To secure and promote an independent and qualified judiciary and a fair system of justice

JUDICIAL CONDUCT REPORTER

A publication of the American Judicature Society Center for Judicial Ethics
Volume 32, No. 1 Spring 2010

Demeanor in Domestic Violence Cases *by Cynthia Gray*

The conflict and intense emotions inherent in court proceedings involving allegations of domestic violence can challenge a judge's ability to demonstrate judicial temperament and convey impartiality. Numerous judicial discipline cases illustrate judicial actions that create the appearance that a judge has prejudged the parties or does not take domestic violence seriously.

In a judicial discipline complaint, a woman explained, "I understand now why women don't go to the courts for help/protection because that judge treated me just like my husband does. I feel like the judge gave permission to my husband to abuse his wife and children." Acting pro se, Eula Warren had filed a petition for protection from abuse against her husband, Charles Warren. Both were present at the hearing; neither were represented. When the judge asked if they wanted a divorce, the couple replied that they did. The judge then questioned why they had not filed for a divorce rather than "go through this c-r-a-p."

With the judge reading from the petition, the following exchange took place between the judge and Mr. Warren:

> The court: All right. It says: "On Sunday, February 11th, we were in Subway eating." Can't you find a better place to eat than that?
>
> "Before we went to the parade. My daughter, Sabrina, two, was acting up in the store and didn't want to sit down to eat. He told Sabrina if she didn't stop he was going to bring her to the bathroom and it was going to be a bloody mess." True?

(continued on page 8)

Judges and Social Networks

In *Florida Advisory Opinion 2009-20*, the Florida judicial ethics committee directed judges not to add lawyers who may appear before them in court as "friends" on social networking sites or permit those lawyers to add them as "friends." The committee acknowledged that "simply because a lawyer is listed as a 'friend' on a social networking site" does not mean that this lawyer is, in fact, in a special position to influence the judge.

> The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether . . . the identification of the lawyer as a "friend" on the social networking site conveys the impression that the lawyer is in a position to influence the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.

In response to the opinion, one judge suggested to the committee that the appearance problem could be solved if she placed a prominent disclaimer on her profile page that stated the term "friend" should be interpreted to mean that the person is only an acquaintance of the judge, not a "friend" in the traditional sense. A second judge proposed accepting as "friends" all attorneys who ask or all persons whose names he recognizes or who share friends with him.

Rejecting those suggestions, the Florida committee reaffirmed the original opinion, although three members believed it was wrongly decided. *Florida Advisory Opinion 2010-6.* The committee did state that a judge who is a member of a voluntary bar association is not required to "defriend" lawyers who are also members on that organization's Facebook page and who use Facebook to communi-

(continued on page 4)

Judges as Board Members for Non-profit Organizations that Provide Court-Ordered Services

by Cynthia Gray

Most judicial ethics opinions that address the issue state that a judge may not serve on the board of directors of a non-profit organization that provides court-ordered services such as alternative sentencing or counseling. Membership on the board of such an organization places a judge in a "dual position as a fiduciary acting on behalf of the organization and as a judge dealing with the organization in the courtroom." *New York Joint Advisory Opinion 00-101 and 00-104.*

The New York committee explained the conflict created if a judge serves on the board of a Youth Court, for example.

> If the inquiring judge declines to refer any cases to the Youth Court because of the judge's position with the organization, he/she may be doing a disservice to eligible defendants. On the other hand, if the judge is considering a referral of cases to the Youth Court it might be concluded that the judge is allowing his/her relationship with the Youth Court "to influence the judge's judicial conduct or judgment."

New York Advisory Opinion 99-130. Similarly, with respect to a non-profit organization that provides services to the municipal court through a community re-entry program, the Ohio advisory committee explained:

> The court's involvement with the community re-entry detention program would require the judge to decide whether a defendant found guilty of violating a municipal ordinance would be incarcerated or given an opportunity to participate in the program. As a member or officer of the Board, the judge might feel real, imagined or even subconscious pressure to refer as many participants as possible to the program in order to ensure its success. No matter how forthright the judge, the obvious concern is that a convicted defendant might question whether competing interests of the judge influenced his sentence. Also, the public might lose faith in the justice system if it believes a defendant might receive a different or more lenient sentence because of a judge's personal interest. Finally, the judge in his fiduciary role as a Board member or officer, would be making decisions regarding costs to the city for services provided by the program.

Ohio Advisory Opinion 91-11. Accord Alabama Advisory Opinion 93-507 (chemical dependency and substance abuse treatment center to which the judge refers defendants)*; Maryland Advisory Opinion 2008-12* (organization to which judge's court refers juvenile drug offenders for counseling and treatment); *New York Advisory Opinion 08-103* (organization that offers risk and responsibility class that is a condition of a plea or sentence); *New York Joint Advisory Opinion 00-101 and 00-104* (organization that provides sentencing alternatives and youth shelter to which the judge has sent juveniles unable to make bail); *New York Advisory Opinion 99-64* (therapeutic riding center to which the judge has sentenced defendants for community service as an alternative to incarceration).

