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Thirteen Judges Removed in 2003

Between 1980 and the end of 2002, approximately 294 judges had been removed from office as a result of state judicial discipline proceedings. In 2003, 13 judges (or in two cases former judges) were removed from office, 20 resigned or retired in lieu of discipline pursuant to agreements with judicial commissions that were made public,

one judge resigned pursuant to an agreement that also included a public reprimand, and two former judges were barred from serving in judicial office, one at any time in the future and one until the end of the term he was serving when he resigned. (Those numbers do not include two removal decisions pending on appeal at the end of the year.)

Two of the removals followed criminal convictions. The New York State Commission on Judicial Conduct removed a judge who had been convicted of knowingly engaging in sexual relations with a mentally disabled woman who had been entrusted to his care. *In the Matter of Westcott*,

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Other Judicial Discipline in 2003

In addition to the judges who were removed or agreed to resign or retire, 82 judges (or former judges in 10 cases) were publicly sanctioned in 2003. In 52 of those cases, the discipline was imposed pursuant to the consent of the judge or based on stipulated facts.

There were 15 suspensions without pay with the length of the suspensions ranging from one month to one year. (Four of the suspensions also included a censure, one required the judge to have his disability treated before he returns to judicial duties, one was followed by a one-year probation, one required the judge to complete 20 continuing legal education credit hours on

ethics, and one provided that the judge not be allowed to resume duties until he completes a course for judges of limited jurisdiction courts.) There was one additional suspension that was stayed pending the judge's compliance with several conditions and will be dismissed if the conditions are completed within the time limits set.

In addition, there were 21 public censures (one censure also barred the former judge from receiving an assignment, appointment, or reference of work from any state court) and 14 public admonishments (one admonishment also included an order of additional education and one included a former judge's agreement not to seek

or hold any judicial office or perform any judicial duties without approval from the commission). There were 28 public reprimands (one reprimand also included a \$50,000 fine, two included agreements by former judges never to seek or accept a judicial office without the permission of the state supreme court, and one included an order that the former judge not seek another judicial position unless first authorized to do so by the court) and three public warnings (one of the warnings also included an order of additional education). One recommendation of removal was dismissed as moot following the judge's resignation. 

Discipline for Appealable Error *by Cynthia Gray*

The number of judges who are disciplined each year publicly or privately is small compared to the number of complaints filed with judicial conduct commissions. For example, of the 993 complaints disposed of by the California Commission on Judicial Performance in 2003, 906 were closed after initial review, 65 were closed following a staff inquiry, preliminary investigation, or the judge's retirement or resignation, and 18 led to advisory letters or private admonishment, while only four resulted in public discipline. Comparable percentages are reported by every commission each year. In its annual report, the Kansas Commission on Judicial Qualifications explains why most complaints are dismissed:

Appealable matters constitute the majority

of the [complaints that are not investigated] and arise from a public misconception of the Commission's function. The Commission does not function as an appellate court. Examples of appealable matters which are outside the Commission's jurisdiction include: matters involving the exercise of judicial discretion, particularly in domestic cases; disagreements with the judge's application of the law; evidentiary or procedural matters, particularly in criminal cases; and allegations of abuse of discretion in sentencing.

On the other hand, the code of judicial conduct does require a judge to "respect and comply with the law," "to be faithful to the law and maintain professional competence in it," and 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." Thus, although mere legal error does not usually war-

rant discipline, additional factors can transform legal error into judicial misconduct as illustrated by several cases in 2003.

Pattern of legal error

Repeated legal error is one of the exceptions to the mere legal error rule. In 2003, judges were sanctioned for failing in numerous criminal cases to advise defendants of their right to counsel (*In the Matter of Fuller*, Determination (New York State Commission on Judicial Conduct September 19, 2003) (www.scjc.state.ny.us/Determinations/2003_decisions.htm) (censure pursuant to agreement for this and other misconduct); a practice of stating, for the record, that defendants had waived their rights to a speedy preliminary examination or timely trial with-

Recurring Problems in Judicial Ethics

Although each case is unique and each year brings new cases, some general patterns of ethical violations recur and result in judicial discipline every year. Several examples of persistent judicial misconduct, with specific illustrations from 2003, are described below.

1. Ticket-fixing: A judge who accepted requests to "fix" traffic tickets and had them relayed to the prosecutor defended his conduct by arguing "that's the real world" and turning down such requests would be "bad manners." In response, the Louisiana Supreme Court acknowledged that judges in both rural and urban areas may have a difficult time avoiding such requests but

concluded that "a judge is forbidden from accepting requests for help, and from passing these requests along to the prosecutor." *In re Fuselier*, 837 So. 2d 1257 (Louisiana 2003).

