

# Disorder in the COURT

Attorneys have an ethical duty to report judicial misconduct. Whether your reputation or your career is on the line, don't be an accessory to judicial misconduct.

By Philip Bogdanoff

A married judge had a secret affair with the married director of the community corrections facility in her county for two years. Even though she was a non-voting member of the board of this facility, she helped set the facility's operating budget, including the director's salary, incarcerated defendants to this facility and heard testimonies from employees of this facility.<sup>1</sup> This judge also sent sexually explicit emails, texts, instant messages and nude photos of herself to the director. She used her judicial chambers during the day to carry on her

affair, performing sexual acts in her chambers and forcing her staff to interrupt her sexual activities to carry out court proceedings. She also directed her staff to keep the affair a secret. Upon the judge's request, two local attorneys that practiced in her court allowed the judge to use their homes to carry out the affair. The judge never disclosed her inherent conflict of interest to any defendants, litigants or attorneys.



When the judge heard that several attorneys threatened to disclose the affair and file an ethics complaint, she self-reported the affair to the chief counsel of the West Virginia Judicial Commission. After the judge self-reported her conduct, the judge's law clerk, several attorneys and the prosecutor filed ethics complaints against the judge alleging a conflict of interest. The West Virginia Judicial Hearing Board found 11 violations of seven Canons of the West Virginia Code of Judicial Conduct, including failing to maintain high standards of conduct, failing to promote public confidence in the integrity and impartiality of the judiciary, allowing social relationships to influence the judge's judicial conduct or judgment, failing to maintain professional competence in judicial administration, failing to have her staff observe the standards of fidelity and diligence that apply to the judge and causing the judge's extra-judicial activities to cast reasonable doubt on the judge's ability to act impartially and interfere with the proper performance of her duties.<sup>2</sup>

When the West Virginia Supreme Court heard the case, the judge asserted in her defense that her affair was "the worst kept secret in the courthouse" and that for two years no one filed an ethical complaint against her or sought to have her disqualified. The West Virginia Supreme Court stated that a "no harm, no foul" rule does not exist in the Code of Judicial Conduct. Further, the Court noted that attorneys were naturally reluctant to file an ethics complaint and waited until after disciplinary charges were filed against the judge because she was the only circuit judge in the county and attorneys feared that they would be labeled as rats. The Court censured the judge for each of her 11 violations of the Code of Judicial Conduct and ordered her suspended without pay.<sup>3</sup>

#### **Attorneys have an ethical duty to report judicial misconduct**

When discussing this case during an Ohio CLE presentation, the overwhelming consensus was that attorneys are reluctant to report judicial misconduct since they must maintain a practice in the courtroom where the judge presides; however, attorneys have an ethical duty to report judicial misconduct. Rule 8.3(b) of the Ohio Rules of Professional Conduct indicates that an attorney who possesses unprivileged information that a judge has violated the Code of Judicial Conduct shall inform the appropriate authority. Further, Rule 8.4(f) of the Ohio Rules of Professional Conduct indicates that it is professional misconduct for a lawyer to knowingly assist a judge in

conduct that is a violation of applicable rules of judicial conduct or other law. Finally, Rule 2.16(B) of the Code of Judicial Conduct states, "A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer."

It is essential to our system of justice that attorneys report violations of the Code of Judicial Conduct. Disciplinary counsel and the Board of Professional Conduct can provide advice and answer questions if an attorney suspects that a judge's conduct violates the Code of Judicial Conduct.

The Ohio Supreme Court has stated that judges are subject to the highest standards of ethical conduct.<sup>4</sup> They should perform their work with a high degree of competence, and should treat litigants, witnesses, attorneys and others who appear before them with courtesy and respect.<sup>5</sup> The Ohio Supreme Court has emphasized that, "It is of utmost importance that the public have confidence in the integrity and impartiality of the judiciary."<sup>6</sup> If attorneys who have knowledge of judicial misconduct are unwilling to file a complaint or notify disciplinary counsel, how can the public have confidence in the impartiality and integrity of our system of justice?

#### **A judge shall promote public confidence in the judiciary and shall perform duties impartially**

Rule 1.2 of the Ohio Code of Judicial Conduct states that "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. Rule 2.11 states that, "a judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Last year, the Ohio Supreme Court interpreted these rules when disciplinary counsel alleged that Judge Oldfield violated the Code of Judicial Conduct when hearing cases involving attorney Catherine Loya.<sup>7</sup> After a party, Judge Oldfield was given a ride home by Loya, the public defender assigned to her courtroom. The police found the judge and Loya parked in a strip mall, and Loya smelled of alcohol. The officer believed that she was drinking and asked her to submit to a sobriety test, and she refused. Loya was arrested and stayed with the judge for three days, and the judge drove her to work. Loya appeared before Judge Oldfield in Akron Municipal Court 53 times after the arrest. The Ohio Supreme Court held that,

