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FEATURED TOPIC

DEFENDING A JUDICIAL MISCONDUCT CASE

Just as attorneys tend to focus on upholding their substantive duties under the Code of Professional Responsibility over the procedure that ensues should they be accused of falling short, judges tend to focus on the substance of the Code of Judicial Conduct rather than what proceedings will follow an allegation of misconduct. This prioritization is certainly reasonable. But it leaves many on their heels when faced with a complaint.

Those who attended the 2021 Kansas Law Review Symposium on "Judicial Conduct and Misconduct: A Review of Judicial Behavior from Sexting to Discrimination" are ahead of the game after receiving a crash course in the practical realities of judicial conduct proceedings. Among the symposium's speakers was Christopher Joseph, who has defended numerous judges before the Kansas Commission on Judicial Conduct and before the Kansas Supreme Court. In his presentation, Chris walked the audience through the various steps in the judicial disciplinary process and provided important commentary for any judge who is the subject of a misconduct complaint. The substance of his remarks is presented below.

The goal of the Code of Judicial Conduct is to maintain "an independent, impartial, and competent judiciary, composed of men and women of integrity, [which] will interpret and apply the law that governs our society" (Rule 601B, Preamble). While much of the Code focuses on a judge's conduct as a judicial officer, certain regulations apply to a judge's personal life. And anyone, whether they know the judge in a personal or professional capacity, can file a complaint with the Commission on Judicial Conduct.

Usually, a judge first learns a complaint has been filed when he or she receives the following letter from the Commission:

Dear Judge [redacted]

The Commission on Judicial Conduct met on [redacted], and considered the above-captioned complaint. The Commission requests your response to the attached complaint under Supreme Court Rule 613(b)(2)(A).

The Commission finds that a judge's response usually provides a thorough and detailed explanation of the proceedings. For this reason your response, or a portion thereof, may be provided to the complainant **without further notice unless an objection is specifically indicated in your response**.

The Commission's next meeting has been scheduled for [redacted]. [redacted] Therefore, please respond electronically to the email address above by [redacted], to allow us time to forward your response to the Commission prior to the meeting.

Cordially,

While it is upsetting to be notified of a complaint, the letter is quite friendly. Indeed, one who is unfamiliar with the disciplinary process may not appreciate the importance of the response the letter requests or the severity of the matter at issue. But this is the stage at which a judge should seek independent advice—to draft a response, to assess the gravity of the complaint, and to prepare for what is to come.

The Inquiry Panel that receives the judge's response has the power to resolve a complaint without referring it for formal proceedings before the Hearing Panel. Pursuant to Rule 614, an Inquiry Panel may dismiss a complaint outright (sometimes offering informal advice), issue a letter of caution, or issue a cease-and-desist as an alternative to referring the matter for formal proceedings.

In addition to determining the duration of the matter, the Inquiry Panel's decision can determine the publicity the matter receives. Except as publicized by the complainant or the judge, the matter will remain confidential from filing through the point of dismissal, the issuance of a letter of caution, or the issuance of a private cease-and-desist order. But a public cease-and-desist order and formal proceedings—including the formal complaint, any documents filed with or issued by the Hearing panel, any hearing before the Hearing Panel, and the final disposition—are not confidential. *See* Rule 611.

If the matter is referred for formal proceedings, the Examiner who investigated the complaint for the Inquiry Panel prosecutes the case before the Hearing Panel:

> **(a) Role of the Examiner.** The Examiner acts in a dual capacity as follows:

> (1) when an Inquiry Panel is considering a complaint against a judge, the Examiner assists the Inquiry Panel, when requested, in investigating the complaint; and
> (2) after formal proceedings are instituted, the Examiner prosecutes the formal complaint before a Hearing Panel and in any proceedings before the Supreme Court.

Rule 606. The Examiner has the burden to prove all Code violations charged by clear and convincing evidence. If the panel finds the charges have been proven, it must:

(1) admonish the respondent;
(2) issue a cease-and-desist order;
(3) recommend to the Supreme Court a discipline of public censure, suspension, or removal; or
(4) recommend to the Supreme Court compulsory retirement of the respondent.

Rule 619. An admonishment or a cease-and-desist order is final. But any recommendation to the Supreme Court means the case goes on.

Even a judge who accepts the Hearing Panel's findings of fact, conclusions of law, and recommended discipline must appear before the Supreme Court for imposition of discipline. A judge who disputes the findings or conclusions must brief the matter as in an appellate action. After considering the Hearing Panel's findings, conclusions, and recommendations as well and the arguments of the Examiner and the judge, Supreme Court may then:

> (1) refer the matter back to a Hearing Panel for any further proceedings as directed by the court;
> (2) reject the Hearing Panel's recommendations;
> (3) dismiss the proceedings;
> (4) order discipline;
> (5) order compulsory retirement; or
> (6) make any other disposition as justice requires.

Rule 620. Proceedings before the Supreme Court are public.

The substantive directives of the Code of Judicial Conduct should be every judge's focus. But, when faced with an allegation of misconduct, knowledge of the disciplinary process can be invaluable.