2. Seeking favors for family members: While the temptation to assist a family member who has gotten in trouble with the law is understandable, judges are required to resist. For example, a New York judge contacted a prosecutor to object to the manner in which the police were investigating a case against his son. The prosecutor assured the judge that he would review the case, and the charge was subsequently dismissed for lack of prosecution, suggesting that the

judge's advocacy was successful. The New York State Commission on Judicial Conduct stated that, although the judge told the prosecutor he was not seeking any special treatment, the "mere fact of his judicial status increased the likelihood that he could not only obtain such a meeting, but get the District Attorney's 'heightened attention' to his concerns about his son's treatment. . . . Respondent's paternal instincts' do not justify a departure from the standards expected of the judiciary." *In the Matter of Pennington*, Determination (New York State Commission on Judicial Conduct November 3, 2003) (www.scjc.state.ny.us/Determinations/2003_decisions.htm).

out obtaining the defendants' personal waivers of these rights as required by law (*Public Admonishment of Roeder* (California Commission on Judicial Performance December 16, 2003) (<http://cjp.ca.gov/pubdisc.htm>)); conducting arraignments and accepting guilty pleas with no prosecutor present (*In re Fuselier*, 837 So. 2d 1257 (Louisiana 2003) (120-day suspension for this and other misconduct); and a pattern of accepting guilty pleas without obtaining proper written plea statements from the defendants (*In the Matter of Michels*, 75 P.3d 950 (Washington 2003) (120-day suspension for this and other misconduct). In *In the Matter of Michels*, the Washington Supreme Court emphasized that the judge "owed it to the community where he served to abide by the laws of Washington, the rules outlined by this court, and our state constitution." The court stressed "that we will not and cannot tolerate

any actions that do not comply with fundamental principles of due process. No shortcuts exist and any judicial officer . . . must adhere to these principles in order that individuals who are charged with crimes are afforded the constitutional protections they are entitled to."

The judge in *In re Fuselier*, 837 So. 2d 1257 (Louisiana 2003) was also disciplined for taking short cuts. In response to the requests of local business and civic groups, the judge instituted a program for collecting checks returned for insufficient funds or written on a closed bank account. Under the program, merchants brought worthless checks to the court clerk where an employee prepared a letter on court stationery that was mailed to the writer of the check. The form letter demanded payment of the check, plus a \$15 collection fee, within 10 days. If there was no payment within

that time, the judge issued an arrest warrant supported by a probable cause affidavit with a facsimile signature of the merchant applied by staff using a rubber stamp without any review by the merchant. The judge would not recall the warrant until the check writer paid the court the amount of the dishonored check, the collection fee, a fine of \$15 to \$35, and court costs. Before the Judiciary Commission, the judge testified that he started the worthless check collection program to benefit his constituents, both the merchants and the makers of the bad checks, and that no one ever objected to the program.

The court stated that the judge's "role in instituting, authorizing, and participating" in the program "created the appearance of impropriety, was an abuse of his constitutional judicial au-

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3. Confrontations following traffic stops: A judge must resist the same temptation to throw the weight or prestige of judicial office around when the judge is stopped by police. For example, the same New York judge objected to being stopped by the police as he drove a truck towing a boat into a state park. Telling the police sergeant that he had permission from the sergeant's boss to use the boat ramp whenever he needed, the judge stated, "I see that the two sides communicate really well with each other, and that you should find out what the fuck you are doing because you are harassing me right now." When the police sergeant asked the judge if he had permission, the judge yelled, "Yes, I told you that already, this is fucking bullshit, I'm going to call my legislator, I'm the fucking judge here in

this village." Convicted of commercial activity without a permit and failing to pay a fee, the judge acknowledged that a non-judge using that language would have risked additional action by the police. The Commission found that the judge had "gratuitously interjected his judicial status into the incident," in an "unseemly display of invective and intimidation." *In the Matter of Pennington*, Determination (New York State Commission on Judicial Conduct November 3, 2003) (www.scjc.state.ny.us/Determinations/2003_decisions.htm).

4. Misuse of court resources: Inappropriate, personal use of court computer facilities has become a frequent subject for discipline. One California judge asked a traffic clerk to use her computer to obtain information from Department of Motor Vehicles records to identify a driver who had

cut him off in traffic. Two judges used court computer equipment and Internet services to access sites for the judge's personal benefit; in one case, a Michigan judge accessed pornographic sites, and in the second case, the South Carolina judge's conduct was contrary to county and state regulations. A Texas judge used the county computer system to send an e-mail to family members, friends, lawyers, and judges to discuss a case and an attorney who had criticized the judge. See *Inquiry Concerning Hyde*, Decision and Order (California Commission on Judicial Performance September 23, 2003) (cjp.ca.gov/pubdisc.htm); *In re Trudel*, 663 N.W.2d 471 (Michigan 2003); *In*

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The Duty to Be Patient, Dignified, and Courteous

by Cynthia Gray

Intolerant, unseemly, and uncivil behavior by a judge in the courtroom influences the public's impression of the quality of justice administered by that judge.

The public looks to judges to set the tone of judicial proceedings. When a judge mistreats staff, belittles counsel or gives vent to his or her anger or frustration, the audience is not only concerned about the result in the specific matter before the court, but worries that other parties, lawyers, jurors and employees will be subjected to similar treatment.

* * *

When a judge lashes out in anger or frustration or personally attacks an attorney or becomes embroiled in a matter, the judge abandons his or her judicial role. This is not to suggest that judges do not become frustrated or angry. The Code of Judicial Ethics, however, restrains the way a judge may manifest anger or frustration. Although any evaluation of a judge's conduct should consider the con-

text in which the conduct took place, the canons apply even when a judge is angry or frustrated.

