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Ethical Judicial Culture

Cynthia Gray

The problems that roil society affect the judiciary. Most recently, an uncontained virus challenged courts to perform their duties remotely for a time and then safely when they reopened. The #MeToo movement forced judicial systems to reckon with their past negligence and adopt reforms to do better in the future. And the racial justice movement of 2020 prompted commitments from state courts to, for example, “look afresh at what we are doing, or failing to do, to root out any conscious and unconscious bias in our courtrooms; to ensure that the justice provided to African-Americans is the same that is provided to white Americans; to create in our courtrooms, our corner of the world, a place where all are truly equal.”¹

Individual judges willing to take up the challenge of justice movements must remember the ethical restrictions that require both impartiality and the appearance of impartiality to protect the judiciary’s credibility. For example, judicial ethics committees have warned judges not to delegate the judiciary’s message to others by joining the millions demonstrating about numerous causes across the country. Judges have been advised not to take part even in such legal community events as “A Silent March of Black Female Attorneys of Connecticut”² or a bar association’s silent “walk for justice.”³ Advisory opinions that do not prohibit marching outright condition participation on a daunting list of criteria.⁴ The general public can protest and declare their view of a just result in a case without waiting for proof beyond a reasonable doubt. In contrast, judges cannot risk the neutrality that gives the public confidence in their ability to preside with an open mind over those contentious cases.

PROFESSIONAL WORKPLACE

Although systemic issues of bias must be broadly remedied by the courts, the enforcement of the strong judicial ethics canons already in place can address specific, frequently high-profile incidents of sexual misconduct or racist behavior. Rule 2.3(B) of the 2007 American Bar Association *Model Code of Judicial Conduct* provides:

A judge 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, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge’s direction and control to do so.⁵

Recent examples of sanctions under this rule are as follows:

- A judge who asked a sexual assault victim, “Close your legs? Call the police? Did you do any of those things?”⁶
- A judge who told an assistant district attorney, “I don’t care what anybody wears, Ms. McKeegan, if you wear yoga pants to court, it’s okay with me.”⁷
- A judge who told two female assistant district attorneys in the hallway, “I have the biggest balls in the courthouse.”⁸
- A judge who gave a female judge and four female court staff a “Gag Order, Esquire” patch.⁹
- A judge who said during a domestic violence case, “On a lighter note, I can take judicial notice that women can drive you crazy.”¹⁰

Footnotes

1. Letter from the Seven Justices of the Massachusetts Supreme Judicial Court to Members of the Judiciary and the Bar (June 3, 2020) (<https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and>). The National Center for State Courts has collected statements on racial justice made in 2020 by court leaders and courts on its website at <https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice>.
2. Connecticut Informal Opinion 2020-3 (<https://jud.ct.gov/Committees/ethics/sum/2020-03.pdf>).
3. New York Advisory Opinions 2020-92/93 (https://www.nycourts.gov/legacyhtm/ip/judicialethics/opinions/20-92_20-93.htm).
4. The Center for Judicial Ethics has summaries of judicial ethics opinion on judges’ and court staff participating in demonstrations and other issue-related community events on its website at https://www.ncsc.org/__data/assets/pdf_file/0027/42588/JudicialParticipationinMarches.pdf
5. See https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_3biasprejudiceandharassment/. Most

- jurisdictions have adopted a version of this rule.
6. In the Matter of Russo, 231 A.3d 563 (New Jersey 2020) (removal for this and other misconduct).
7. In the Matter of Gerber, Determination (New York State Commission on Judicial Conduct June 27, 2020) (<http://cjc.ny.gov/Determinations/G/Gerber.Howard.2020.06.17.DET.pdf>) (admonition for this and other misconduct).
8. Inquiry Concerning Bennett, Decision and Order (California Commission on Judicial Performance March 25, 2020) (https://cjp.ca.gov/wp-content/uploads/sites/40/2020/03/Bennett_Censure_3-25-20.pdf) (censure for this and other misconduct).
9. In the Matter of Potter, Stipulation and Order of Consent to Public Admonishment (Nevada Commission on Judicial Discipline September 30, 2020) (http://judicial.nv.gov/uploadedFiles/judicialnv.gov/content/Discipline/Dicisions/2020_09_30_CaseNo2019-182-P.pdf).
10. Inquiry Concerning Laettner, Decision and Order (California Commission on Judicial Performance November 6, 2019) (https://cjp.ca.gov/wp-content/uploads/sites/40/2019/11/Laettner_DO_Removal_11-06-19.pdf) (removal for this and other misconduct).