Recusal by the judge does not solve the problem caused by membership on an organization's board. The Virginia advisory committee rejected a judge's suggestion that he could serve on the board of a juvenile group home if he recused himself when a child-placing agency notified him that the home was being considered for the placement in a case. *Virginia Advisory Opinion 00-3.* The committee believed the procedure would not ensure timely recusal and could delay the child's placement. Further, the committee concluded that a judge should not knowingly place himself in a position that would require recusal from cases. Similarly, the Maryland committee stated that a judge may not serve on the board of an organization that provides services to individuals with developmental disabilities in guardianship matters before the judge's court even if the judge recuses from cases in which the organization is involved. *Maryland Advisory Opinion 08-5.*

In contrast, the Florida committee advised that a family division judge could serve on the board of a supervised visitation facility even if the judge may order visitation at the facility and a fee is charged to the parties. *Florida Advisory Opinion 97-11*. However, the committee warned the judge to "closely monitor" the program to ensure that its employees or volunteers are not becoming involved frequently in litigation, either as parties or witnesses.

Who chooses

Even if the judge does not specify which organization must be used by a litigant, membership on the board of a service provider may be inappropriate because the judge makes the initial determination that the service is necessary, thus cre-

(continued on page 5)

Appearance of quid pro quo in appointments

In *Inquiry into Blakely*, 772 N.W.2d 516 (Minnesota 2009), the Minnesota Supreme Court censured a judge and suspended him without pay for six months for obtaining a substantial fee reduction from his personal attorney while contemporaneously appointing her to provide mediation in matters pending before him. The court also reprimanded him as an attorney.

By the time a final dissolution decree was entered in September 2004, the judge owed approximately $98,000 to Christine Stroemer for her representation in his divorce proceedings. Between December 2003 and April 2006, the judge appointed Stroemer as a mediator or third-party neutral in 16 cases. On April 4, 2006, the judge paid her firm $31,982.84; the law firm wrote off $64,128.

The judge and Stroemer had exchanged several e-mails discussing the fees he owed and his referrals to Stroemer. For example, in one e-mail, after acknowledging the judge's financial situation, Stroemer stated, "I DO want to thank you for the referrals and certainly appreciate the work. I'll do my best to get those cases resolved and off the court calendar."

The judge advised Stroemer by e-mail that he was "in a serious bind" and expressed hope that she would agree to accept the proceeds from the sale of his home "and forego any more fees." He stated:

> I recognize this may not be a small compromise in your view. On the other hand, a sizeable lump sum now may be preferable to very long-term payments. There is also very substantial past, and future, benefit to you from significant business referrals we have made in excess of the compromise we are asking for.

The judge testified that the "business referrals we have made" referred to two referrals of clients that he and his second wife had made.

In a subsequent e-mail, noting he was asking her to "forego over $60,000 in earned fees," Stroemer responded:

> Nonetheless, it is my hope that we continue a good relationship and that you continue to refer cases to me to assist in mediation/arbitration of family court matters. I have appreciated the referrals in the past.

In an e-mail after the judge's final payment, Stroemer stated:

> FYI, I had to do a lot of explaining to my partners as to the reasoning for writing off over $60,000 in your legal fees. I hope you understand that this was a very difficult decision for me to make. It affected my income. I do hope that you continue to recognize my legal abilities and continue to refer mediation cases to me.

Noting the law firm was qualified to provide mediation services and well regarded in the area of family law, the court agreed that an actual quid pro quo had not been established. However, stating the "findings bring to light an extremely disturbing course of events," the court concluded that the judge's actions "reflect a serious lack of judgment," constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and violated Canons 1, 2A, 2B, 4A, 4D(1)(a), and 4D(5).

Using recusal as a tactic

Accepting an agreed statement of facts and joint recommendation, the New York State Commission on Judicial Conduct censured a judge who had disqualified himself from cases in which parties were represented by law firms that included legislators as a tactic to force the legislature to pass a judicial pay raise, encouraged other judges to recuse themselves, denigrating those who refused, and made public comments about pay raise litigation. *In the Matter of Himelein*, Determination (December 17, 2009) (www.scjc.state.ny.us).

Recent Decisions

New York judges have not received a pay raise in over 10 years. The New York advisory committee issued several opinions stating that a judge need not recuse from cases in which a legislator or a member of a legislator's firm appears based on the legislator's role in setting the judge's salary or the dispute over judicial salary increases. Despite those opinions, over 10 months beginning in September 2007, the judge disqualified himself from 11 cases involving three law firms who had four legislators as members.

In addition, by hitting "reply all" to e-mails received on the court system's server, the judge sent 11 "blast" e-mails to numerous judges about the failure of the legislature to enact pay raises. For example, the first e-mail stated:

> Does anyone really think that banding together or lobbying together or doing anything together will have any effect on those people in Albany?? I remain convinced that the only weapon in our arsenal is recusal on all cases where a firm has a legislator or a relative of a legislator in a firm …

In one e-mail, the judge stated:

> It has nothing to do with whether I could be impartial.
>
> I really believe this is the only weapon we have ... there are enough lawyers in the senate who would be very unhap-

(continued on page 6)

Judges and Social Networks *(continued from page 1)*

cate about the organization and other non-legal matters. *See also Florida Advisory Opinion 2010-4* (judge's assistant may add lawyers who appear before the judge as "friends" without reference to the judge or the judge's office; the judge should direct her assistant to immediately "de-friend" a lawyer who attempts an ex parte communication through the site and to report it to the judge); *Florida Advisory Opinion 2010-5* (judicial candidate may add lawyers who may appear before him, if elected, as "friends" and permit such lawyers to add the candidate as their "friend").

