

Philadelphia Inquirer editorial (March 3, 2012; excerpts)

## Selecting judges requires a higher standard

The controversies point to twin problems with the state's system of electing all of its judges: the corrupting influence of campaigns and fund-raising, and whether voters are adequately equipped to choose qualified candidates for the bench.

House legislation aired at a hearing Thursday in Philadelphia would address those problems for the appellate bench, at least. The measure, sponsored by Rep. Bryan Cutler (R., Lancaster), would switch to appointments for Supreme Court justices, and Superior and Commonwealth Court judges.

Civic, legal, business, and religious groups favor the reform . . . . A nominating panel would recommend candidates to the governor, whose choices would go before the state Senate for confirmation. . . . In other states, appointed benches tend to be more diverse, and the process spares candidates from having to raise the millions needed to mount statewide campaigns. A recent study found that, in two out of three cases to come before Pennsylvania's top court, litigants had given a campaign contribution to at least one justice hearing the case. . . .

[V]oters repeatedly tell pollsters that the mere involvement of judges in fund-raising creates the perception that justice is for sale. While a frequent claim about merit-based appointment is that voters don't directly pick judges, in fact, every appointee would have to stand for a retention election after four years.

The **New York State Commission on Judicial Conduct** released its 2011 annual report ([www.cjc.ny.gov/Publications/AnnualReports/nyscjc.2012annualreport.pdf](http://www.cjc.ny.gov/Publications/AnnualReports/nyscjc.2012annualreport.pdf)). Among other discipline, confidential cautionary letters were summarized. Among them were:

- 2 judges were cautioned for isolated and relatively minor *ex parte* communications or taking judicial action without affording one or more parties the opportunity to be heard.
- 1 judge failed to disclose on the record that the complaining witness in a case was the judge's client in a routine matter more than 2 years earlier.
- 1 judge presided over a matter involving a distant relative.
- 6 judges were cautioned for being discourteous or making inappropriate comments to litigants, attorneys, witnesses, or the press. For example, 1 judge made public comments about a case that was pending on appeal; 1 judge made inappropriate comments in open court about an attorney's appearance.
- 3 judges were cautioned for failing to timely file a financial disclosure statement.
- 1 judge was cautioned for a delay of several months in rendering a decision in a criminal case.
- 2 judges were cautioned for failing to administer an oath to the parties prior to their testimony.
- 1 judge was cautioned for improperly using an official parking permit;
- 1 judge was cautioned for using his judicial office to promote a charity.

Chief Judge David Barrett is retiring. The **Georgia** Judicial Qualifications Commission was investigating Judge Barrett after he pulled out his pistol in the courtroom during a hearing.

The **U.S. Department of Justice** asked U.S. District Judge Virginia Hopkins to vacate her order dismissing a clean air lawsuit against **Alabama** Power Co. and disqualify herself from the case because she and her mother had financial investments related to the company.

Based on the information disclosed by the judge, Judge Hopkins knew sometime after she was assigned the case in 2004 that her mother owned 1,000 shares of Alabama Power's parent company, Southern Co.; that the judge sold her mother's stock in 2009 in an exercise of a durable power of attorney; and, in November 2010, Judge Hopkins purchased shares in a **utility sector mutual fund** with holdings in Southern Co. and other coal-fired utilities facing lawsuits similar to the case pending before her.

The **Texas State Commission on Judicial Conduct** publicly admonished Judge Bobby Nicholds for repeatedly interceding in a criminal matter on behalf of a defendant who is the daughter of the woman with whom he was living. Judge Nicholds contacted the prosecutor and the presiding judge, attempting to influence law enforcement officials to curtail any investigation into her possible criminal activities. (February 8, 2012)  
[www.scjc.state.tx.us/pdf/actions/FY2012-PUBSANC.pdf](http://www.scjc.state.tx.us/pdf/actions/FY2012-PUBSANC.pdf)