Inquiry Concerning VanVoorhis, Decision and Order (California Commission on Judicial Performance February 27, 2003) (cjp.ca.gov/pubdisc.htm).

In *VanVoorhis*, the California Commission on Judicial Performance removed a judge for 11 instances of improper courtroom demeanor. Although the judge mistreated litigants, staff, and jurors, the main target for his bullying (7 of the 11 incidents) was attorneys. One example took place during an exchange with a deputy district attorney who was attempting to introduce evidence in a drunk-driving case that the defendant had been unable to follow a police officer's directions when attempting to perform a field test for intoxication. The judge told the attorney to instruct

the jury that the evidence did not mean anything, and she complied. The Commission found that this was an abuse of authority and gave the appearance that the judge was unable to remain neutral and impartial, noting that his belittling of the prosecutor — not his determination to exclude the evidence — was at issue. The Commission concluded that the judge's conduct served no proper purpose but was in bad faith for the corrupt purpose of venting his anger and frustration.

A Florida judge was also sanctioned for a general pattern of rude and intemperate behavior toward attorneys; he needlessly interjected himself into counsel's examinations of witnesses; embarrassed and belittled counsel in court; and questioned the competence of counsel by making remarks such as, "What, are

Treatment of Jurors

Disrespectful treatment of jurors played a part in the proceedings against Judge Van Voorhis and Judge Walsh. In one case, after receiving a written question from a jury during deliberations, Judge VanVoorhis called the jury in and said:

I normally correspond in writing, but this time I've decided to answer your question orally, because I want you to look at the question you gave me. And you'll see that you could improve on your English, and therefore your question could be way more precise for me. And one of the things you can help me to do is to make your questions as pre-

cise as possible, which means look them over several times, because an English teacher would object to the wording of that question. But I'll read it to you and then you'll see my answer.

The masters found that the judge's comments almost affected the outcome of the case because the foreperson was so upset that he considered deciding the case on grounds other than the evidence, although he did not do so.

When a potential juror who could not find anyone to care for her two young children entered

Judge Walsh's courtroom, the judge, in a loud and harsh tone, told her she could not bring the children into the courtroom, pointed his finger at her, and told her to leave. The court noted that the juror was, as a matter of law, entitled to be excused from jury duty, that the judge's staff should have advised the juror of the requirement of providing an affidavit, and that the judge had the responsibility to ensure such issues were addressed without causing embarrassment to potential jurors.

you stupid?” *Inquiry Concerning Schapiro*, 845 So. 2d 170 (Florida 2003). (The judge avoided removal by participating in psychological/behavioral therapy.) For example, the judge ordered two assistant state attorneys to try cases despite doctor’s orders that they remain in bed (one attorney was pregnant; the second had received a diagnosis of possible pneumonia). The judge routinely berated and unnecessarily embarrassed attorneys for allegedly talking in his courtroom even though they were either not talking at all or were speaking in appropriately low tones of voice concerning legitimate business of the court (for example, conferring with one another concerning plea negotiations). During a sidebar conference (held in a small room behind the bench commonly known as “the woodshed” among attorneys), an assistant public defender advised the judge that he might need a continuance; instead of simply denying the motion, the judge responded, “You’re going to try this mother fucking case.” When he returned to the

bench, the judge threw the docket down on a desk.

A New York judge was disciplined for using her judicial office as a forum to express her personal animosity toward an attorney. The judge disqualified herself from a summary proceeding for the eviction of a single mother because the petitioner’s attorney had represented the judge’s ex-husband in their divorce and custody litigation. The judge stated in open court, “I am well acquainted with the manner in which [the attorney] postures himself in such cases involving females in marital or family situations and I find it distasteful.” The New York State Commission on Judicial Conduct concluded that “her public, derogatory comments, criticizing the attorney’s conduct toward women in family-related proceedings, concerned a highly sensitive subject and thus were particularly hurtful” and that the judge “violated her duty as a judge to be an exemplar of dignity, courtesy and neutrality.” The Commission also stated that the judge’s delay in transferring the

attorney’s case after disqualifying herself conveyed the appearance that her bias affected her discharge of her responsibilities. *In the Matter of Canfield*, Determination (New York State Commission on Judicial Conduct September 19, 2003) (www.scjc.state.ny.us/Determinations/2003_decisions.htm) (admonition pursuant to agreement for this and other misconduct).

Another New York judge was sanctioned for intimidating and inappropriate comments to an attorney. The judge had worked to settle a matrimonial case and believed the settlement that had been reached depended in part on the sale of a parcel of land at a private sale. The judge entered a TRO to stop a sheriff’s sale of the land to satisfy a judgment that had been entered in favor of a law firm and against the husband. An attorney for the law firm appealed, and the TRO was struck. When the attorney went to the judge’s courtroom and told the judge’s

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Treatment of Court Staff

Three incidents of discourteous treatment of court staff formed part of the basis for Judge Van Voorhis’s removal.