Cautious permission

The judicial ethics committees in New York and Kentucky issued less restrictive opinions than the Florida committee but still emphasized that judges must exercise caution in their use of social networks. *See also South Carolina Advisory Opinion 17-2009* (judge may be a member of Facebook and be friends with law enforcement officers and employees as long as they do not discuss anything related to the judge's position). Stating "in some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting," the New York committee noted that a judge "generally may socialize in person with attorneys who appear in the judge's court," subject to the code, and that there is nothing "per se unethical about communicating using other forms of technology, such as a cell phone or an Internet web page." *New York Advisory Opinion 08-176*. Acknowledging the many "news reports regarding negative consequences and notoriety for social network users who used social networks haphazardly," the committee concluded, "the question is not whether a judge can use a social network but, rather, how he/she does so."

Similarly, the Kentucky committee advised that a judge may participate in an internet-based social networking site, such as Facebook, Linkedin, Myspace, or Twitter, and be "friends" with persons who appear before the judge in court, such as attorneys, social workers, and law enforcement officials. *Kentucky Advisory Opinion JE-119* (2010).

> While social networking sites may create a more public means of indicating a connection, the Committee's view is that the designation of a "friend" on a social networking site does not, in and of itself, indicate the degree or intensity of a judge's relationship with the person who is the "friend." The Committee conceives such terms as "friend," "fan," and "follower" to be terms of art used by the site, not the ordinary sense of those words.

The Kentucky committee stated that it had "struggled with this issue, and whether the answer should be a 'Qualified Yes' or 'Qualified No,'" noting several judges around the state who had joined internet-based social networks but later limited or ended their participation. The committee concluded that judges should be "**extremely cautious** that such participation does not otherwise result in violations of the Code of Judicial Conduct."

Both the Kentucky and New York committees emphasized that a judge must consider whether any on-line connections, alone or in combination with other facts, rise to the level of a close social relationship requiring disclosure and/or recusal. The New York committee noted that "the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond." In addition, the committees warned judges to be careful not to respond to inquiries from users who want the judge to discuss their cases, comment on pending cases or controversial issues, or provide legal advice.

Further, noting a news article reporting a judge's statement that he uses "'sites to keep track of adjudicated offenders under his jurisdiction,'" the Kentucky committee reminded judges that they may not independently investigate facts. Further, the committee advised that it would be inappropriate for judges to post pictures and commentary that may be of "questionable taste" even if that conduct would be acceptable for the general public.

The Center for Judicial Ethics has links to the web-sites of judicial ethics advisory committees at http://www.ajs.org/ethics/eth_advis_comm_links.asp

Judicial Conduct Reporter
Spring 2010

Seth S. Andersen
Executive Director

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

American Judicature Society
The Opperman Center
at Drake University
2700 University Avenue
Des Moines, IA 50311

Published quarterly
$36 per year, single copy $11

ISSN: 0193-7367

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

An index is available on the AJS web-site at www.ajs.org/ethics/.

Judges as Board Members for Non-profit Organizations that Provide Court-Ordered Services *(continued from page 2)*

ating the possibility of a placement at, and payments to, the organization even though the specific choice is made by the litigant or a government agency. *New York Advisory Opinion 07-2* (organization that provides therapeutic visitation services to parents referred, directly or indirectly, by the court). Further, the litigants may appear before the judge for review during or after treatment by the organization, and employees of the organization may make reports to or appear as witness before the judge.

For example, the Washington advisory committee stated that a judge may not serve on the board of one of the organizations that provides batterer's treatment even though it is the defendant in domestic violence cases who chooses which organization to use to comply with the judge's order. *Washington Advisory Opinion 02-11. Accord Ohio Advisory Opinion 06-7* (organization that defendants may choose to obtain mental health and chemical dependency treatment that is a condition of probation); *Washington Advisory Opinion 01-4* (organization that is on a list of mental health and chemical dependency programs distributed by probation department to defendants). Similarly, the New York advisory committee stated that a judge should not be a board member for an organization that provides residential placement for children even though the judge does not designate where a child will receive treatment or be confined but simply orders the child to the custody of a county or state agency that places the child with a specific social services organization. *New York Advisory Opinion 02-91. See also Alabama Advisory Opinion 99-738* (substance abuse council to which the court referral officer refers DUI offenders for mandated driving education); *Massachusetts Advisory Opinion 06-7* (health care provider that offers services to substance abusers and those with mental health issues)*; New York Advisory Opinion 98-10* (treatment facility that is assigned cases by drug court administrator and team).