The **Tennessee Court of the Judiciary** reprimanded Judge Andrew Jackson for abuse of the contempt power. The judge initiated a summary contempt of court against a woman for an incident that occurred outside of his presence, finding her in contempt of court and ordering that she serve 10 days in jail without appointing counsel for her, even though both counsel for the opposing party and the guardian *ad litem* suggested that he do so. In another case, the judge held a person in civil contempt for failure to pay child support without appointing an attorney and without conducting a hearing to determine the individual's ability to pay the back support to purge the contempt.  
[www.tsc.state.tn.us/sites/default/files/docs/coj\\_public\\_reprimand\\_-\\_judge\\_andrew\\_jackson\\_1-30-12.pdf](http://www.tsc.state.tn.us/sites/default/files/docs/coj_public_reprimand_-_judge_andrew_jackson_1-30-12.pdf)

The **North Dakota Supreme Court** censured Judge Richard Hagar for a pattern of delay. Beginning in 2009, the judge delayed deciding a number of cases. In one bench trial which was held on September 21, 2010, he did not enter findings of fact, and conclusions of law until March 10, 2011. In a second bench trial in November, 2009, the judge did not enter the judgment until August 5, 2011.

On July 11, 2011, the presiding judge removed Judge Hagar from all new case assignments for 30 days and required him to devote full time to bringing his docket current and resolving all matters that required an immediate decision.

The **Landmark Legal Foundation**, described in news reports as a national conservative advocacy group, asked the **Wisconsin Judicial Commission** to investigate the 29 judges who signed petitions to recall Governor Scott Walker. The

letter also requests that the Commission investigate whether any of the judges are presiding in any cases in which the governor or his administration are parties, arguing that “if so, recusal must be required immediately and any failure by a judge to have already disclosed his or her apparent conflict of interest should be investigated separately by the Commission.”

The **Kentucky Commission** publicly reprimanded a judge for a pattern of delay in cases under submission. The Commission noted that the judge had no prior infraction, met with the Commission, changed his practices as recommended, and addressed the cases in question.

### **Facebook update: MA, FL, KY, NY, OH, CA.**

The **Massachusetts Supreme Judicial Court Committee on Judicial Ethics** has issued an advisory opinion stating that a judge may not “friend” on Facebook or other social networking sites any attorney who may appear before the judge because to do so creates the impression that those attorneys are in a special position to influence the judge. Massachusetts Advisory Opinion 2011-6 ([www.mass.gov/courts/sjc/cje/2011-6n.html](http://www.mass.gov/courts/sjc/cje/2011-6n.html)).

The **Florida** judicial ethics board gave similar advice (Florida Advisory Opinion 2009-20). Judicial ethics committees in **Kentucky, New York, and Ohio** have less restrictive opinions, allowing judges to “friend” attorneys who may appear before them although emphasizing that judges must exercise caution in their use of social networks. Kentucky Advisory Opinion JE-119 (2010); New York Advisory Opinion 08-176; Ohio Advisory Opinion 2010-7.

A **California** allows a judge to interact on social media sites with attorneys who may appear before the judge, but not interact with attorneys who have cases pending before the judge. California Advisory Opinion 66 (2010).

A Pennsylvania judge reinstated drunken-driving charges against a **Pennsylvania** state representative, holding that the prior judge should have recused because he was the legislator’s Facebook friend. The prior judge had thrown out the prosecutor’s evidence against the representative.

### **Should incorrect legal and evidentiary rulings be a basis for discipline?**

The **Arizona Commission on Judicial Conduct** reprimanded Judge Caryl Parker for stating that she lacked jurisdiction to consider a punitive damages claim, preventing the complainant from asking leading questions of an adverse witness, and providing inaccurate and misleading information to the Commission. The Commission noted that the judge’s statement that she lacked jurisdiction to consider a punitive damages claim and her refusal to allow the complainant to ask leading questions were misstatements of

clear law and that, while it did “not believe either legal error affected the outcome of the case, the judge clearly misapplied or ignored the law.”

The judge claimed in her response to the Commission that the 26 photographs the plaintiff had offered were cumulative, but the recording of the proceeding clearly demonstrated that the 26 exhibits were separate documents establishing the parties’ communication history. The judge also claimed that she had to “continually admonish [the complainant] for interrupting when others were speaking,” but the recording of the proceeding showed that the complainant had not interrupted others.