NEW AUTHORITY

KANSAS LAW REVIEW SYMPOSIUM 2021: JUDICIAL CONDUCT AND MISCONDUCT: A REVIEW OF JUDICIAL BEHAVIOR FROM SEXTING TO DISCRIMINATION

As discussed in last month's *Legal Ethics & Malpractice Reporter*, on November 15, 2021, the *Kansas Law Review* sponsored a half-day virtual symposium on "Judicial Conduct and Misconduct: A Review of Judicial Behavior from Sexting to Discrimination." The presentations ranged from the highly theoretical to the very practical. The final lineup of presenters included:

- Ross Davies – Professor, Antonin Scalia Law School, George Mason University
- Michael Ariens – Professor, St. Mary's University School of Law
- Stephen Sheppard – Professor, St. Mary's University School of Law
- Susan Saab Fortney – Professor, Texas A&M University School of Law
- Christopher Joseph – Attorney, Joseph, Hollander & Craft, LLC
- Honorable Caleb Stegall – Justice, Kansas Supreme Court

Professor Ross Davies began the afternoon discussing how judicial misconduct of United States Supreme Court Justices has been handled to date. He reminded us all that there are a number of "coercive" and "non-coercive" ways to address the conduct of these justices appointed to lifetime terms of service. They range from impeachment, as in the case of Justice Chase, to offering a different and more "desirable" position, as illustrated by Justice Goldberg stepping down from the Supreme Court in order to become the U.S. Ambassador to the United Nations.

Professor Michael Ariens gave a delightful talk on the development of codes of judicial conduct in the United States and, in particular, the development of the concept of an "appearance of impropriety." He reminded the audience of a key factor in the development of the "appearance of impropriety" standard: opposition to Judge Kennesaw Mountain Landis simultaneously serving as a federal district court judge and as the first Commissioner of Baseball (and being paid for doing both).

Professor Stephen Sheppard's presentation looked at the history of the notion of "justice" and how the development of this idea has informed and transformed the judiciary and the expectations of how judges ought to act.

Professor Susan Saab Forte gave a fascinating talk on the need for judges to be "leaders" in their courts and proposed that judicial codes

of conduct be amended to hold judges responsible for discriminatory acts or harassment by court personnel under their supervision. Noting the practical implications of the issue, she cited a number of cases demonstrating the adverse consequences of supervisory failures.

Chris Joseph spoke from the perspective of a lawyer who regularly defends judges in disciplinary proceedings. A summary of his remarks is the lead article in this month's *LEMR*.

Judge Caleb Stegall's keynote address was a brilliant exposition of the ethical obligations of a judge from the perspective of a sitting Supreme Court Justice. It was a thoughtful and nuanced discussion about the ethical contours of judicial decision making—an issue he identified as "the most pressing judicial ethics question that we face today." It would be a disservice to Judge Stegall's presentation to summarize it in a few sentences. Instead, interested readers should view Justice Stegall's complete talk online. It is well worth the time.

The video of the entire symposium will be available online on the KU Law YouTube channel. The printed version of the symposium—with expanded versions of the presentations—will appear in the Spring 2022 issue of the *Kansas Law Review*.

ETHICS & MALPRACTICE RESEARCH TIP
NEW PERIODICAL LITERATURE DRAWN FROM THE CURRENT INDEX OF LEGAL PERIODICALS

1. Rebecca Aviel & Alan K. Chen, *Lawyer Speech, Investigative Deception, and the First Amendment*, 2021 U. Ill. L. Rev. 1267 (2021).

Aviel and Chen offer an important investigation of the limits of the First Amendment rights of lawyers.

2. Lori D. Johnson, *Navigating Technology Competence in Transactional Practice*, 65 Vill. L. Rev. 159 (2020).

These days, there are few more important issues for lawyers than ensuring that they are meeting the requirements of Rule 1.1 on competence, especially competence in the ever-changing developments in legal technology. This is an excellent article exploring one aspect of the competency rule.

3. Leah Wing et al., *Designing Ethical Online Dispute Resolution Systems: The Rise of the Fourth Party*, 37 Negot. J. 49 (2021).

From an issue of the *Negotiation Journal* dedicated to the theme of artificial intelligence, technology, and negotiation, here is another

article on legal technology and the ethical traps that await the unwary and the uninformed.

BLAST FROM THE PAST
AN EXCERPT FROM THE KANSAS LAW JOURNAL, MAY 1885

We take the following from the *Daily Capital* of this city:

> "That cautious and prudent conservatism with which judges usually approach the consideration of grave questions is a valuable trait in judicial character. Upon it in very large measure depends the security of public liberty. Nothing is more commendable in the decorum of judicial officers than a spirit of deliberateness. There is more than dignity in it; for when it is coupled with learning, it commands [the] respect and confidence of the people. But conservatism does not mean a clinging to wrecks. Courts, like legislatures, must bend to the current of the world's thought. They must accommodate themselves to the actual and permanent changes of affairs among men. Glaciers' movements are measured by permanent objects on the hills. The world moves by epochs, and we trace its march by the new things wrought. Principles are germs always sending out new phases and developing new forms. Courts and the practice in them are built upon great truths. The fundamental principle of law is protection against wrong. As the world moves ahead men's interests become more complex, and facilities for doing right and for doing wrong multiply, and courts will not, they must not, fail to recognize in the same old principles which have governed them since the last upheaval, new elements, new powers, new applications to accord with what men need now. Protection is always the same in principle, but methods of affording or of obtaining it must necessarily vary under varying circumstances; courts must recognize these grand marches of men; judges must grow with the time's mentality. Like priests, they must come out of the cloisters and monasteries, and take up their abode among men."

1 *KANSAS LAW JOURNAL* 258 (1885)