In contrast, the Arkansas advisory committee stated that a judge may serve on the board of an organization that has a contract with the state to operate a residential program for juveniles when the decision where a juvenile will be placed is made by the department of human services, independently of the judge. *Arkansas Advisory Opinion 93-05.* Other committees have created exceptions that allow a judge to serve on a board:

- if the organization is the only local provider of the court-ordered service (*Alabama Advisory Opinion 04-831* (family support center that is the sole provider in the judge's jurisdiction of services such as G.E.D., adult education, parenting classes, and domestic violence monitoring); *Alabama Advisory Opinion 00-767* (board of YMCA that operates a rehabilitation program to which the judge may refer youths as an alternative to incarceration where there is no other comparable program in the area); *Florida Advisory Opinion 93-23* (DUI countermeasure school that provides the only alcohol safety education course in the county));
- if the organization serves court-involved clients in another region (*Massachusetts Advisory Opinion 2010-2* (organization that provides community-based services to juveniles and families to promote healthy living));
- if litigants are diverted to the organization from juvenile court and the judge sits in criminal court (*Florida Advisory Opinion 2010-7* (organization that provides pre-trial diversion program and social services to juveniles who are at risk for dropping out of school));
- if the organization does not accept court-ordered referrals but only referrals from other state agencies (*Maryland Advisory Opinion 2008-25* (residential treatment facility for adolescent girls)); or
- if the judge can be effectively insulated from the contracting process (*Arizona Advisory Opinion 96-17* (organization that provides mental health services under a contract with the court on which the judge sits)).

Discipline cases

Several recent judicial discipline cases illustrate the problems that arise when judges are not careful about the potential conflicts between an extra-judicial relationship with a non-profit organization and judicial duties.

In *In re Morvant*, 15 So. 3d 74 (Louisiana 2009), the Louisiana Supreme Court held that a judge violated the code of judicial conduct by ordering drug court probationers to pay fees to a substance abuse education program for school children while serving on the advisory council of the program. The Court found, "without question, the ease of association between the monetary assessments and his council position leads to the perception that Judge Morvant misused the prominence of his judicial office to further his personal interests." The Court cautioned the judge to refrain from similar conduct, although it found that a sanction was not warranted because he did not have an improper motivation and immediately stopped when his actions were questioned.

The Vermont Supreme Court suspended a judge for six

(continued on page 6)

Judges as Board Members for Non-profit Organizations that Provide Court-Ordered Services *(continued from page 5)*

months without pay for his handling as a judge of the sale of a county building to a non-profit organization while serving on its board. The Court also ordered the judge to resign from the board of any organization doing business with or seeking funding from the county. *In re Boardman*, 979 A.2d 1010 (Vermont 2009). The judge was a founder and a board member of a non-profit corporation called Emerge, which provides supervised parent-child visitation services to the family court in high-conflict cases. On behalf of the county, the judge accepted the organization's offer to purchase a county office building, signing the sales agreement. The Court found that the judge's argument that the county and the organization shared a "confluence" of interest was "mistaken because a public official's overriding and undivided duty of loyalty is to the public he or she serves."

> The evidence here reveals not only an appearance of divided loyalties inherent in respondent's competing fiduciary duties to the county and Emerge, but a genuine conflict between respondent's public duty as an assistant judge to sell the county property occupied by Emerge at the highest possible price consistent with the public interest and his corporate duty, as a director of Emerge, to purchase the property for the lowest possible amount.

The Arkansas Supreme Court removed a judge from office for his relationship with probationers and his involvement with a non-profit organization that ran a probation program. *Judicial Discipline and Disability Commission v. Proctor* (Arkansas Supreme Court January 25, 2010). The judge created Cycle Breakers, Inc., and 99% of the probationers in the organization's program were there under this authority.

He was involved in Cycle Breakers activities such as counseling, teaching classes, and conducting meetings for probationers. He had computer programs on his official computer for its finances, its bank statements were mailed to his office, and he had access to its checks. Its tax return listed Cycle Breakers' address as the judge's office, and its web-page was listed as his court's. The judge met with community and church leaders on behalf of the program, obtained the services of volunteers, mentors, security, and speakers, and paid the organization's bill. The judge also levied unauthorized "civil fees" on probationers that went to Cycle Breakers and enforced payment of those fees with jail or the threat of jail.

The Court found that the judge's involvement with Cycle Breakers cast reasonable doubt on his capacity to act impartially and that he was, at a minimum, an advisor for an organization that was engaged in proceedings that would ordinarily come before him.

Recent Decisions *(contunued from page 3)*

> py if their cases could not be heard and their firms started letting them go…

In the e-mails, he referred to the legislators as "clowns" and to the Assembly Speaker as a "slug," urged other judges to "grow some stones," and called judges in New York City "gutless," "lackies," "toadies," "wusses," and "wimp judges." The judge spoke to two reporters about the dispute.

The Commission concluded that the judge's recusals were unrelated to whether he could be impartial but were intended to pressure legislators to enact a pay raise. The Commission found his conduct was aggravated by his e-mails encouraging other judges to abrogate their professional duty by also recusing as a tactic.

Rejecting plea agreement

The New York Commission censured a village court judge for refusing to accept a plea agreement and attempting to coerce a plea to additional charges because he wanted a disposition that would bring revenue to the village, in addition to other misconduct. *In the Matter of Herrmann*, Determination (December 15, 2009) (www.scjc.state.ny.us).

A defendant was arrested by village police and charged with driving while intoxicated, open container, and unlawful possession of marijuana. Presented with a negotiated agreement that included a plea only to a reduced driving while ability impaired charge, the judge expressed concern that the village derives no revenue from such a charge, stating, "Someone has to generate money for the Village to support the expensive police department." Ignoring the attorneys' protests, the judge proposed a plea to the open container charge with a maximum fine, which would go to the village, making clear that the alternative was a 15-day jail sentence for a plea to DWAI alone.