[www.azcourts.gov/LinkClick.aspx?fileticket=GEIqZAAz8KY%3d&tabid=4217&mid=5582](http://www.azcourts.gov/LinkClick.aspx?fileticket=GEIqZAAz8KY%3d&tabid=4217&mid=5582)

The **Kentucky Judicial Conduct Commission** publicly reprimanded Judge Gregory Popovich for (1) failing to use procedures that adequately assured that some defendants understood and were able to understand their procedural rights, including the right to counsel, to trial by jury, and not to incriminate themselves and (2) addressing some parties and counsel in undignified and demeaning language. The Commission also ordered the judge to complete legal education on judicial demeanor/temperament and constitutional procedures/due process.

The **North Carolina Supreme Court** suspended Judge Denise Hartsfield for 75 days without pay for ticket-fixing. Among the conduct, the judge admitted that she dismissed driving while license revoked cases, on her own motion, without hearings, and without authorization of the prosecuting authority.

Believing the district attorney’s charging policy punished the defendants after they had done what they needed to do to obtain a valid driver’s license, the judge would dismiss the cases. She ceased the practice after a professor at the UNC School of Government told her she did not have jurisdiction to dismiss the charges in that manner.

The **New Mexico Supreme Court** ordered that Judge John Pope permanently resign, effective March 16, 2012, and never hold any New Mexico judicial office. The **Judicial Standards Commission** had filed a petition for temporary suspension after he tested positive for alcohol consumption in a random urine test administered by a probation officer in February. Random testing was one of the conditions imposed on the judge in disciplinary proceedings in 2006 in which the judge had stipulated that he suffers from the disease of alcoholism.

In May 2010, Cynthia Judge Brim was one of 4 judges reassigned and paired with mentor judges by the Chief Judge for Cook County, **Illinois**, after a FOX Chicago News/Better Government Association investigation showed some judges were leaving court earlier than they were supposed to.

The **Wisconsin** Republican Party has filed a complaint with the **Judicial Commission** alleging Judge David Flanagan should have disclosed that he had signed a petition to recall Governor Scott Walker before issuing a temporary injunction that bars the implementation of photo ID requirements in a state law.

The **Arizona Commission on Judicial Conduct** issued a public reprimand to Judge Clancy Jayne for advertisements for his wedding services on his personal web-site. The Commission noted that the ads were a clear violation warranting a public reprimand because the judge had received an advisory letter when he previously included a wedding services advertisement on his website.

[www.azcourts.gov/LinkClick.aspx?fileticket=PIEbK3mwfak%3d&tabid=4217&mid=5582](http://www.azcourts.gov/LinkClick.aspx?fileticket=PIEbK3mwfak%3d&tabid=4217&mid=5582)

**Colorado** attorney regulation counsel John Gleason and James Sudler were appointed by the **Arizona Chief Justice** to prosecute a lawyer disciplinary case against the former Maricopa County (Phoenix) District Attorney and a deputy DA. Messrs. Gleason and Sudler first began working on the case two years ago. The disciplinary allegations include the improper filing of criminal charges against a district court judge. A fascinating ABA Journal article about the prosecution is at:

[www.abajournal.com/magazine/article/the\\_prosecutor\\_on\\_trial\\_ex-maricopa\\_co\\_atty\\_faces\\_disbarment\\_for\\_political/](http://www.abajournal.com/magazine/article/the_prosecutor_on_trial_ex-maricopa_co_atty_faces_disbarment_for_political/)

The **Wisconsin Judicial Commission** has filed a complaint alleging Supreme Court Justice David Prosser touched Supreme Court Justice Ann Bradley's neck without her permission and told Chief Justice Shirley Abrahamson, in the presence of other justices, "you are a total bitch."

According to news reports, settlement talks between the special prosecutor appointed for the Commission and Justice Prosser's attorney were unsuccessful.

212 law professions signed a letter to the **U.S. Supreme Court** calling on the justices to voluntarily adopt the code of conduct that applies to other federal judges and to implement a mechanism for reviewing a justice's decision not to recuse from a case

[www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/law-prof-letter-to-scotus-3-5-12.pdf](http://www.afj.org/connect-with-the-issues/supreme-court-ethics-reform/law-prof-letter-to-scotus-3-5-12.pdf)

Without comment, the **U.S. Supreme Court** denied a motion by the organization Freedom Watch for time at the oral argument on the Patient Protection and Affordable Care Act to argue that Justice Elena Kagan should be disqualified from the case.