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Judicial discipline for drunk driving offenses

by Cynthia Gray

In New Mexico, judges convicted of driving under the influence routinely agree to permanently resign from office, apparently recognizing the inevitability of removal even if they tried to contest the sanction. *See, e.g.,* ***Inquiry Concerning Walker,*** **Order** (New Mexico Supreme Court January 31, 2019). In Michigan, a 90-day suspension without pay with a public censure is the standard sanction for a first-time operating a motor vehicle while impaired or intoxicated offense. *See, e.g., In re Nebel*, 777 N.W.2d 132 (Michigan 2010). In contrast, there are still a few states that do not consider the threat to public safety and confidence sufficient to warrant more than a private disposition for a judge caught driving while impaired.

In most cases, however, the baseline sanction for a first-time drunk-driving offense by a judge is a public reprimand or admonition. As the Mississippi Supreme Court explained, a judge's position requires that the resolution of such a disciplinary matter "be known to the public." *Commission on Judicial Performance v. Thomas*, 722 So. 2d 629 (Mississippi 1998) (reprimand). In most cases, the judge had pled guilty to the criminal charges and agreed to the disciplinary sanction.

Moreover, a harsher sanction such as a censure or suspension without pay may be imposed if there are aggravating factors, although judges avoid removal when there are significant mitigating factors as well. The aggravating factors applicable to other types of misconduct, such as a prior discipline record, and the usual mitigating factors, such as an excellent professional reputation, also apply in drunk driving cases. In addition, there are factors specific to cases involving alcohol-related driving offenses that are considered:

- Whether the judge invoked the judicial office to obtain preferential treatment from law enforcement officers,
- Whether the judge was cooperative and candid or obstructive and deceptive with law enforcement officers,
- The degree of the judge's intoxication,
- Whether the judge caused an accident or injury,
- Whether the judge also committed a related offense such as leaving the scene of an accident,
- Whether it was a first-time offense or the judge had previous arrests for drunk driving,
- Whether the judge accepted responsibility for the offense,
- Whether the judge self-reported the arrest to the judicial conduct commission, and
- Whether the judge took remedial efforts to address possible alcohol problems.

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For example, in 1991, the New Jersey Supreme Court publicly reprimanded a judge for driving while under the influence of intoxicating liquor and failing to observe a traffic signal. *In the Matter of Lawson*, 590 A.2d 1132 (New Jersey 1991). The same month, the Court publicly censured a judge who had pled guilty not only to driving under the influence but also to leaving the scene of an accident and careless driving and whose misconduct was compounded by "regrettable post-accident circumstances." *In the Matter of Connor*, 589 A.2d 1347 (New Jersey 1991). The Court explained:

> Aside from the gravity per se of the motor vehicle violations, the drunk driving offense resulted in an accident involving innocent people; the offense of leaving the scene of the accident not only served to interfere with proper law enforcement but placed the victims of the accident potentially in greater jeopardy; and the careless driving offense clearly posed added dangers to other innocent persons. Further, respondent engaged in other deleterious conduct. When confronted after the final accident, he attempted to leave the scene; he did not respond initially to the investigating officers; and when he did respond, he denied being involved in a prior accident and blamed the victim for the incident.

The Court also noted that, although the judge "did not, to his credit, attempt to take advantage of his judicial office, the police on the scene quickly learned he was a judge, albeit nothing more was made of that."

However, the Court recognized several mitigating circumstances: the judge acknowledged his guilt, was contrite, publicly apologized, showed "genuine self-confrontation and commitment to rehabilitation," had no prior record of misconduct, and had an "exemplary personal and professional reputation." The Court emphasized that it did "not view offenses arising from the driving of an automobile while intoxicated with benign indulgence. They are serious and deeply affect the safety and welfare of the public. They are not victimless offenses."

The next year, holding that censure was not sufficient, the New Jersey Court suspended for two months without pay a judge who had a second drunk driving offense, had informed the arresting officer that he was a judge, and had falsely told the officer that he was responding to an emergency at the courthouse. *In the Matter of Collester*, 599 A.2d 1275 (New Jersey 1992). During the discipline proceedings, the judge admitted that "he is, and has been, an alcoholic." The Court stated that it did "not fault alcoholics for failing to cure their condition," but that a judge who fails "to confront and neutralize the effects of such a condition, when evidenced in part by repeat offenses, . . . comes perilously close to demonstrating unfitness to hold judicial office."

However, in mitigation, the Court noted that the judge was "aggressively confronting and combatting his alcoholism," was remorseful and sincerely committed to rehabilitation, and had an "exemplary personal and professional reputation." In addition to the suspension, the Court required the judge to continue to participate in rehabilitation programs and disqualified him from "any cases involving drunk driving until his rehabilitation becomes secure."

In most cases, the baseline sanction for a first-time drunk-driving offense by a judge is a public reprimand or admonition.

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Not a typical case

Several recent judicial discipline cases illustrate the application of aggravating and mitigating factors to alcohol-related driving misconduct.

For example, adopting the recommendation of the Commission on Judicial Discipline based on a stipulation, the Colorado Supreme Court suspended a judge for 28 days without pay and publicly censured him for driving under the influence and crashing his vehicle while avoiding a collision with another vehicle. *In the Matter of Timbreza*, 454 P.3d 1280 (Colorado 2019).

One Saturday afternoon, the judge consumed several glasses of wine at a vineyard and drank more wine at a poolside party. As he drove home, the judge crashed his vehicle into trees and bushes beside the road while avoiding a collision with another vehicle. The judge was arrested and charged with driving under the influence and careless driving.

The next Monday, the judge called the Commission to report his arrest and the charges. The judge pled guilty to driving while ability impaired and was sentenced to one year of probation, alcohol monitoring, a $200 fine, useful public service, and two days of suspended jail time.

The Commission concluded that this was not a typical driving-under-the-influence case because it "involved significant aggravating factors;" the judge had disregarded advice not to drive home from the party, according to a colleague, had almost collided with another vehicle, and had refused to take a blood-alcohol test when he was arrested. The Commission also emphasized that the judge should have been aware "as a judicial officer of the risks and consequences of driving while his ability was impaired by alcohol." In mitigation, the Commission noted the judge's record of service to the Colorado Bar Association and his community activities.