Two weeks later, when the defendant was prepared to accept his proposal, the judge insisted on an additional plea to marijuana possession, with an additional fine, and reiterated his interest in having some money go to the village. When the defendant pleaded guilty to DWAI only, the judge

sentenced him to 15 days in jail.

The Commission found that the judge "misused his judicial discretion and impaired the independence of his court, conveying the impression that its primary function is to generate revenue rather than 'to apply the law in each case in a fair and impartial manner.'"

Inappropriate outbursts

The North Carolina Judicial Standards Commission publicly reprimanded a judge for intimidating and inappropriate outbursts, in another judge's courtroom, at prosecutors in two cases in which his wife was the defense attorney. *Public Reprimand of Smith* (March 4, 2010) (www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc09-138.pdf). The judge was not in his judicial robe during either incident.

In April 2008, Judge Smith sat in the public area of another judge's courtroom several times during the three-day trial of a criminal case in which his wife, Jacqueline Smith, was the public defender. During a recess, the presiding judge asked Judge Smith why he was there, and Judge Smith replied that Mrs. Smith was his wife and he was there to support her.

After the jury returned a guilty verdict, as the assistant district attorney, Madelaine Colbert, was exiting the courtroom, Judge Smith moved in front of her and turned to face her, one to two feet from her, impeding anyone from moving forward. Pointing his finger at Colbert's face, the judge said repeatedly, "Your officer was lying Maddie," and words to the effect that, "He made all those admissions up," "There's no way [the defendant] admitted to any of that stuff," and "Your officer was flat out lying on the stand." His face was red, and he appeared agitated and angry.

On May 1, 2009, Judge Smith entered the same courtroom during sentencing in another case in which his wife was representing the defendant. After sentencing, the presiding judge left to speak with the jurors. Judge Smith then stood and, from the back of the courtroom, called out the name of the assistant district attorney, William Bunting. When Bunting turned toward him, the judge loudly and sarcastically exclaimed, "Congratulations, Mr. Bunting, you just wasted $600,000 of taxpayer money to keep a drug user in jail."

Inappropriate detention

The Texas State Commission on Judicial Conduct publicly admonished a judge for allowing her anger and frustration with caseworkers who recommended that a juvenile be detained, and with the juvenile's mother, to interfere with her judgment, resulting in seven adults being briefly but unlawfully detained in locked cells. *Public Admonition of Meurer* (March 30, 2010) (www.scjc.state.tx.us/pdf/actions/FY2010-PUBSANC.pdf).

At an initial detention hearing for E.Y., a juvenile who had been arrested for allegedly assaulting her mother, caseworkers believed detention was the best option until treatment could be arranged. The recommendation was based in large part on the request of E.Y.'s mother, who wanted her daughter's medication re-evaluated by a psychiatrist before she returned home.

As the caseworkers attempted to explain, the judge became visibly angry. She stated her belief that the caseworkers were only recommending detention for expedience and their own convenience and registered her disapproval, telling the caseworkers, "before I do that, each of you will spend three hours in this locked cell. You go in there and you be stripped [sic] searched." Before taking a recess, the judge told the parties to come back and "tell me the honest truth and quit making up these stories" and to stop "using this Court." After the recess, the caseworkers and E.Y.'s mother recommended that E.Y. return home with a safety plan.

At approximately 2:15 p.m., the judge asked everyone who had originally recommended detention for E.Y. to raise their hands. The judge then directed her bailiff as follows:

> This case will be recessed until 2:45, at which time I will reconvene with a decision. Each of you . . . are to go back into detention. Detention, you are to have six different cells, and you are to put them in that cell and just let them sit there until 2:45. Tell me if this is where you want this child to be . . . You're to see what it's like to be locked up. I want the mother to experience what it's like for the daughter to be locked up. . . Please follow [the bailiff] in.

The child protective services caseworker and her supervisor, the CASA volunteer, the reintegration project coordinator, the Texas Family Support Services parent coach and mentor, and E.Y.'s mother were escorted to a secure holding area and placed in small, locked in-take cells for approximately 20 minutes.

When they returned to the courtroom, the judge stated: "This is not punishment; this is helping people understand that jail is not a tool and that the deprivation of liberty is a frightening experience. And it's a degrading experience." The judge accepted the recommendation that E.Y. be returned to her mother with a safety plan and concluded the hearing by stating: "For those of you who I've worked with, I would ask to speak with you [in chambers]. If you care not to, that's your decision. Those of you who know me, know exactly what I did and why. For those of you who don't and are angry, I'm sorry." The incident was reported in the *Austin American-Statesman*.

Demeanor in Domestic Violence Cases *(continued from page 1)*

> Mr. Warren: No, sir. I told her that I was going to take her in the bathroom and whip her booty and make her booty bleed.
>
> The court: That's good. Good for you.
>
> "When we got to the parade route and park[ed], he started on me. He told me he wished that . . . we would ... [l]eave, and that he wanted a divorce. He was mad because my uncle and his brother asked him if he beat me. He threatened to beat me three or four times a day. He told me that if I didn't look at him when he was talking he would punch me in the face. At one time he threatened to throw his coffee in my face. My girls were sitting in the back seat and they had started to fight over some toy. He told them they needed to stop."