In one incident, when two files were missing, the judge angrily told a fill-in clerk to find out where the files were, pointing his finger at her and speaking harshly. Later, when none of the persons on the calendar were in the courtroom when the call began, the judge said in an angry tone, “I have no bodies. I have these files. What’s going on?” As

he said this, he threw the four-inch stack of files over the ledge of the bench.

In a second incident, the judge stood up and told a fill-in clerk that she had wasted 20 seconds of the court’s time by swearing in on the record a bailiff who was going to take charge of a jury. After the incident, the clerk was shaken, short of breath, embarrassed, and humiliated, and she asked not to be assigned to the judge’s courtroom again. The Commission found that the comments were un-

called for, belittling, sarcastic, inappropriate, and unjust.

In the third incident, the judge overheard a deputy sheriff who was filling in as a security deputy tell the public defender that a defendant had not been transported because her court date was shown to be vacated. The judge said to the deputy “You need to learn how to do your job” so the judge would not “blow his top” in court. The statement embarrassed the deputy before the district attorney, defense counsel, members of the audience, and defendant.

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law secretary the TRO had been vacated, the judge said he would be on the bench for 11 more years, that he had a “long memory” and would “remember” what the attorney’s firm had done should it appear before him on other matters, and that it was a “good thing” the firm did not practice matrimonial law. The Commission had found that the judge’s “words could only be construed as a threat” and that “even the suggestion of using judicial power as a weapon of retaliation is a serious distortion of a judge’s proper role as a neutral, unbiased arbiter.” *In the Matter of Raab*, 793 N.E.2d 1287 (New York 2003) (censure for this and other misconduct).

Tone of voice, body language

The findings in these cases frequently note not just what the judge said but how he or she said it. In *VanVoorhis*, the judge’s tone of voice is variously described as loud, condescending, disrespectful, hostile, harsh, arrogant, belittling, very nasty, derogatory, sarcastic, angry, and contemptuous. The judge was described as tense, upset, agitated, irritated, wide-eyed, red-faced, and clenched-jawed, leaning forward in his chair, gesturing with his hand, and pointing with his finger. In *Schapiro*, the judge was described as screaming in one incident, unnecessarily raising his voice in another, and speaking sarcastically in a third.

Inappropriate demeanor directed toward litigants has also been sanctioned. A New York judge was censured, pursuant to an agreement, for making statements at arraignments that indicated bias and prejudice. *In the Matter of Fuller*, Determination (New York State Commission on Judicial Conduct September 19, 2003) (www.scjc.state.ny.us/Determinations/

2003_decisions.htm). For example, at an arraignment on a charge of criminal trespass, the judge stated in a raised voice to the defendant, who had not yet entered a plea, “What part of trespassing don’t you understand?”, and “You can’t be up at the school trespassing”, and “You’re a good looking fellow. I don’t want to see you get in any deeper than you already are.” When the defendant’s mother objected that her son was not guilty, the judge threatened to hold her in contempt and send her to jail if she spoke further.

The judge made the statements in a misguided attempt to deter young defendants from further transgressions. The Commission stated:

Respondent’s conduct was antithetical to the proper role of a judge at an arraignment, which is to be an impartial arbiter, and was inconsistent with the fair and proper administration of justice. It is inappropriate for a judge to lecture defendants about their transgressions before they have been afforded the full panoply of rights and before they have entered a plea. Respondent’s hectoring, biased statements violated his duty to be “patient, dignified and courteous” to litigants and to refrain from improper, ex parte communications.

The Commission also noted that the judge had improperly cross-examined the defendants about the underlying facts, creating a risk of eliciting admissions of guilt.

Intemperate behavior toward defendants was also one of the bases for the judge’s removal in *In the Matter of Walsh*, 587 S.E.2d 356 (South Carolina 2003). For example, after releasing the jury at the conclusion of a trial, the judge screamed at the defendant, told her how ashamed he was of her, and asked her “who the hell” she thought she was. On another occasion,

the judge stated in open court, “It’s purposely cold in here. I don’t want it comfortable in here. In fact, I’m thinking about taking out chairs and just putting in hard benches. It’s intentionally uncomfortable, that’s part of the punishment aspect.” On a third occasion, the judge held in contempt a defendant who had requested to be excused early after appearing for the “roll call” the judge required in jury cases. The judge stated to the defendant:

You’re the one who asked for a jury trial. You’re gonna waste the city’s money on a jury trial? You don’t think that I, a judge, would give you a fair hearing? You want a jury to hear it? You want to cost the city all that money for a jury? You’re the one making a big deal of it! So you think a jury trial is fair, so that means you don’t think I can be fair. . . . You’ve got things you’ve got to do so you come in and you mouth off, you mouth off to the Clerk of Court, you mouth off to the administrative judge and you come in my courtroom with an attitude.

One of the incidents at issue in *In Inquiry Concerning Schapiro* involved the judge’s statements to the mother of a child who had been killed by a motorcyclist. Approximately two days after the incident and before the child was buried, the judge presided over a bond hearing, and after the judge made a preliminary determination that the defendant was entitled to bond, the assistant state attorney advised him that the victim’s mother wanted to address the court. The judge responded, “What do I need to hear from the mother of a deceased kid for? All she will tell me is to keep the guy in custody and never let him out” or words to that effect. The victim’s mother heard the sarcastic remarks and was then afraid to address the court. 