Accepting an agreed statement of facts and recommendation, the New York State Commission on Judicial Conduct publicly censured a part-time judge for driving while ability impaired by alcohol, which resulted in his losing control of his vehicle and crashing into a building, and for being uncooperative and belligerent at the scene. ***In the Matter of Petucci*, Determination** (New York State Commission on Judicial Conduct January 30, 2020).

Leaving his non-judicial work one evening, the judge drove to Stoney's Tavern where he drank at least two alcoholic beverages between 6:40 p.m. and 7:10 p.m. He then drove approximately half a mile to the Elks Lodge where he drank at least two more alcoholic beverages between 7:15 p.m. and 8:20 p.m. The judge drove back to the tavern, where he consumed more alcohol until sometime after 9:00 p.m., when he drove away from the tavern.

At approximately 9:28 p.m., as a result of his impairment by alcohol, the judge lost control of his vehicle and crashed into the side of a former Kmart building. The crash damaged the building and the judge's vehicle; the left front wheel of the vehicle flew off, and the airbags deployed. At the time of the crash, the judge was carrying a loaded handgun and had a full

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magazine of ammunition in a pocket. (The judge was licensed to carry a firearm.)

At the scene of the crash, the judge, whose breath smelled strongly of alcohol, yelled obscenities and was belligerent towards a paramedic and a police sergeant. At one point, the judge asked the paramedic to arrest the sergeant. The judge repeatedly refused the sergeant's request to undergo field sobriety tests or a chemical test of his blood alcohol content, despite being warned about the consequences of such refusals, including suspension of his driver's license. In response to one of sergeant's requests, the judge said, "No, f*** you." The judge was transported to the hospital.

The judge did not invoke his judicial position at the scene, but the sergeant was aware that he was a judge because the sergeant had appeared in his court. In addition, the license plate on the judge's car bore the insignia of the SMA—the State Magistrates Association.

The judge was charged with driving while intoxicated and refusing to take a breath test. The charges were returnable in his court but were transferred. The judge pled guilty to driving while ability impaired by alcohol in satisfaction of both charges. He was fined $500 and ordered to attend a victim impact panel and undergo an assessment, and his driving privileges were suspended for 90 days.

The judge underwent a comprehensive alcoholism and substance abuse evaluation. Although no treatment was recommended, the judge voluntarily entered out-patient treatment. During the discipline proceedings, the judge averred that he had not used alcohol since the night of the accident.

The Commission emphasized the seriousness of the judge's misconduct:

> According to the New York State 2018 Highway Safety Annual Report, there are thousands of arrests for alcohol-related driving offenses every year. That report indicated that alcohol-impaired driving causes over 300 fatalities and 5,000 injuries in New York state each year. Respondent should have known that by driving his vehicle after consuming a large amount of alcohol in a relatively short period of time he created a significant risk to himself and others.
>
> Given respondent's role in adjudicating civil and criminal cases involving impaired driving, respondent's misconduct undermines his effectiveness as a judge and undermines public confidence in the judiciary.

In aggravation, the Commission noted that the judge had been uncooperative and belligerent during his arrest and carried a loaded handgun while impaired by alcohol. In mitigation, the Commission noted that the judge voluntary participated in counseling, his misconduct involved only one incident, he recognized that a severe sanction was appropriate, and the administrative judge had suspended him from performing his judicial duties.

Close to removal

In a second recent case, the New York Commission came close, based on the aggravating factors, to removing a judge who had pled guilty to driving while ability impaired. ***In the Matter of Miranda*, Determination** (New York State

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Commission on Judicial Conduct January 30, 2020). (Suspension without pay is not an available sanction in judicial discipline proceedings in New York.)

One evening, while in Orlando, Florida, the judge drank alcoholic beverages. He still felt the effects the following morning when, at the airport, he drank at least four or five glasses of vodka and seltzer from approximately 9:00 a.m. to 11:00 a.m., before boarding a flight to Albany, New York. During the approximately three-hour flight, the judge drank at least another four alcoholic drinks. The judge ate two small bags of peanuts but had nothing else to eat.

After arriving in Albany, still under the influence of alcohol, the judge began to drive to his home approximately 70 miles away. His vehicle bore "SMA" license plates, which indicated it belonged to a judge. While on the New York Thruway, the judge stopped at a service area, drank from a bottle of vodka that was in his car, then resumed his drive home.

At approximately 5:30 p.m., the judge lost control of his vehicle and crashed, damaging the front of his vehicle, two stop signs, and two benches.

A state trooper at the scene of the accident smelled alcohol emanating from the judge's breath and observed that the judge had slurred speech, glassy/watery eyes, difficulty standing, and impaired motor coordination. When the trooper asked whether the judge had consumed any alcoholic beverages, the judge replied that he had drunk "two beers" at the Orlando airport.

When a trooper asked for the judge's license and registration, the judge asked if the trooper knew who he was, which the trooper understood to be a reference to his judicial office. When the trooper replied, "Yes, I do," and/or that he did not care, the judge said that he would never again come out to conduct an arraignment for the state police. Although the judge did not recall making those statements, he does not dispute the trooper's recollections and attributes the comments to his diminished capacity and judgment due to his alcohol consumption.

The judge failed three standard field sobriety tests at the scene and refused to submit to a portable breath test. The troopers arrested the judge and transported him to the state police barracks.

At the state police barracks, the judge was cooperative and agreed to submit to a chemical breath test. The test indicated that the judge's blood alcohol content at that time was 0.17%. In New York State, a BAC of .05% is evidence of driving while impaired, a BAC of .08% or higher is evidence of driving while intoxicated, and a BAC of .18% or more is evidence of aggravated driving while intoxicated. The judge was apologetic and did not invoke his judicial office or ask for any special consideration at the police barracks.

The judge was charged with five vehicle and traffic law offenses. The charges were returnable in his court, but the judge and his co-judge recused themselves, and the charges were transferred. The judge pled guilty to driving while ability impaired in satisfaction of all the charges.

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He was fined $300 and ordered to pay a $260 surcharge, which he paid immediately.

The judge voluntarily admitted himself into a three-day alcohol detoxification program and then a two-week in-patient alcohol rehabilitation program. The judge successfully completed the programs and signed a continuing care plan.