The judge then summarily dismissed the complaint without explanation, stating: "Heat, big smoke, but no fire. Dismissed. You want a divorce, get a divorce. You're not getting a TRO. See y'all later."

The judge denied that he was trying to belittle the Warrens with the comment about Subway, claiming it was "an inside joke" with his court staff. Regarding his apparent approval of Mr. Warren's threat to make his daughter's "booty bleed," the judge testified that he believed Mr. Warren was speaking colloquially and only meant that he was going to spank his daughter. The judge acknowledged he should have made it clear that he believed in correction, but not abuse.

The Louisiana Supreme Court concluded that the judge's lack of patience "prevented a full consideration of the legitimacy of the allegations in the pleading, especially considering some of the complaints in the pleading were not addressed before the matter was summarily dismissed." *In re Ellender*, 16 So. 3d 351 (Louisiana 2009).

> There was a potential risk of serious harm stemming from this judicial misconduct in that the complainant was seeking protective relief from threatened violence in a domestic matter. Mrs. Warren appeared before Judge Ellender, unrepresented by counsel, asking the court for protection based on allegations of domestic abuse. The record is clear that Judge Ellender not only failed to treat this matter seriously, but he also acted in a condescending and demeaning manner toward Mrs. Warren and treated her with a lack of patience.

The Court explained "why such behavior should not be tolerated with respect to any litigant, or attorney."

> Judges are called upon to render difficult decisions in sensitive and emotional matters. Being in court is a common occurrence for judges, but for litigants, especially pro se litigants, a courtroom appearance can be an immensely difficult experience. Litigants appear before judges to have their disputes resolved. Judges serve the public, in part, by setting an example in how to resolve these disputes in a patient, dignified, and courteous manner. If a judge acts belligerently, those before the judge believe belligerence is acceptable. Judges have an opportunity to teach by example and demonstrate those attributes which all should strive to possess.

The Court acknowledged that a judge's patience is often "tested when simultaneously confronted with crowded dockets to be managed and countless difficult decisions to be made." However, noting that it had listened to the recording of the hearing, the Court found that the litigants had not said "anything that could be interpreted as grounds for provoking an inappropriate response on the part of the judge . . . ." The Court suspended the judge for 30 days without pay.

Grossly insensitive conduct

The California Commission on Judicial Performance publicly admonished a judge for her remarks in numerous cases and for appearing to set distant trial dates to reflect her view that the cases should not be tried; several of the cases involved domestic violence. *Public Admonishment of Moruza* (California Commission on Judicial Performance December 16, 2008) (http://cjp.ca.gov/). The Commission found that the judge's statements were impatient, discourteous, inappropriately personal, undignified, and demeaning and suggested abandonment of the judicial role, embroilment, and a bias in domestic violence prosecutions.

For example, the judge commented that a domestic violence case was a "crazy waste of time" and that pursuing it amounted to "stupidity," stating she had lived 30 years longer than the prosecutor and knew "a lot more about relationships and life and the court system." In another case, the judge asked, "Is this another case where we're going to ruin the relationship between the victim —?" In a third domestic violence case, the judge made a remark to counsel in chambers to the effect that she had tried to slap her husband once, that he had been quicker and slapped her back, and that she had never tried to slap him again. On another occasion, the judge told counsel that she had once called the police on her husband for domestic violence.

A domestic violence case that was approximately 10 months old and had been set for trial twice came before the judge for a pretrial conference in March. The public defender asked that the conference be continued for two weeks so that he could consult an immigration specialist. The judge

noted her concern that the victim was using the criminal courts to gain an advantage in a family law case. The judge then set the trial for November, although the prosecutor had asked for a date no later than June. The Commission found that the judge gave the appearance that she set the distant trial date because she thought the case should not be tried.

The New York State Commission on Judicial Conduct removed a judge for, in addition to other misconduct, statements on and off the bench that indicated the judge "does not take seriously domestic violence complaints and is reluctant —- if not negligent —- in properly applying the law in such matters." *In re Romano*, Determination (New York State Commission on Judicial Conduct August 7, 1998) (www.scjc.state.ny.us).

In statements off-the-bench to his court clerk and the assistant district attorney, the judge indicated that he believed that many domestic assault charges were exaggerated by women and unfair to men, expressing skepticism about cases in which the victim was the primary witness and the complaint was signed by a police officer instead of the victim. He indicated that he did not favor issuing an order of protection or keeping an alleged abuser out of the home unless the victim came to court with a "turban of bandages." The judge expressed his belief that, "if a female victim was truly frightened, [she could] leave the home and go to other family or friends or to the shelter." The judge also told the assistant district attorney several times that he did not like most domestic violence cases because they involve "he said, she said" issues. The judge periodically told the court clerk that the police and prosecutors should be "more discreet" with domestic abuse cases because "most likely, the defendant is the father; he's the husband; he's the one who makes the money, and it's not right that they're told that they can't go back into the house."

"Judges serve the public, in part, by setting an example in how to resolve these disputes in a patient, dignified, and courteous manner. If a judge acts belligerently, those before the judge believe belligerence is acceptable."