"Because Loya was temporarily living with Judge Oldfield and because the judge was a potential witness in Loya's criminal prosecution, Judge Oldfield should have recused herself from cases in which Loya was representing clients. Under the circumstances, her 'impartiality might reasonably be questioned.' Jud.Cond.R. 2.11(A). By creating this appearance of impropriety, Judge Oldfield failed to promote public confidence in the judiciary as required by Jud. Cond.R. 1.2."<sup>8</sup> The Court felt strongly that when a judge drives a person home after his or her arrest, there is an impression of bias whether the person is before the court or representing a person before the court.<sup>9</sup> The Court ordered a public reprimand.

#### **A judge should be patient, dignified and courteous**

The Ohio Supreme Court has made it clear that it expects judges to have a high degree of professionalism on the bench and to treat everyone in the courtroom with courtesy and respect. The Ohio Supreme Court Commission on Professionalism has even published a "Do's and Don'ts" on Judicial Professionalism to guide judges on their conduct.<sup>10</sup> This guide indicates that judges are to be patient and temperate, especially under trying circumstances. It also indicates that judges are not to chastise, correct or question attorneys in a demeaning manner, especially in front of their clients or the jury. Rule 2.8(B) of the Ohio Code of Judicial Conduct indicates that, "A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control."

In 2012, the Ohio Supreme Court interpreted this rule when disciplinary counsel filed a complaint against a Massillon municipal judge for making improper comments in his courtroom while speaking to a defendant.<sup>11</sup> Judge Elum sentenced an offender of underage drinking to probation. When the offender did not pay his fines, he was summoned to the probation department, but Judge Elum interceded and brought him to court for a "probation review" without a prosecutor or attorney being present. He told the probationer to "Quit f\*\*\*ing up," and "you have a bad case of D.H. Dickheaditis." He also stated, "You're screwing off. You can't keep continuing to screw off or you'll be like the rest of the dickheads at the Stark County Jail."<sup>12</sup> The parties stipulated, the board found, and the Ohio Supreme Court held

that Judge Elum's conduct violated Jud. Cond.R. 1.2 (a judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety) and 2.8(B) (a judge shall be patient, dignified, and courteous to litigants). "By using vulgar and intemperate language, Judge Elum behaved in an undignified, unprofessional, and discourteous manner toward litigants in his courtroom."<sup>13</sup> The Court ordered a six-month stayed suspension; Judge Elum also had a second count involving a dispute with the chief of the police of the Massillon Police Department that contributed to this sanction.

### A trial judge cannot coerce parties to accept a plea bargain

Rule 2.6(B) of the Ohio Rules of Judicial Conduct indicate that, "A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement." The Ohio Supreme Court's Commission on Professionalism has indicated that judges are not to "threaten or disclose how you are leaning on a dispositive motion as a means of forcing a settlement."<sup>14</sup> The Ohio Supreme Court found that a magistrate in a domestic relations court violated this rule when attempting to obtain a settlement in a divorce action involving child custody.<sup>15</sup>

The Court has also addressed this conduct under the prior Code of Judicial Conduct. In *Disciplinary Counsel v. Parker*, the judge recessed the jury during a domestic-violence case, stepped down from the bench and told defense counsel that the prosecutor was "about ready to offer" a plea and that the defense counsel was "about ready to take it."<sup>16</sup> The prosecutor, however, had not previously offered a plea deal to the defendant. When the prosecutor refused to offer a minor misdemeanor, the judge demanded an explanation in chambers. After the prosecutor again refused to offer a minor misdemeanor, the judge tried ex parte to persuade the police officer to agree to the lesser minor-misdemeanor charge.

The Ohio Supreme Court held that "strong-arm measures to coerce a plea agreement necessarily compromise a defendant's right to trial or a prosecutor's discretion and are antithetical to a fair and balanced criminal justice system."<sup>17</sup> Judicial advocacy is strictly forbidden: "The judge may not ... materially assist one party at the expense of the other. Such advocacy creates the appearance, and perhaps the reality, of partiality on the part of the judge. This, in turn,

erodes public confidence in the fairness of the judiciary and undermines the faith in the judicial process that is a necessary component of republican democracy."<sup>18</sup> In *Disciplinary Counsel v. O'Neil*, the Court held that a judge commits a disciplinary violation when the judge coerces a plea by threatening to revoke a defendant's bond.<sup>19</sup> Although courts exercise their discretion in numerous ways, judicial discretion does not allow strong-arm measures that compromise a defendant's right to trial.<sup>20</sup>