In the discipline proceedings, the judge acknowledged that he had suffered from alcohol use disorder for approximately 12 years prior to his arrest and should have sought treatment before the accident, adding that the incident was "a trigger for him to obtain the help that he needed." The judge averred that he had not consumed an alcoholic drink since shortly after the accident. He was contrite and cooperative with the Commission, "expressed embarrassment and remorse for his behavior and any diminution of respect for the judiciary it may have caused," and recognized that "his conduct had the potential to put innocent lives at risk of death and serious injury."

The Commission stated:

> Respondent's diminished capacity as a result of his drinking is no excuse for this behavior. Alcoholism is a disease and the Office of Court Administration should treat it as such by encouraging judges to come forward and seek treatment. Getting into a car and driving while under the influence is a choice.

"Respondent's diminished capacity as a result of his drinking is no excuse for this behavior."

In aggravation, the Commission noted that the judge made false statements about his alcohol consumption and invoked his judicial office to law enforcement personnel at the scene of the crash. The Commission stated that, given the numerous aggravating factors, "this case comes very close to removal." However, in mitigation, the Commission considered that it involved one incident, and the judge acknowledged his misconduct, recognized that a severe sanction was appropriate, and was committed to continuing his treatment and abstaining from alcohol. The Commission noted that the judge is a Vietnam Veteran, was a prosecutor for nearly 20 years, and "has an otherwise unblemished record during his approximately 14 years on the bench."

See also ***In the Matter of Rebolini*, Decision and order** (New York State Commission on Judicial Conduct April 30, 2020) (judge's resignation and agreement not to serve in judicial office again concluded formal written complaint alleging he had operated his motor vehicle while under the influence of alcohol and asserted his judicial office with the police officer at the scene in an attempt to avoid arrest or other adverse consequences).

Invoking the judicial position

Any gratuitous reference to the judicial position during a traffic stop is considered not only an aggravating factor but misconduct as law enforcement personnel could and usually do reasonably interpret it as an attempt by the judge to use the prestige of office to escape the consequences of the judge's conduct, even if the request for favoritism

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is implied rather than express. For example, in a recent Ohio case, when police officers responded to reports of a vehicle in a ditch and asked the driver to identify herself, she stated several times that she was a judge. The judge was unsteady and almost fell several times while walking up the embankment to the side of the road. After being placed in the back of the cruiser, she exclaimed, "I am so intoxicated[!]" The Board on Professional Conduct emphasized that "a judge's operation of a vehicle while intoxicated imperils public confidence in the integrity of the judiciary" and that "a judge's repeated nonresponsive statements about being a judge during the judge's arrest is an abuse of the prestige of the office—even when they are 'borne of the lip-loosening effects of alcohol.'" ***Disciplinary Counsel v. Doherty*** (Ohio Supreme Court April 14, 2020), *accepting* **Findings, conclusion, and recommendation** (public reprimand).

In another New York case, after a judge was pulled over and arrested, when the state trooper asked her where she was headed, the judge stated: "I'm going to City Court to do the arraignments at 9:30 this morning." The Commission concluded that answer was not an improper assertion of her judicial position because it was an accurate response to the trooper's question. ***In the Matter of Astacio,*** **Determination** (New York State Commission on Judicial Conduct April 23, 2018), *accepted In the Matter of Astacio*, 112 N.E.3d 851 (New York 2018) (removal for operating a vehicle while under the influence of alcohol, asserting position to avoid arrest, and other misconduct).

However, the judge also told the trooper that he did not have "sufficient probable cause to arrest" her or "enough for a conviction," adding, "with all due respect, I don't know you, so you don't do DWIs, and you don't know what you're doing, but you're making a very big mistake ... I'd rather you call someone who does know what they're doing." Rejecting the judge's argument, the Commission found that she "was not simply defending herself," but "giving her 'unsolicited judicial opinion' about the merits of the arrest in an effort to persuade the trooper to drop the matter" after referring to her judicial status.

Further, at the police barracks after her arrest, the judge told a lieutenant that she had court responsibilities that morning and that nobody at the court was aware that she was not going to show up. For example, she stated: "Please don't do this;" "I have to go to work;" "I have arraignments;" and "I have court right now." The Commission found that "these gratuitous references to her judicial position while attempting to avoid the consequences of her arrest were an implicit request for special treatment, conveying the appearance that she was calling attention to her status as a judge in order to bolster her plea to the police." The Commission rejected the judge's argument that she was only asking to telephone her court, stating that interpretation was "inconsistent with her actual words . . . ('Please don't do this') . . . ." The Commission concluded that the lieutenant clearly understood that "she was 'pleading' because she did not want to be arrested, and, therefore, "any reference to her judicial position in that context could be perceived as conveying the message that because she is a

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judge, she should be exempt from the ordinary standards of law enforcement that apply to others."

Other examples of impermissible invocations of the judicial office following traffic stops:

- "Don't you know who I am?" Judge to law enforcement officer during second arrest for driving under the influence. ***Inquiry Concerning Bradley*, Decision and Order** (California Commission on Judicial Conduct June 3, 1999) (censure of former judge and bar from receiving assignments).
- "But I'm a judge, and I told you I wasn't the driver." Judge to officer who told her that he needed her to answer some questions and perform field sobriety tests after she was found alone in her car in a ditch. ***Inquiry Concerning Rushing*, Decision and Order** (California Commission on Judicial Performance June 8, 2006) (censure).
- "Why don't you run my license and then we can talk?" and "But you know what this is going to do; this will substantially impair my career." Judge to officer who pulled him over. ***Inquiry Concerning Schwartz*, Decision and Order** (California Commission on Judicial Performance June 9, 2006) (censure).
- "Do you know who I am?", "I'm going to lose my job over this," and "How can I sit up on the bench and pass judgment on people when I'm being convicted of the same thing?" Judge to sheriff's deputy who stopped him for reckless driving. ***In re Racculgla*, Order** (Illinois Courts Commission September 7, 2001).
- "So, I live right there. I'm Judge Atwal from Ramsey County." Judge to officer who arrested him for driving while intoxicated before asking three times to be allowed to walk home. ***In the Matter of Atwal*, Public reprimand** (Minnesota Board on Judicial Standards May 30, 2018) (reprimand).
- "I have a public official job that this will kill me. It will become very bad. I can't tell you because if I tell you, I can get in trouble for that. But I won't. I was on the phone with my wife, that's why I was swerving. This will kill me more than the average guy," and later, "I'm a judge." Judge to the trooper who stopped him for drunk driving. ***In the Matter of Baptista*, Order** (New Jersey Supreme Court May 19, 2016) (censure).
- "You know that. I'm a f**cking judge. I would never do anything to hurt you man. Come on." Judge to police officer while being handcuffed during arrest for driving while intoxicated. ***In the Matter of Benitez*, Order** (New Jersey Supreme Court September 6, 2018) (censure).
- Is there "anything we could do to resolve the matter" and "[can you extend] professional courtesy?" Judge to officer who knew he was a judge. ***In the Matter of Maney*, Determination** (New York State Commission on Judicial Conduct December 20, 2010) (censure).