As he was reading the charges from the bench for a defendant charged with hitting his wife with a telephone, the judge stated, "What was wrong with this? You need to keep these women in line now and again." Both the judge and the defense attorney laughed. The defense attorney then said, "Do you know why 200,000 women get abused every year? Because they just don't listen." The judge and the defense attorney laughed, and the judge did not rebuke the lawyer for the remark.

The Commission stated that the judge's statements and actions made it apparent that he is "predisposed against victim of domestic violence." The Commission emphasized that "judicial indifference and gross insensitivity is inappropriate" and discourages "those who look to the judiciary for protection," noting that "even isolated remarks cast doubt on a judge's ability to be impartial and fair-minded."

See also In the Matter of Roberts, 689 N.E.2d 911 (New York 1997) (judge stated "Every woman needs a good pounding now and then" and orders of protection "were not worth anything because they are just a piece of paper," are "foolish and unnecessary," "useless," and of "no value"); *In the Matter of Moore*, Determination (New York State Commission on Judicial Conduct November 19, 2001) (www.scjc.state.ny.us) (judge stated, that he knew the victim (the defendant's daughter) and that he would have "slapped her around" himself, before deciding not to issue an order of protection); *In the Matter of Bender*, Determination (New York State Commission on Judicial Conduct February 7, 1992) (www.scjc.state.ny.us) (during arraignment, judge asked police officer whether an alleged assault was "just a Saturday night brawl where he smacks her around and she wants him back in the morning" and advised the defendant to "watch your back" because "women can set you up"); *In re Greene*, 403 S.E.2d 257 (North Carolina 1991) (in open court, judge told victim in an assault on female case she would ruin her children's lives if she did not reconcile with her husband, referred to a support group as a one-sided, man-hating bunch of females and pack of she-dogs, and polled spectators as to how many had little spats during their marriages); *In re Turco*, Stipulation and Admonishment (Washington State Commission on Judicial Conduct December 1, 1995) (www.cjc.state.wa.us) (judge stated to one defendant "you didn't need to bite her. Maybe you needed to boot her in the rear end, but you didn't need to bite her;" in second case, stated, "my opinion is that the police do 95% of the work when they separate the parties.... You know, all we're doing is slapping someone after the

(continued on page 10)

police have remedied the situation. But, so be it. So I mean there's nothing to get excited about in missing these cases;" in third case, after finding defendant guilty of assaulting his wife while forcibly removing her from an apartment where controlled substances were being used, stated "fifty years ago I suppose they would have given you an award rather than what we're doing now").

Treatment of victim

In several cases, a judge's treatment of a domestic violence victim went beyond discourtesy to detention or the threat of incarceration. The Florida Supreme Court publicly reprimanded a judge for improperly and sua sponte ordering that the victim in a domestic battery case also be taken into custody. *Inquiry Concerning Bell*, 23 So. 3d 81 (Florida 2009). The judge had met the former husband who was the subject of a probable cause affidavit when they both were sole practitioners. During the marriage, the couple had attended the same church as the judge where he interacted with them. The judge's children provided babysitting for the couple. After the couple was divorced, the former husband came before the judge in a professional setting. The judge had also spoken to the former wife at a social event.

After reading the sheriff deputy's affidavit, the judge found that probable cause existed for a domestic battery charge against the former husband. Based on interviews, the former wife's injuries, and the location of the incident, the deputy had concluded that the former husband was the primary aggressor.

After five minutes of computer research, however, the judge found that there were sufficient facts in the affidavit to establish probable cause that the former wife had committed domestic battery when she attempted to force her former husband from her home. Therefore, the judge ordered that the former wife, who was present in court as a victim of domestic violence, be taken into custody — despite the absence of a complaint from the former husband, the sheriff's office, or the state attorney's office. The former wife was incarcerated overnight.

The judge explained that he had the former wife arrested because she had pushed her former husband first, transforming the argument from a verbal to a physical argument. He had concluded that the former wife was the primary aggressor but that the deputy had arrested the former husband because he was a male, exhibiting leniency toward the woman. Although he believed he acted lawfully, the judge admitted that he would not have had the former wife arrested if she had not been in the courtroom that day. The judge acknowledged that his actions had the potential to create an appearance of impropriety.

See also In the Matter of Ward, Findings, Conclusions, and Discipline (Nevada Commission on Judicial Discipline February 3, 2006) (www.judicial.state.nv.us/decision%20index.htm) (judge issued a protective order against an applicant who had sought a protective order even though the adverse party had not requested such an order; judge made comments to effect that he did not hear domestic violence cases); *In the Matter of Bender*, Determination (New York State Commission on Judicial Conduct December 21, 1999) (www.scjc.state.ny.us) (during an arraignment for a man charged with assaulting his girlfriend, judge stated that the woman could be charged with trespass, advised the defendant that he could bring an eviction proceeding against the woman, agreed with the defendant's statement that he should "dump the woman," and, when the defendant stated that the woman had caused him problems, replied, "They can do that," and "Women can be problems").

Summary punishment

In *In the Matter of Singer*, Determination (New York State Commission on Judicial Conduct July 1, 2009) (www.scjc.state.ny.us), the New York State Commission on Judicial Conduct admonished a judge who threatened to hold a litigant in contempt for not disclosing the address of the shelter where she was residing and did hold her attorney in contempt, in addition to other misconduct.