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the Matter of Abraham, 583 S.E.2d 435 (South Carolina 2003); *Inquiry Concerning Jenevein*, Findings, Conclusions, and Order (Texas State Commission on Judicial Conduct January 17, 2003).

5. Delay: Sanctions were imposed for delays ranging from a four-year delay in one case, to six-to-14 month delays in four cases, delays up to two years in seven cases, delays of one to two years in over 33 cases, and delays of over two years in seven cases. In most instances, the judges had also failed to timely and accurately file required reports on undecided cases. *See In re Sharp*, 856 So. 2d 1213 (Louisiana 2003); *In re Clark*, Stipulation, Agreement and Order (Washington State Commission on Judicial Conduct February 7, 2003) (www.cjc.state.wa.us); *Complaint against Jelsema*, Opinion and Order (Michigan Judicial Tenure Commission February 12, 2003); *Washington v. State Commission on Judicial Conduct*, 800 N.E.2d 348 (New York 2003).

6. Biased statements: The manifestations of bias sanctioned in 2003 included a California judge who told an attorney born in Ecuador that his accent was charming but he should lose it; one from Florida who told a female attorney she needed to emulate male attorneys who did not get as emotional; a New York judge who made comments about education at Catholic parochial schools and references to allegations concerning the Catholic Church and asked an attorney whether he was Jewish after a series of hostile, discourteous comments; and a New York judge who stated to an Arab-American woman fighting a parking ticket, "You have money to support the terrorists, but you don't want to pay the ticket." *See Inquiry Concerning VanVoorhis*,

Decision and Order (California Commission on Judicial Performance February 27, 2003) (cjp.ca.gov/pubdisc.htm); *Inquiry Concerning Schapiro*, 845 So. 2d 170 (Florida 2003); *In the Matter of Dye*, Determination (New York State Commission on Judicial Conduct September 19, 2003) (www.scjc.state.ny.us/Determinations/2003_decisions.htm); *In the Matter of Crosbie*, Decision and Order (New York State Commission on Judicial Conduct July 17, 2003) (www.scjc.state.ny.us/Determinations/2003_decisions.htm).

7. Attempted humor: Newspapers nation-wide repeated a story about the judge who "pushed a button on a device that simulated the sound of a commode flushing" to demonstrate to a defense attorney what he thought of an argument in a sexual battery case. *Inquiry Concerning Schapiro*, 845 So. 2d 170 (Florida 2003).

8. Statements disparaging crimes against women: Newspapers across the country also picked up the report of a judge who resigned to end disciplinary proceedings based on his statements about the victims of domestic violence. The judge told one victim that all domestic violence cases are "dragged out" and are a "waste of the court's time," and stated to a police officer that most women enjoy being abused and ask to get "smacked around." *In the Matter of Hamley*, Decision and Order (New York State Commission on Judicial Conduct December 16, 2003) (www.scjc.state.ny.us/Determinations/2003_decisions.htm).

9. Embroilment: A judge becomes improperly embroiled in a case if, for example, the judge reacts to a peremptory challenge by asking the successor judge ex parte to "back him up" on a bail decision or if the

judge reacts to a reversal by communicating ex parte with the attorney defending the judge's order to urge further appeal. *See Inquiry Concerning Hyde*, Decision and Order (California Commission on Judicial Performance September 23, 2003) (cjp.ca.gov/pubdisc.htm); *In the Matter of Reagan*, Reprimand (Nebraska Commission on Judicial Qualifications June 2, 2003).

10. Substance abuse: A judge was disciplined for repeatedly becoming extremely intoxicated in bars close by his office, often during normal working hours. The judge was aggressive and abusive; on one occasion, he was in a fistfight; on more than one occasion, local law enforcement officers were summoned and had to decide whether to charge the judge before whom they regularly appeared. *In re McCarthy*, 828 A.2d 25 (Pennsylvania Court of Judicial Discipline 2003), *aff'd*, 839 A.2d 182 (2003). In a case that received nation-wide attention, a judge took several puffs on a marijuana cigarette that was being passed down the row in which he was sitting at a Rolling Stones concert. *In re Gilbert*, 668 N.W.2d 892 (Michigan 2003). A judge who had been charged with felony possession of heroin and cocaine resigned following a recommendation that he be removed and as part of the plea bargain in which he pleaded guilty to lesser included misdemeanors. *In re Harding*, Final Order (Utah Supreme Court March 25, 2003). Several judges were sanctioned for driving while intoxicated, including a justice of the Washington State Supreme Court who was given an aggravated sanction because of her position. *In re Bridge*, Stipulation, Agreement and Order (Washington State Commission on Judicial Conduct August 15, 2003) (www.cjc.state.wa.us). 

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Determination (New York State Commission on Judicial Conduct February 3, 2003) (www.scjc.state.ny.us/Determinations/2003_decisions.htm).