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- "Isn't there anything we can do?" Judge to officer after giving his name and judicial office. ***In the Matter of Henderson*, Determination** (New York State Commission on Judicial Conduct March 18, 1994) (admonition).
- "[You will] regret this" and "[you should] watch out." Judge to officer while being arrested for driving while impaired after saying that he was a judge. ***In the Matter of Winkworth*, Determination** (New York State Commission on Judicial Conduct September 23, 1992) (admonition).
- "Is this the way you treat a Supreme Court Justice?" and "Couldn't this just be resolved with a Speeding ticket?" Judge after at least twice volunteering that he was coming from a judicial conference to state police sergeant who pulled him over. ***In the Matter of Landicino*, Determination** (New York State Commission on Judicial Conduct December 28, 2015) (censure).
- "I am a judge in this county." Judge repeatedly to police officer who stopped him for speeding and arrested him on suspicion of driving while intoxicated. ***Public Admonition of Glicker and Order of Additional Education*** (Texas State Commission on Judicial Conduct July 12, 2016).

Public hearings in judicial discipline proceedings

Effective May 1, 2020, hearings on formal charges in judicial discipline proceedings in Louisiana will be public as a result of an amendment to the **rules for the Judiciary Commission** adopted by the Louisiana Supreme Court. The new rule provides:

> Once the Commission files a notice of hearing . . . and the respondent judge either files an answer or the time for filing an answer has expired, proceedings before the Judiciary Commission and its hearing officers in the matter shall be open to the public . . . and the pleadings, orders, and evidence filed into the record of the proceedings shall be public record, subject to the right of the hearing officer or the Commission to issue a protective order . . . .

Prior to the amendments, "all documents filed with, and evidence and proceedings before the Judiciary Commission or its hearing officers" were confidential; confidentiality ceased with the filing of the record with the Court, and proceedings before the Court were not confidential. In **a press release** explaining the change, the Court emphasized that, even after the amendments, confidentiality will still apply during the Commission's initial consideration and investigation of complaints to protect "complainants and witnesses, who may otherwise be reluctant to come forward for fear of public scrutiny, retaliation, or recrimination;" to protect "our system of

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justice from frivolous complaints;" and to protect "the public at large by ensuring the integrity of the investigatory process."

With the change in Louisiana, in 35 states, there are now public hearings on formal charges in judicial discipline cases.

- In 27 states, confidentiality ceases after formal charges are filed.
- In seven states, confidentiality ceases when the judge files an answer to the complaint or when the time for filing an answer has passed.
- In two states (Oregon and Rhode Island), confidentiality ceases at the beginning of the fact-finding hearing. Rule 12(b) for the Oregon Commission on Judicial Fitness and Disabilities provides that the Commission shall issue "a public notice of the hearing not less than 14 days prior to the date of the hearing."

Even when the hearing is public, the commission members' post-hearing discussion of the case is confidential. For example, Rule 4.130(3) for the Kentucky Judicial Conduct Commission provides: "Hearings in formal proceedings shall be public, except that the Commission shall deliberate in executive session in reaching any decision involved in such hearings."

Some commissions have limited exceptions to the requirement of public hearings. For example, Rule 5D of the Massachusetts Commission on Judicial Conduct states that "proceedings may remain confidential, even after a finding of sufficient cause, if the judge, the Commission, and the complainant, if any, all concur." Rule 2:15-20 for the New Jersey Advisory Committee on Judicial Conduct allows the Committee to "apply to the Supreme Court for permission to retain confidentiality in a matter involving special circumstances, such as when the Committee determines that the privacy interests of a witness or other person connected with the matter outweigh the public interest in the matter.

Confidential hearings

In 16 jurisdictions, formal charges remain confidential, and the hearing is not open to the public.

- In 12 states, judicial discipline proceedings remain confidential through the hearing, and confidentiality ceases only if the commission files a recommendation for public discipline with the supreme court.
- In four jurisdictions (Delaware, D.C., Hawaii, and North Carolina), judicial discipline proceedings remain confidential through the hearing and even if there is a finding of misconduct and a recommendation of a public sanction, becoming public only if the supreme court decides to publicly sanction the judge.

Some states with closed hearings allow the judge to waive that confidentiality. For example, Section 44.4 of the statute in New York provides: "The hearing shall not be public unless the judge involved shall so demand in

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writing." (Judges have waived confidentiality in only 12 of 800 formal proceedings in the state.)

The New York State Commission on Judicial Conduct has advocated for opening up its hearings to the public since 1978, when they were closed by legislation after previously being public. In an annual report, for example, the Commission argued that the rationale for public hearings in judicial discipline cases is a "fundamental premise of the American system of justice since the founding of the republic"—"the rights of citizens are protected by conducting the business of the courts in public." It explained:

- The public has a right to know when a prosecuting authority has filed formal charges against a public official;
- The prosecuting entity, in this circumstance the Commission, "is more likely to exercise its power wisely if it is subject to public scrutiny;"
- The judicial discipline process is lengthy, and, if the charges and hearing are open, "the public would have a better understanding of the entire disciplinary process;" and
- Maintaining confidentiality is often impossible at the hearing stage because, as the Commission and the judge prepare, "more 'insiders' learn of the proceedings, [and] the chances for 'leaks' to the press increase, often resulting in published misinformation and suspicious accusations as to the source of the 'leaks.'"

The Commission acknowledged that, if charges are eventually dismissed after a hearing, the judge "may feel his or her reputation has been damaged by the trial having been public," but emphasized that "the historical presumption in favor of openness is so well established that criminal trials, where not only reputations but liberty are at stake, have been public since the adoption of the Constitution."