While presiding over a custody matter that involved allegations of domestic violence, the judge ordered the victim to disclose the address of the shelter where she was living. Counsel for the victim indicated that her client could not disclose the address. The judge replied that if the victim failed to provide her address to the court, he would hold her in contempt. When the case was recalled later that morning, the judge again threatened to hold the attorney in contempt if she persisted in refusing to disclose the location of the shelter. The attorney's supervisor was present and similarly declined to reveal the address, noting that state and federal statutes prohibited them from revealing the address of the shelter. The judge persisted in demanding disclosure of the address and grew increasingly impatient, discourteous, and intemperate toward the victim and her attorney. The judge held the attorney in contempt and fined her without giving her a reasonable opportunity to make a statement or issuing a written order.

The Commission stated:

> Having been placed on notice as to the issue, the judge should have determined whether the law provided such protection for a victim of domestic violence, as the attorney

> had suggested, before summarily punishing the attorney for her principled refusal to provide the information. Clearly there were no "necessitous" or urgent circumstances justifying the judge's peremptory imposition of contempt against an attorney who was simply attempting to protect her client's interests and who had a sound legal basis for her position.

See also Disciplinary Counsel v. Parker, 876 N.E.2d 556 (Ohio 2007) (judge insisted on having victim's facial injuries photographed); *In the Matter of Lamb*, 665 S.E.2d 169 (South Carolina 2008) (during bond hearing in a domestic violence case, judge directed the defendant to look at the victim, contrary to instructions by the transportation officer from the detention center); *Judicial Inquiry and Review Commission v. Shull*, 651 S.E.2d 648 (Virginia 2007) (in custody hearing, judge twice directed the mother to lower her pants in the courtroom after she claimed the children's father had injured her thigh); *In the Matter of Browning*, 452 S.E.2d 34 (West Virginia 1994) (judge refused to assist woman seeking protective order, returned to her office to do paperwork, and later agreed to assist another litigant).

Penalizing pro se litigants

Finally, a judge has a duty to avoid unduly rigid or overly technical conduct that would impede petitioners who are not represented by counsel from obtaining relief in domestic violence proceedings. *Inquiry Concerning Eriksson* (Florida Supreme Court February 11, 2010). Judge Eriksson openly disagreed with the circuit's policy that required him and other county judges to hear petitions for injunctions against domestic violence, writing letters to the Court and the Office of the State Courts Administrator.

One day in 2007, the judge presided over a series of domestic violence injunction hearings in which the pro se petitioners appeared to have little, if any, experience with the legal system. Instead of asking the petitioners whether they wanted to testify, the judge asked, "Who is your first witness?" and dismissed petitions if the petitioners did not know they were allowed to testify in their own cases and failed to produce independent witnesses. The judge refused to admit police reports and the petitioner's own sworn statements because he considered them hearsay. The judge also questioned petitioners about who instructed them to come to court, asking questions such as, "Who sent you here?" and "Who told you to file this?"

As the calendar proceeded, the judge became less rigid and formalistic, attempting to address the substance of the petitions. In some cases, he asked the petitioners to "look in the mirror" to identify their first witness.

The judge argued that no statute or prior case required him to instruct petitioners how to proceed. The Court noted that other judges had testified at the hearing that they routinely "explain the rights of both the petitioners and respondents prior to the commencement of these injunction proceedings." The judge also argued that, if he informed petitioners of their rights, he would be assuming an adversarial role. The Court stated that assertion was inconsistent with his refusal to allow petitioners to use police reports as evidence without any objection raised by the opposing party, noting he "refused to insert himself into the controversy when petitioners did not know they had a right to testify on their behalf, but had no problem with rejecting potential hearsay evidence sua sponte."

The Court stated that it has "recognized the importance of the constitutional guarantee of citizen access to the courts, with or without an attorney." It also noted that the legislature has provided that a cause of action for an injunction against domestic violence "shall not require that either party be represented by an attorney" and has waived the filing fee for domestic violence petitions to ensure that victims have access to the courts.

The Court concluded that the judge's conduct was particularly disturbing in light of his disagreement with the manner in which domestic violence injunctions were processed in his circuit.

> By asking extrajudicial questions such as, "Who sent you here?" and "Who told you to file this?" Judge Eriksson made his displeasure with being required to adjudicate domestic violence petitions abundantly clear. Even if this Court were to accept Judge Eriksson's contention that his questions to petitioners regarding how they learned about the injunction process were performed in an academic and curious manner, the questions were not relevant to the cases at hand and reflected his intolerant attitude. The courtroom is not the proper venue for Judge Eriksson to express his disagreement with what he perceived to be a serious flaw with the system.

Finding that "instead of promoting the accessibility of the judicial system, [the judge] discouraged vulnerable individuals from exercising their access to justice," the court held that the judge's "unduly rigid and formulaic process" and his "overly technical" approach "penalized pro se petitioners for being unfamiliar with the judicial system." The Court publicly reprimanded the judge for this and other misconduct.

The Opperman Center
at Drake University
2700 University Ave.
Des Moines, Iowa 50311

Nonprofit Org.
U.S. POSTAGE
PAID
Chicago, Illinois
Permit No. 2482

JUDICIAL CONDUCT REPORTER