The Pennsylvania Court of Judicial Discipline removed a former judge who had been convicted of state charges of obstructing justice, a misdemeanor. *In re Eagen*, 830 A.2d 952 (Pennsylvania Court of Judicial Discipline 2003).

Attorney misconduct

Three of the removals in 2003 were for attorney misconduct. In two cases involving pre-bench attorney misconduct, the New York Court of Appeals removed one judge who had been disbarred for misappropriating \$2,300 in legal fees from his law firm and altering a receipt book to disguise one theft (*In the Matter of Tamsen*, 789 N.E.2d 613 (New York 2003)), and a second judge who had been disbarred for being derelict in the management of his attorney escrow account. *In the Matter of Fitzgerald*, 790 N.E.2d 767 (New York 2003).

The New York Court removed a third judge for commingling personal funds with clients' funds in his attorney escrow account, both before and after the judge went on the bench. *In the Matter of Mason*, 790 N.E.2d 769 (New York 2003). The grounds for removal also included giving contradictory testimony to the Commission and failing to respond to its requests for information.

Failure to cooperate with Commission proceedings was also part of the grounds for removal in two other New York cases. The New York Court re-

moved a judge for failing to respond in a timely manner to the Commission's repeated inquiries concerning her conduct, failing to render timely decisions in numerous small claims matters despite the active intervention and assistance of her administrative judge, and failing to file timely, accurate reports of undecided matters. *Washington v. State Commission on Judicial Conduct*, 800 N.E.2d 348 (New York 2003).

Failure to cooperate with Commission proceedings was also part of the grounds for removal in two other New York cases.

The New York Commission removed a former judge who made false entries in her official court records in an effort to conceal that she had knowingly presided over seven cases involving her relatives. (The judge had resigned after the referee filed a report following a hearing.) *In the Matter of Kadur*, Determination (New York State Commission on Judicial Conduct May 28, 2003) (www.scjc.state.ny.us/Determinations/2003_decisions.htm). For example, the judge had imposed a fine of \$25 on her son, Gunter Kadur, who had been charged with not wearing a seat belt. In an attempt to conceal that she had presided over the charge, the judge recorded her son's name as "G.E. Kadell." When she was asked to appear before the Commission, the judge altered the original entry by overwriting it to change the spelling of the defendant's name to "Kadur."

Lying to a conduct commission during an investigation was one of the

bases for removal in *In re King*, 857 So. 2d 432 (Louisiana 2003). The judge in that case had told the Judiciary Commission in a letter and subsequently under oath that he had not required any of his court staff to engage in campaign activity. However, audiotapes of four staff meetings made by his court reporter, without the judge's knowledge, revealed that the judge had personally sold tickets to a fund-raising event for his re-election campaign, required his court staff to sell tickets to the event and instructed them to hand-deliver the tickets to lawyers and law firms on court time, informed staff that their activities in support of his campaign were a pri-

ority, and told staff that if they were unwilling to do what he asked, he would find people to replace them who were more "enthusiastic." Explaining its decision to remove the judge, the Louisiana Supreme Court stated:

Lying to the Commission in a sworn statement taken as part of an investigation is simply conduct which this Court cannot and will not tolerate. . . . In our view, any discipline less than removal would undermine the entire judicial discipline process and diminish the strict obligation of judges to be truthful in the face of an investigation by the Commission.

Prior discipline records

In several cases, the judges that were removed had been disciplined previously and were before the conduct commissions again on charges involving a variety of misconduct. In *In the Matter of Walsh*, 587 S.E.2d 356 (South Carolina 2003), holding that removal was warranted, the South

Carolina Supreme Court noted the judge's history of intemperate behavior in the courtroom and his failure to modify his behavior after two previous letters of caution for similar conduct. In the 2003 case, the judge had admitted intemperate behavior; initiating a procedure pursuant to which pro se defendants who requested jury trials were required to appear in court once a week and answer a "jury trial roll call;" soliciting input on the disposition of a matter from the ministerial judge and the clerk of court; and requiring pro se defendants to attend pre-trial conferences and enter into discussions with the prosecutor. For longer discussions of this case, see the articles on pages 2 and 4.

In explaining its decision to remove a judge, the California Commission on Judicial Performance emphasized the five prior sanctions he had received, the close relationship between his current misconduct and his prior misconduct, the lack of candor in his filings with the Commission, and concerns about his credibility. *Inquiry Concerning Hyde*, Decision and Order (California Commission on Judicial Performance September 23, 2003) (cjp.ca.gov/pubdisc.htm). (The judge did not seek review by the California Supreme Court so the Commission's removal decision was final.) In the 2003 proceedings, the Commission found that the judge had asked a traffic clerk to obtain information from the Department of Motor Vehicles records to identify a driver who had cut the judge off in traffic; prevented the continuance of his daughter's case and personally chose an attorney with whom he was acquainted to be the judge pro tem to handle her case; failed to pro-

vide the prosecutor or the defense attorney with a copy of his letter to a defendant and failed to give the prosecutor notice of his letter or an opportunity to respond; granted a request for termination of probation for a defendant with whom he was acquainted based on an ex parte communication; acted as an advocate for a woman seeking to file pro se for divorce at least in part out of anger at her husband; after being disqualified from a case, initiated an ex parte substantive discussion with his successor judge;

“Lying to the Commission in a sworn statement taken as part of an investigation is simply conduct which this Court cannot and will not tolerate.”

and told a story in the presence of female court employees about a former court employee being engaged in a blow job in the courthouse parking lot.