A table showing when confidentiality ceases in formal judicial discipline proceedings in each state is available on the Center for Judicial Ethics website.

Why do judicial conduct commissions dismiss so many complaints?

All judicial conduct commissions dismiss most of the complaints filed against judges every year. There are several explanations for the high dismissal rate.

Dismissal after screening

Many complaints are closed by judicial conduct commissions at the initial screening stage, when a complaint is reviewed to determine whether the

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commission has authority over the individual or the conduct complained of, also called jurisdiction. For example, according to their annual reports for 2019, the Nevada Commission on Judicial Discipline dismissed 182 complaints after initial review (of 196 dispositions), and the North Carolina Judicial Standards Commission dismissed 344 complaints after initial review (of 475 matters considered).

There are numerous reasons cases are dismissed at this stage.

- Complaints are dismissed if the allegations are about individuals over whom a commission has no authority, for example, federal judges, prosecutors and other attorneys, law enforcement officers, court staff, and administrative law judges.
- Complaints are dismissed that do not allege a violation of the code of judicial conduct. For example, litigants sometimes complain that a judge did not respond to phone calls because they do not understand that a judge is prohibited from engaging in such ex parte communications. Or a complainant might allege that a judge should have disqualified himself from their case because he was acquainted with the opposing lawyer, but an acquaintanceship alone is not sufficient to require disqualification.
- Complaints are dismissed if the allegations are conclusory, claiming misconduct without specific facts to support the accusation. As Rule 607(g)(2) for the Kansas Commission on Judicial Conduct provides: "Statements of opinion, speculative assertions, and conclusory allegations do not constitute facts and are not sufficient to warrant further investigation or a finding that there is reason to believe a violation of the Code of Judicial Conduct has occurred." For example, complainants frequently allege that a judge was biased against them, which could violate the code, but provide no evidence other than that the judge ruled against them. Because judges have to rule against someone in every contested case, a ruling itself is not sufficient evidence of bias for a commission to investigate.
- Sometimes complainants withdraw their complaints.
- Some commissions do not have jurisdiction over former judges, and those commissions dismiss any complaint against a judge who has retired, resigned, not been re-elected, or whose term has expired. Sometimes commissions, despite having jurisdiction, will dismiss complaints against former judges to conserve their resources.
- Some commissions do not have jurisdiction over a judge's pre-bench conduct, and those commissions dismiss any complaint about such conduct.
- Some commissions have statutes of limitations and dismiss complaints falling outside those time limits. For example, section 51-51l(d) of the statute governing the Connecticut Judicial Review Council provides: "No complaint against a judge . . . shall be brought . . . but within one year from the date the alleged conduct occurred or was discovered

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or in the exercise of reasonable care should have been discovered, except that no such complaint may be brought more than three years from the date the alleged conduct occurred." Further, commissions may dismiss complaints about years-old conduct because stale complaints are inherently difficult if not impossible to investigate. For example, Administrative Policy 4 for the Arizona Commission on Judicial Conduct states: "As a general rule, the Commission will not investigate complaints involving allegations of misconduct that occurred more than three years prior to the date of the complaint, unless the allegations involve a long-term pattern of misconduct. It is difficult and unfair to require a judge to respond to a complaint involving conduct that occurred so far in the past that neither the judge nor the witnesses, if any still exist, would be able to accurately remember the incident. This is especially true if the alleged misconduct took place during a court proceeding for which records may no longer exist."

- Complaints may be dismissed or at least returned to the complainant if they do not meet filing requirements. For example, Rule 607(d) for the Kansas Commission provides that the staff for the Commission may return a complaint if it is illegible and does not conform to the rules requiring that complaints be in writing, signed, submitted on the form provided by the Commission, and be against only one judge.

Legal error rule

Finally, many complaints are dismissed after screening because the allegations are about a judge's decision and, in effect, are asking the commission to act as an appellate court, which is beyond its authority. For example, the New Mexico Judicial Standards Commission reported that, of the 151 cases it disposed of in fiscal year 2019, it dismissed 60 as "appellate;" the Michigan Judicial Tenure Commission reported that 70% of the requests for investigation it received in 2018 "sought to have the Commission review the merits of the underlying case," but because "the Commission has no jurisdiction to act as an appeal court, those matters were dismissed unless they also included evidence of judicial misconduct."

This is often referred to as the "legal error rule" or the "appealable error rule." The rule applies to claims of incorrect findings of fact or abuses of discretion as well as legal error.

Examples of typical complaints that are dismissed by commissions under the legal error rule include allegations that a judge:

- Improperly admitted or excluded evidence,
- Believed perjured testimony,
- Was too hard or too soft in sentencing,
- Set bond too high or too low,
- Should have made a larger or smaller award of child support,
- Awarded custody of a child to the wrong person,

Many complaints are dismissed after screening because the allegations are about a judge's decision and, in effect, are asking a commission to act as an appellate court, which is beyond its authority.

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- Awarded spousal support that was too high or too low,
- Found a criminal defendant guilty,
- Found a criminal defendant not guilty,
- Dismissed a civil lawsuit,
- Found in favor of the plaintiff in a civil lawsuit, or
- Awarded damages in a civil lawsuit that were too high or too low.

These types of complaints are usually beyond a commission's jurisdiction because, even assuming the judge did commit an error, being wrong is not unethical, it simply reflects the human fallibility of judges. In addition, under most circumstances, a commission would have to retry a case to determine if the judge made a mistake, which is impossible.

Moreover, a commission is not a court and cannot interpret ambiguous law, resolve differences in interpretation of the law, or second-guess a judge faced with a novel situation. Deciding such legal questions and correcting such errors is the role of the appellate courts, not judicial conduct commissions. Furthermore, a commission does not have the power to, for example, order a new trial or change the custody of a child; appellate courts do. Disappointed litigants cannot file a complaint with a commission as a substitute for the appellate process established in the state constitution.

Finally, the power of judicial conduct commissions is limited to protect the independence of the judiciary: judges must feel free to make decisions that may prove unpopular with the public or the losing party without fear that they will be disciplined. Thus, although Rule 2.2 of the 2007 American Bar Association *Model Code of Judicial Conduct* provides that "a judge shall uphold and apply the law," comment 3 explains that, "when applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule."

