This is particularly so since Mr. Santana clearly indicated that he did not understand some questions at all. When asked, "What do you have to say about this?", he responded, "No speaking English." When asked, "What type of work do you do in the warehouse?", he responded, "I don't understand that. I'm sorry." Nor did he understand, "Where were you born?" Even the landlord acknowledged under oath that when he had previously spoken to Mr. Santana, someone had interpreted for him. It is obviously unacceptable if a party with limited knowledge of English understands only some of what is being said in a court proceeding while the rest remains incomprehensible.

The Commission noted that Santana was in an especially vulnerable position because he "was unrepresented by counsel and was facing an adversary with an attorney. With no lawyer to protect his rights, the fact that he could barely communicate in English compounded his vulnerability and left him virtually defenseless." The Commission also found that the judge's "comment about bilingualism ('The last time I heard, I think Puerto Rico was bilingual') was irrelevant and, in context, snide." The Commission stated:

> As the proceeding continued, respondent, who never made clear that the case would not be adjourned, continued to ignore red flags indicating Mr. Santana's limited proficiency in English. The litigant responded to some questions in Spanish, or told his wife to respond, or did not respond at all as his wife answered for him. While his wife attempted to present defenses for non-payment of rent, Mr. Santana barely participated in the proceeding. In this context, when respondent asked Mr. Santana several times if he understood what was said, his halting affirmative responses hardly seem convincing. Even after respondent announced that the warrant of eviction was granted, Mr. Santana asked if an interpreter was coming and if they had to return to court, suggesting he did not realize he had just been evicted. Despite Mr. Santana's evident confusion about what had transpired, respondent simply told him to "talk to the clerk downstairs" who would "explain what happens next."
>
> The consequences of this case were significant: a family was summarily evicted. Even if the result might have been the same had Mr. Santana had the assistance of an interpreter, Mr. Santana's rights to be heard according to law and to meaningfully participate in the proceeding were compromised.
>
> Access to interpreting services when needed is a critical element of access to justice. It is an issue that the Unified Court System has addressed in a public report and has emphasized in judicial training. Every judge must be sensitive to this important issue and respond appropriately when the issue is raised. ★

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The **Center for Judicial Ethics** is now part of the **National Center for State Courts**, a non-profit corporation that promotes the rule of law and improves the administration of justice in state courts and courts around the world. This change will allow the CJE to continue its services and programs unaffected by the dissolution of the American Judicature Society, which established it in 1977. Further, the expertise and resources of the NCSC allow for the expansion of the CJE's services as a national clearinghouse for information on judicial ethics and discipline.

If you have any questions, contact the CJE's director, Cynthia Gray at cgray@ncsc.org. Visit the CJE's new web-site at www.ncsc.org/cje.

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