In a second removal case, the California Commission explained that although the judge "intellectually recognizes ethical issues once they are brought to his attention, Judge Platt, despite advice from his colleagues, a prior admonition [from the Commission], and even lack of cooperation from his staff, repeatedly fails to recognize that his proclivity to help others causes him to violate judicial canons." *Inquiry Concerning Platt*, Decision and Order (California Commission on Judicial Performance August 5, 2002) (cjp.ca.gov/pubdisc.htm). (This case was not final until the California Supreme Court denied review in 2003 so is included in the 2003 statistics.) The California Commission removed the judge for

fixing four tickets and attempting to influence other jurists in three cases.

The California Commission removed a third judge from office for 11 instances of improper courtroom demeanor. *Inquiry Concerning VanVoorhis*, Decision and Order Removing Judge VanVoorhis from Office (California Commission on Judicial Performance February 27, 2003) (cjp.ca.gov/pubdisc.htm), *petition for review denied*, www.courtinfo.ca.gov/courts/supreme/. The Commission found that the judge made a statement

to an assistant prosecutor that gave the appearance that he had ruled against her to teach her how to handle adversity; made disparaging comments about a defense attorney in front of the jury; told a public defender, in the presence of his client, that he should lose his accent; ridiculed and badgered several prosecutors; threw

a stack of files over the ledge of the bench when he was angry at a fill-in clerk; belittled and chastised court staff; and criticized a jury for the grammar in a written question it had sent him during deliberations. For a longer discussion of this case, see the article on page 4.

Sexually suggestive comments and to inappropriate touching of two women resulted in the judge's removal in *In re Canales*, 113 S.W.3d 56 (Review Tribunal Appointed by the Texas Supreme Court 2003). 

The Center for Judicial Ethics has links on its web-site (www.ajs.org/ethics/index.asp) to the state judicial conduct commission sites. The Center web-site also has a weekly judicial ethics news story on a recent case or other development.

Discipline for Appealable Error *(continued from page 3)*

thority, and caused him to engage in persistent and public conduct prejudicial to the administration of justice that brought the judicial office into disrepute.”

His belief that he could handle worthless checks as “civil” matters at the demand letter stage and convert the process to “criminal” if payment did not occur was erroneous. A court’s handling of worthless checks is confined to following statutory criminal law. Further, by instituting the bad check program, Judge Fuselier stood in the shoes of the check recipient in trying to collect the checks, which disqualified him from presiding over any case based on those checks or involving those parties. Judge Fuselier’s impartiality could reasonably be questioned when he adjudicated the cases where the checks were not paid, a clear violation of Canon 3C. Further, persons who received demand letters and could not pay surely believed they were unlikely to be treated neutrally and fairly as their cases proceeded through the very court that initiated collections against them Finally, Judge Fuselier should have clearly understood that an affidavit of probable cause, which says on its face that the affiant appeared to provide facts sufficient to support arrest, means what it says. To use facsimile signatures on behalf of the merchants so that they would be spared the inconvenience of executing proper affidavits creates the very risk that affidavits of probable cause were designed to eliminate, i.e., that innocent people would be detained and arrested. In these cases, persons could have paid the check after they realized their mistake or received the demand letter, yet the court would not be aware of this because the merchant did not appear the day the affidavit was executed and attest to the fact that the check was not yet paid.

A South Carolina judge also adopted out-of-the-ordinary proce-

dures that led to discipline for legal error. *In the Matter of Walsh*, 587 S.E.2d 356 (South Carolina 2003) (removal for this and other misconduct). The judge required unrepresented defendants charged with magisterial level offenses who requested jury trials to appear once a week and answer a “jury trial roll call” at the conclusion of court business even when no jury trials were scheduled. The roll call re-

quired defendants without attorneys different from those with attorneys.

The same judge also adopted a procedure pursuant to which unrepresented defendants were subpoenaed to attend pre-trial conferences during which the judge sat on the bench and the defendants were required to enter into discussions with the prosecutor. The court noted that this arrangement suggested a bias toward the state, that

no statute authorized the issuance of such subpoenas, that it was inappropriate to issue such subpoenas for the convenience of the state and not the defendants, that it was inappropriate to allow the prosecutor to conduct the conferences, and that the procedure conflicted with the directives of an administrative order.