There are exceptions to the legal error rule. Under those exceptions, a judge's appealable decision may also be reviewable by a judicial conduct commission if:

- The decision was made in bad faith,
- The error was intentional,
- The error was egregious, or
- There is a pattern of legal error by the judge.

The exceptions ensure that judicial independence is not used as a cover for intentional abuse of judicial power and that ignorance of the law does not excuse the great harm judicial error can cause both to individual litigants and to the judicial system.

Dismissal after investigation

If a commission does not dismiss a complaint after its initial review, it investigates the allegations. After an investigation, a commission dismisses

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a complaint if no evidence was uncovered that substantiates the allegations of misconduct. For example, in its 2018 annual report, the Massachusetts Commission on Judicial Conduct gave the following example of a complaint dismissed after an investigation.

> A self-represented defendant/tenant in a summary process matter alleged that a judge of the Housing Court Department treated him and his co-tenant discourteously, created an appearance of bias against them because they were self-represented, and failed to grant them a full opportunity to be heard during the trial on the complaint for eviction and during several post-judgment hearings. The investigation included reviewing the complaint, the docket sheet for the eviction matter, interviewing the judge, and listening to the audio records of the trial and post-judgment hearings at issue. The investigation revealed that, throughout the trial and post-judgment hearings, the judge treated the defendants/tenants politely and professionally, never said or did anything that would cause a reasonable person to believe that the judge was biased against the defendants/tenants because they were self-represented, and provided all parties a full opportunity to be heard.

Similarly, the Delaware Court on the Judiciary explained that a complaint by a litigant alleging that the judge who presided over her case was related to one of the witnesses for the opposing party, which she assumed because they had the same last name, was dismissed when an investigation "found no evidence of a family relationship between the judge and a witness."

Dismissal following a hearing

Finally, if a commission does not dismiss a complaint after an investigation but files formal charges and holds a hearing, it will dismiss the complaint if the fact-finder concludes that none of the allegations of misconduct were proven by the evidence presented. For example, Rule 8(d)(1) for the Wyoming Commission on Judicial Conduct and Ethics provides: "Following a hearing, the adjudicatory panel shall make findings and adjudications concerning allegations of judicial misconduct, criminal misconduct, civil misconduct and disability, and . . . where none is proven by clear and convincing evidence, shall dismiss the case . . . ."

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Recent cases

Intoxicated altercation

Based on agreements, the Indiana Supreme Court suspended three judges for injudicious conduct that culminated in a verbal altercation, a physical altercation, and gunfire outside a White Castle restaurant. *In the Matter of Adams, Jacobs, and Bell*, 134 N.E.3d 50 (Indiana 2019).

On April 30, 2019, Judge Andrew Adams, Judge Bradley Jacobs, and Judge Sabrina Bell traveled to Indianapolis to attend the Spring Judicial College. After checking into their hotel rooms, they spent the evening socializing with other judicial officers and drinking alcoholic beverages.

Around 12:30 a.m. on May 1, the judges and a magistrate met at a bar, where they continued to drink. Around 3:00 a.m., the group walked to a strip club and tried to enter, but found that it was closed.

The group then walked to a White Castle. While the magistrate went inside, the judges stood outside. Around 3:17 a.m., Alfredo Vazquez and Brandon Kaiser drove past and shouted something out the window. Judge Bell extended her middle finger to them.

Vazquez and Kaiser then pulled into the White Castle parking lot and got out of the vehicle. There was a "heated verbal altercation . . . , with all participants yelling, using profanity, and making dismissive, mocking, or insolent gestures toward the other group."

After a verbal exchange between Judge Bell and Vazquez, there was a physical confrontation. At one point, Judge Jacobs had Kaiser on the ground, raised his fist back, and said, "Okay, okay, we're done, we're done," or "This is over. Tell me this is over," or words to that effect. At another point, Judge Adams kicked Kaiser in the back. Judge Bell made several attempts to stop the fighting, including seeking help by pounding on the door of the White Castle. The confrontation ended when Kaiser pulled out a gun, shot Judge Adams once in the abdomen and shot Judge Jacobs twice in the chest. Judge Bell immediately called 911.

Judge Adams and Judge Jacobs were transported to local hospitals where they both had emergency surgeries.

At the police station, Judge Bell was too intoxicated to remember what she had said to Vazquez or Kaiser or what started the physical altercations. After being informed that police had video of the incident, Judge Bell said:

- "I'm afraid that I said something to them first, I don't know."
- "We're all very good friends and they're very protective of me. And I don't know, and I'm afraid that I said something to those two strange men at first, and then they said something back to me. And then I said something and then [Judge Adams and Judge Jacobs] went to defend me."
- "I'm not denying that I said something or egged it on … because I drink … I mean I fully acknowledge that I drink and get mouthy, and I'm fiery and I'm feisty, but if I would have ever thought for a second

The judges had not done anything "to avoid a confrontation or de-escalate the conflict."

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that they were gonna fight or that that guy had a gun on him, I would never, never…"

A grand jury indicted Judge Adams on seven counts of battery and disorderly conduct. Although the grand jury also investigated Judge Jacobs, no criminal charges were filed against him. On September 9, Judge Adams pleaded guilty to misdemeanor battery resulting in bodily injury. All other charges were dismissed, and Judge Adams was sentenced to 365 days in jail, with 363 days suspended.

Noting that the judges had not done anything "to avoid a confrontation or de-escalate the conflict," the Court held that their "actions were not merely embarrassing on a personal level; they discredited the entire Indiana judiciary" and "gravely undermined public trust in the dignity and decency of Indiana's judiciary." The Court suspended Judge Adams for 60 days without pay; Judge Jacobs and Judge Bell were each suspended for 30 days without pay.

Letter in support

Approving the findings, conclusions, and recommendations of the Judicial Qualifications Commission based on a stipulation, the Florida Supreme Court reprimanded five judges for submitting a letter encouraging the Florida Department of Children and Families to award a contract to a particular vendor. ***Inquiry Concerning Lederman, Caballero, Figarola, Pooler, and Ruiz*** (Florida Supreme Court March 26, 2020).

In March 2018, DCF initiated a competitive procurement process to award a contract for the lead agency for community-based care in the southern region of Florida. The contract was potentially worth more than $500 million over five years. Two non-profit corporations submitted proposals: Our Kids of Miami-Dade and Monroe, Inc. and Citrus Health Network. Our Kids had held the contract and served as the lead agency over the preceding several years.