### Judges shall perform their duties without bias or prejudice

Rule 2.3 of the Code of Judicial Conduct indicates that judges shall perform their duties without bias or prejudice and "shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex \*\*\*." The Ohio Supreme Court reviewed this issue under the prior code of Judicial Conduct when Summit County Judge James Campbell was accused of sexual misconduct in his courtroom.<sup>21</sup>

When one young female assistant prosecutor asked about what procedure he wanted to follow in welfare fraud cases, he indicated that it depended on whether she wanted to be his lover. On another occasion, when a second female assistant prosecutor asked him if he was ready to begin court, he responded, "Just tell me when and where. When a young woman tells me she's ready, I am ready to go." Both prosecutors indicated that the comments had a sexual connotation and were accompanied by a smirk. Each prosecutor avoided the judge's courtroom after these encounters.<sup>22</sup>

The judge also attempted to kiss and hug a female attorney in his chambers. When she told him it was inappropriate, he told her "she knew what the score was." She then ran out of his chambers. The attorney felt very uncomfortable whenever she had to appear in Judge Campbell's courtroom and her stomach would be tied up in knots. The judge also made inappropriate comments and advances toward the director of the court's psycho-diagnostic unit by stroking her hair and kissing her.<sup>23</sup> The Ohio Supreme Court noted that Judge Campbell had a position of influence over his victims and, "Such conduct would be unacceptable by any member of society. We, however, find it particularly intolerable by an attorney and abhorrent for a member of the judiciary."<sup>24</sup> The judge resigned his office, and the Ohio Supreme Court suspended his law license for one year.

### Contact Ohio disciplinary counsel if you believe a judge has violated the Code of Judicial Conduct

When a judge's conflict of interest was the "worst kept secret in the courthouse," attorneys ignored the misconduct because they practiced in the judge's courtroom; however, if these same attorneys observed a drunk driver weaving on the roadway, they would call 911 without hesitation and report the driver because the driver is a danger to the public. A judge's violation of the Code of Judicial Conduct can be just as dangerous to the legal community as a drunk driver is to the public. Do not hesitate to contact disciplinary counsel to seek guidance if you believe that a judge has violated the Code of Judicial Conduct. 

### Endnotes

- <sup>1</sup> *In Re Wilfong*, 765 S.E.2d 283 (W.Va. 2014).
- <sup>2</sup> *Id.*
- <sup>3</sup> *Id.*
- <sup>4</sup> *Mahoning Cty. Bar Assn. v. Franko*, 168 Ohio St. 17, 23 (1958).
- <sup>5</sup> *Disciplinary Counsel v. O'Neill*, 815 N.E.2d 286, 103 Ohio St.3d 204, 2004-Ohio-4704 (2004).
- <sup>6</sup> *Disciplinary Counsel v. Allen*, 79 Ohio St.3d 494, 495, 684 N.E.2d 31 (1997).
- <sup>7</sup> *Disciplinary Counsel v. Oldfield*, \_\_\_ N.E.2d \_\_\_, 140 Ohio St.3d 123, 2014-Ohio-2963 (2014).
- <sup>8</sup> *Id.* at 127.
- <sup>9</sup> *Id.*
- <sup>10</sup> [www.supremecourt.ohio.gov/Publications/AttySvcs/judProfessionalism.pdf](http://www.supremecourt.ohio.gov/Publications/AttySvcs/judProfessionalism.pdf).
- <sup>11</sup> *Disciplinary Counsel v. Elum*, 133 Ohio St.3d 500 (2012).
- <sup>12</sup> *Id.* at 501.
- <sup>13</sup> *Id.* at 505.
- <sup>14</sup> [www.supremecourt.ohio.gov/Publications/AttySvcs/judProfessionalism.pdf](http://www.supremecourt.ohio.gov/Publications/AttySvcs/judProfessionalism.pdf).
- <sup>15</sup> *Disciplinary Counsel v. McCormack*, 977 N.E.2d 598, 133 Ohio St.3d 192, 2012-Ohio-4309 (Ohio 2012).
- <sup>16</sup> *Disciplinary Counsel v. Parker*, 876 N.E.2d 556, 116 Ohio St.3d 64, 2007-Ohio-5635 (2007).
- <sup>17</sup> *Id.* at 68 (citations omitted).
- <sup>18</sup> *Id.* (citations omitted).
- <sup>19</sup> *Disciplinary Counsel v. O'Neill*, 815 N.E.2d 286, 103 Ohio St.3d 204, 2004-Ohio-4704 (2004).
- <sup>20</sup> *Id.*
- <sup>21</sup> *Disciplinary Counsel v. Campbell*, 68 Ohio St.3d 7 (1993).
- <sup>22</sup> *Id.*
- <sup>23</sup> *Id.*
- <sup>24</sup> *Id.*

### Author bio



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