Although mere legal error does not usually warrant discipline, additional factors can transform legal error into judicial misconduct, as illustrated by several cases in 2003.

quirement caused some defendants to travel long distances weekly and caused others to be absent from their jobs. At least three defendants who did not appear were tried in their absence and convicted. The judge maintained that the purpose of the “jury trial roll calls” was to keep track of defendants who often ended up not availing themselves of the jury trials they had requested and that, while awaiting roll call, defendants would be educated about the judge and his court and many would determine the judge was lenient and fair and that it would be in their best interest to withdraw their request for a jury trial. The South Carolina Supreme Court noted that the “jury trial roll call” procedure deterred persons from exercising their right to a trial by jury and their right to be released on bond pending trial and that it was inappropriate to coerce defendants to obtain an attorney and to treat

Egregious error

There are judicial discipline decisions in which legal error in a single criminal case was egregious enough to justify discipline without proof of a pattern or bad faith. For example, the Nevada Commission on Judicial Discipline publicly reprimanded a justice of the peace for revoking a defendant’s probation without the defendant’s attorney being present. *In the Matter of EnEarl*, Findings of Fact, Conclusions of Law and Imposition of Discipline (Nevada Commission on Judicial Discipline September 18, 2003) (www.judicial.state.nv.us/enearldecision.htm). (The Commission decision is final because the judge did not appeal.) The judge admitted he had not allowed a defendant to be heard through his duly appointed representative with regard to allegations that the defendant had violated the terms of his probation. The Com-

mission found that the judge's failure to ensure that the defendant's attorney was present, either to contest the allegations or to enter his client's waiver of a hearing, denied the defendant critical due process protections and that the judge's conduct demonstrated unwarranted impatience and intemperance.

While the Respondent generally may be successful in handling with so-called "tough love" minor offenders experiencing drug problems, the law expects that imposition of punishment will be afforded after the provision of minimal due process protections, including the right to counsel where loss of liberty is a possibility. As a defendant given the privilege of probation, [the defendant] faced the prospect of several months incarceration if the Respondent concluded that revocation of the privilege was warranted. It was the Respondent's responsibility, not that of the defendant himself or the deputy district attorney, to ensure that probation was revoked only after a fair hearing with counsel, not a one-sided colloquy with an unrepresented litigant. Notwithstanding the defendant's previous failures to appear or tardiness for court, or both, it was the Respondent's duty to ensure that the defendant was incarcerated permanently only after due process protections were afforded.

Findings of judicial misconduct have also been made where a judge conducted a single civil case in a manner that departed completely from the usual procedures required by the adversary system. In *In the Matter of*

McCall, Determination (New York State Commission on Judicial Conduct March 28, 2003) (www.scjc.state.ny.us/Determinations/2003_decisions.htm), the judge had commenced a hearing in a small claims case 20 to 30 minutes earlier than it had been noticed for, hearing evidence from the claimant prior to the defendant's arrival. When the defendant arrived, she showed the judge the notice to appear, but the judge proceeded with the balance of the hearing. At the conclusion of the hearing, the judge mistakenly awarded the claimant double the court costs and awarded attorneys' fees of \$50, notwithstanding that the claimant had not been represented by counsel at the hearing.

Finding that the judge's mishandling of the case violated her obligation to perform her judicial duties diligently and fairly, the Commission stated that "the judge deprived the defendant of a full opportunity to be heard."

Since the judge had already heard evidence from the claimant before the defendant arrived at the scheduled time, the judge should have re-started the proceeding. The judge further conveyed the appearance of partiality towards the claimant by a series of errors, including mistakenly awarding the claimant double the court costs and awarding attorneys' fees

The judge was censured for these errors and failing to cooperate with the

Commission during its investigation.

In *Commission on Judicial Performance v. Perdue*, 853 So. 2d 85 (Mississippi 2003), the judge was suspended for 30 days without pay for entering an ex parte order that awarded a father temporary custody of a minor child without a petition being filed, evidence being taken, or an official court file being established. Her order violated several statutes and was eventually vacated by a different judge. The court noted it was convinced that the judge's actions were not taken in bad faith but emphasized that through her actions, the proper parent was deprived of the custody of a minor child for two and one-half months and had to incur attorneys fees in excess of \$13,000 to have custody restored.

Noting that exercising discretion is a very appropriate judicial duty, the court reassured "our learned judges" that "judicial complaints are not the appropriate vehicle to test a possible abuse of judicial discretion." The court dispelled concern that the decisions by the court and Commission were made "in the cool light of after-the-fact reflection by way perhaps of second-guessing," noting that a sitting chancellor presided over the hearing, the Commission meeting was presided over by a sitting circuit judge and four other sitting judges were also present. The court stressed: "This case is not about abuse of judicial discretion. This case is about clear violations of our judicial canons and our statutes." 

A longer version of this article will be published under the title "The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability" in the summer 2004 issue of the Hofstra Law Review.

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The 19th National College on Judicial Conduct and Ethics Chicago, Illinois October 21 – 23, 2004

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, 511 N. Columbus, Chicago, Illinois. 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 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 College will begin Thursday afternoon with registra-

tion. Friday through Saturday morning, there will be six sessions with three concurrent workshops offered during each session. Topics under consideration include: revisions to the ABA model code of judicial conduct; ethical issues for new judges; ethical issues for judges and their families; attending seminars; judges as administrators; disqualification; charitable activities; sanctions; issues for new members of conduct commissions; and issues for public members.

More information will be provided in subsequent issues of the *Judicial Conduct Reporter* and on the Center web-site at www.ajs.org/ethics.