Judge Lederman drafted a letter to DCF advocating that Our Kids be selected as the lead agency and asked the four other judges to also sign. A letter written on Judge Lederman's judicial letterhead and signed by the five judges was sent to DCF. The letter endorsed Our Kids and concluded: "We have worked with Our Kids and we have complete faith only in the Our Kids model of leadership. When you select the agency please keep our voices in mind."

In February 2019, the letter was mentioned in a newspaper article entitled, "Alleged conflicts of interest roil $500 million child welfare fight." DCF terminated the competitive procurement process and restarted it; there was no evidence that the judges' letter affected the DCF decision to reopen the process.

The Commission recommendation noted that, arguably, the judges could have written a letter "explaining their knowledge working with the provider in a much narrower context." However, it concluded that the letter

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that was sent inappropriately created the appearance that the judges and the judiciary were advocating "on behalf of one private entity over another." The Commission found that the letter's language raised questions about the judges' impartiality, noting that "the employees and vendors of the Lead Agency regularly appear in court assisting and advocating on behalf of clients of DCF, and the agency" and that "such an enormous and hotly contested contract award will almost certainly result in legal challenges, and likely even court proceedings" in the judges' circuit. The Commission emphasized that the judges had not been "motivated by any corrupt intent or design" and had intended "to protect the interests of the children and families served by DCF." However, it concluded that "their actions went too far in this instance," as the judges acknowledged.

Review and approve

The Minnesota Board on Judicial Standards publicly reprimanded a judge for failing to supervise her law clerk, approving her clerk's inaccurate timesheets, and exchanging inappropriate emails with the clerk. ***Public Reprimand of Leahy*** (Minnesota Board on Judicial Standards March 19, 2020).

Based on several complaints about the judge's law clerk, a judicial branch auditor performed a thorough review of the clerk's timekeeping for December 12, 2018 through March 5, 2019. According to the audit report, the clerk could not account for 50.5 hours claimed on timesheets during that period. The report concluded that the clerk had been paid for hours the clerk did not work, had not always taken the appropriate leave time, and did not have a teleworking agreement that provided hours of work and approval by the judge. The report also found that the judge had not properly reviewed and approved the clerk's timesheets to ensure that the clerk worked the hours recorded, which was the judge's responsibility under the Minnesota judicial branch payroll policy.

In a meeting with the Board, the judge stated that she could not criticize the auditor's report but noted that she was making work accommodations to assist the clerk who was going through a difficult time personally. The Board stated:

> When an employee is dealing with personal or health issues, a judge may need to provide additional supervision to ensure the employee is fulfilling the employee's duties. Proper supervision of employees is critical to maintaining cordial relationships with court administration and to maintaining public confidence in the judiciary.

During the auditor's review of the clerk's timekeeping, inappropriate use of judicial branch emails by the judge and the clerk was discovered, including "comments that could reasonably be considered harmful to the reputation and business of the Judicial Branch" and comments about matters before the judge sent while court was in session.

The judge and the clerk disparaged attorneys and parties in emails. For example, in an email with the subject line "[S]hoot me already," the judge wrote of an attorney: "He is an awful attorney." Of a party, the judge wrote:

"The duty to supervise court employees also extends to an employee's use of electronic communications."

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"He is a most obnoxious mean man." In another matter, the judge wrote in an email to the clerk: "Kill me," in response to an email about the attorney appearing before her.

During a jury trial regarding a criminal sexual conduct charge, the clerk wrote: "[Y]our last sexual experience;" the judge responded: "EEEEEEEEEEEkkkkkkkkkkkkkkkkkk." Regarding another criminal jury trial, in an email with the subject, "[C]an you keep a secret?", the clerk wrote: "This VD sucks. Don't tell anyone." The judge responded: "Deep sigh." ("VD" stood for voir dire.) In another criminal jury trial, the clerk stated in an email: "[J]ust accept the [jury] panel and put on [the] case!" The judge responded: "They won't . . . the [S]tate will ask a million dumb questions about burden of proof, etc."

In an email to the clerk, the judge referred to the sheriff's department employees involved in a decision to change the warrant process as "stupid people."

The Board noted that the judge had not only failed to advise the clerk that the emails were inappropriate, but had personally engaged in the same improper use of judicial branch emails. The Board stated:

> The duty to supervise court employees also extends to an employee's use of electronic communications. The Code and Judicial Branch policies prohibit a judge from sending disparaging and inappropriate emails. Even when electronic messages are considered confidential, they may be forwarded outside the Judicial Branch or otherwise made public.

The Board found that the disparaging emails violated the requirement that a judge "be patient, dignified, and courteous" to those with whom the judge deals in an official capacity and to require similar conduct of court staff.

"Beyond mere friendly conversation"

Adopting the **findings and recommendation of the Board of Professional Conduct**, the Ohio Supreme Court suspended a former magistrate from the practice of law for six months, with the entire suspension stayed conditionally, for having a lengthy ex parte conversation with one party after the other party left the courtroom following a hearing and failing to disqualify herself from the case after the conversation. ***Disciplinary Counsel v. Porzio*** (Ohio Supreme Court April 23, 2020).

On August 2, 2017, Walter Gerino filed a petition for a civil stalking protection order against his neighbor, Paul Fish. The following day, Fish filed a counterpetition. On August 16, the magistrate held a hearing on both petitions. Gerino and Fish appeared pro se and testified on their own behalf. After the close of evidence, the magistrate requested that the parties exit the courthouse separately and that Fish leave first.

After Fish left the courtroom, the magistrate talked for 23 minutes with Gerino and his witnesses. The magistrate repeatedly criticized Fish and commented on his credibility; she stated that he was "such a liar," "made himself look like a fool," was "clueless," and acted "like he's 10 years old."

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She also discussed the evidence, explained the legal standard for obtaining a civil stalking protection order, and stated that neither party had proved his case, indicating how she intended to decide the matter.

The magistrate also "made offhand and unnecessary comments about the parties' religions and ethnic backgrounds."

> For example, she stated, "[Fish] said he was a minister. What's the story with that? * * * A Christian minister even though he's Jewish" and "Do Jewish people have halos? I think they have angels though, right? * * * The Catholics got lots of angels or uh * * * Halos." The magistrate also "used inappropriate slang and profanity, such as stating that some of Fish's testimony had been "such bull sh--." She said to Gerino, "[A]t the end of this, who looked like * * * an as----le and who looked like a good guy?"

At one point, the magistrate left the courtroom to confront Fish; one of Gerino's witnesses stated, "She don't like him, does she?"

A few months later, the magistrate granted Gerino a five-year civil protection order and denied Fish's counterpetition.

The Board found that, because the magistrate's communication with Gerino after Fish left the courtroom "went beyond mere friendly conversation and veered into [her] views of the case and legal concepts," she had engaged in an inappropriate ex parte communication. The Board also concluded that, because she had "discussed the evidence, her personal views on Fish's integrity, and how she intended to rule," the magistrate's "impartiality most certainly could be reasonably questioned," and, therefore, she should have disqualified herself from the case.

"Much more than catching extra fish"

Based on the findings and conclusions of the Judicial Hearing Board, the West Virginia Supreme Court of Appeals suspended a magistrate for 90 days without pay, fined him $2,000, and reprimanded him for violating a state fishing regulation and for his "belligerent and coercive behavior" toward the DNR officers. ***In the Matter of Ferguson*** (West Virginia Supreme Court of Appeals April 22, 2020).

On February 21, 2017, the magistrate went fishing with his father at the East Lynn Lake spillway. A state regulation sets the daily creel limit at six trout per person.

After the magistrate had already caught six trout, Department of Nature Resources Corporal Larry Harvey saw him catch two additional fish and give one to his father and one to a third man. Officer Jacob Miller also witnessed the magistrate catch extra fish. Corporal Harvey instructed Officer Miller to write a citation.

Officer Miller followed the magistrate up a hill to a parking lot. When they reached the judge's vehicle, Officer Miller identified himself as a DNR officer and displayed his DNR badge and identification card, saying, "just to show you, I'm not lying about who I am." The officer requested the magistrate's photo identification, fishing license, and trout stamp. Officer Miller testified that the magistrate dropped the tailgate of his truck, threw a West

"The respondent acted in a completely inappropriate, belligerent, and coercive manner toward the DNR officers while they were engaged in law enforcement activities."

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Virginia Supreme Court photo identification card down on the tailgate in an "arrogant manner," and said, "well, I'm not lying about who I am, either."

The magistrate's father and the third man then walked from the spillway to the parking lot. A few minutes later, Corporal Harvey joined them and sent Officer Miller to issue citations to other people who were fishing illegally. Corporal Harvey testified that he instructed the magistrate, the magistrate's father, and the third man to stay where they were while he went to a nearby picnic table to gather his paperwork. Before he left, Corporal Harvey saw that there were three creels each holding six fish in the back of the magistrate's truck. However, when the corporal returned from the picnic table, the third man had left, and there were only two creels with five fish each in the truck. When Corporal Harvey asked "what happened to your friend," the magistrate answered "what friend?" When Harvey explained that he was asking about the man that they had been fishing with, the magistrate said, "I don't know what you're talking about."

Corporal Harvey testified that "things [were] starting to get a little bit out of hand." He described how the magistrate, while pointing to the fish in the truck bed, raised his voice and demanded that the corporal "prove that . . . I've exceeded the limit of trout. I want you to look in the back of this truck right here. There's two stringers there, and there's five fish on each stringer. Now you tell me—prove to me, how that [sic] I've exceeded the limit." According to the corporal, the magistrate twice said, "you go ahead and do what you're gonna do. This ain't going nowhere." Meanwhile, the magistrate's father also became agitated.

Corporal Harvey returned to the picnic table to write the citations and to put some distance between himself and the agitated men. The magistrate started walking toward the corporal with his hands in his pockets. The corporal testified that being approached by someone with his hands in his pockets was a "huge officer safety issue" because there could be a weapon in the person's pocket. Corporal Harvey directed the magistrate to remove his hands from his pockets, saying, "I don't want to get shot today," or words to that effect. According to the corporal, this "enraged" the magistrate, and he began pacing back and forth and saying angrily to his father, "so now I'm gonna shoot . . . I guess I'm gonna shoot him." The magistrate's father then demanded that they be allowed to leave.

The corporal testified that their "bad behavior continued to escalate:"

> [They were] pacing back and forth, side to side, screaming at the top of the lungs. . . . [T]he Respondent's father, if I'm remembering, is the one that really talked to me about the law, and the [sic] he – he said that, you know, "I know the law. You can't be arrested. This is not a jailable offense. You can't be arrested for this." And that goes on a minute. And the Respondent would – would come back and – and he would justify it. He would say again what the father said. "Yeah, you can't arrest us for this. This is not – this is not a jailable offense." And like I said, most of the whole time, is screaming, it's throwing their hands up in the air like this, and just unbelievable to me, to be truthful with you.

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The men finally calmed down, and the corporal issued each of them a citation for violating the state fishing law. As he handed the citation to the magistrate, the magistrate named two of the corporal's DNR supervisors and indicated that he would be contacting them.

The magistrate pled no contest to exceeding the creel limit and paid a small fine and court costs.

Although the Board had stated in mitigation that the magistrate's conduct had been "entirely personal in nature," the Court concluded that his "actions were directly related to the administration of justice and demonstrated a selfish and callous disregard for our system of justice."

> This case is about much more than catching extra fish. Certainly, we want judicial officers to obey all laws, including state fishing regulations. However, if the respondent had behaved in a professional manner when receiving the fishing citation, this matter never would have resulted in a formal disciplinary proceeding. Instead, the respondent acted in a completely inappropriate, belligerent, and coercive manner toward the DNR officers while they were engaged in law enforcement activities. . . .

Recent posts on the blog of the Center for Judicial Ethics

Conditions as part of judicial discipline sanctions

Recent cases (February)

Recent cases (March)

Recent cases (April)

A sample of recent judicial ethics advisory opinions (March)

A sampling of recent judicial ethics advisory opinions (May)

Coronavirus and judicial conduct

Sexual harassment and fidelity to procedures (*In re Murguia* (U.S. Judicial Conference Committee on Judicial Conduct and Disability 2020)

Renouncing third-party campaign statements

"A calm steady hand" needed (*In the Matter Concerning Gary* (California 2020))