- A judge who described his court reporter to prospective jurors as, “Quite tall,” and “very pretty,” adding, “[you will] enjoy looking at her.”¹¹
- A judge who asked a female deputy district attorney, “What kind of Asian [are you]?”¹²
- A judge who told an African-American defendant to stop “shucking and jiving.”¹³
- A judge who referred to Caucasian and African-American defendants as “crackers” and “homeboys.”¹⁴
- A judge who told a reporter, “The young black men – and it’s primarily young black men rather than young black women – charged with felony offenses, they’re not getting good advice from their parents. Who do they get advice from? Rag-tag organizations like Black Lives Matters, which tell you, ‘Resist police,’ which is the worst thing in the world you could tell a young black man . . . they teach contempt for the police, for the whole justice system.”¹⁵
- A judge who said to a courtroom audience, “the Grand Wizard of our Supreme Court said we have to wear these masks,” or words to that effect.¹⁶
- A judge who, when complaining to law enforcement about trucks associated with a solar farm project that was next to property owned by her family, said, “None of them had driver[s] licenses, since they are Mexican.”¹⁷

It is reasonable for the public to believe that judges who say such things are less likely to listen to and believe people like those they singled out for extraneous comments and disrespectful presumptions. The sanctions issued demonstrate to the public and remind judges that the judiciary does not tolerate harassment or bias. To protect the credibility to the judiciary, the cases do not accept “just joking” as an excuse or require proof of intentional bias before sanctioning its expression.

The cases illustrate that the best way for individual judges to avoid any suggestion of harassment or bias is to resist the urge to play for laughs, to shun references to personal characteristics, and to examine their vocabularies for stereotypes. A strictly business courtroom and courthouse may seem unnecessarily solemn, but a casual, informal culture leads to gaffes, ill-advised attempts at humor, and careless comments. Rigorous professionalism in the workplace better supports claims of judicial neutrality than does an over-familiar atmosphere that may make traditionally marginalized staff, lawyers, litigants, and judges feel left out, uncomfortable, and discriminated against.

IF YOU SEE SOMETHING, SAY SOMETHING

It is not enough for individual judges to avoid harassment or biased behavior themselves, and the absence of an effective requirement that judges confront other judges’ misconduct is an obvious deficiency in judicial ethics. Rule 2.15 of the model code does provide:¹⁸

(A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge’s honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority. . . .

(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.

Despite the “shall” language, the rule is almost never the basis for discipline, and many advisory opinions approve a passive approach that allows judges to believe that, unless they are an eyewitness to an offense that should result in removal, they can stick their heads in the sand. However, when a scandal finally breaks, the public is unlikely to believe that other judges knew nothing and readily believe they covered up for a colleague. The code is only the minimum required; judges are not prohibited from doing more in the interests of public confidence.

The appearance of a country club judiciary should be replaced with an ethos of bystander intervention where judges resist inappropriate slights, innuendos, and microaggressions directed to other people by other judges.¹⁹ This does not presume bigotry by the other judge but recognizes that unconscious bias will remain unconscious unless its expression becomes a teachable moment. However awkward and uncomfortable, judges need to learn to say to other judges, “Let her speak,” “That is not funny,” and “That is not appropriate” in response to interruptions, off-color jokes, inappropriate compliments, careless clichés, or thoughtless affronts.

Further, while judges should not report every bit of court-

“A strictly business courtroom . . . may seem unnecessarily solemn, but a casual, informal culture leads to gaffes, ill-advised attempts at humor, and careless comments.”

11. *Id.*

12. *Id.*

13. Inquiry Concerning Bennett, *supra* n. 8.

14. Disciplinary Counsel v. Burge, 134 N.E.3d 153 (Ohio 2019) (six-month suspension of former judge’s law license for this and other misconduct).

15. Public Warning of McSpadden (Texas State Commission on Judicial Conduct November 12, 2019) (<http://www.scjc.texas.gov/media/46781/mcspadden18-0682pubwarn111219.pdf>).

16. Re Ledsinger (Tennessee Board of Judicial Conduct September 28, 2020) (http://www.tncourts.gov/sites/default/files/docs/jere_ledsinger_reprimand_2020_09_28.pdf) (reprimand).

17. Public Warning of Plaster and Order of Additional Education (Texas State Commission on Judicial Conduct August 12, 2020)

(<http://www.scjc.state.tx.us/media/46805/plaster19-1857public-warning-oae.pdf>).

18. See https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_15respondingtojudicialandlawyer-misconduct/.

19. Microaggressions “are the thinly veiled, everyday instances of racism, homophobia, sexism (and more) that you see in the world. Sometimes it’s an insult, other times it’s an errant comment or gesture.” A. Limbong, *Microaggressions Are a Big Deal: How to Talk Them Out and When to Walk Away*, NPR (June 2, 2020) (<https://www.npr.org/2020/06/08/872371063/microaggressions-are-a-big-deal-how-to-talk-them-out-and-when-to-walk-away>).

house gossip, there is often a lot of truth in hearsay, and some kind of follow-up is necessary for anything but the most obviously scurrilous rumor. The kind of evidence needed to prove judicial misconduct may only be discoverable by the agency constituted for that purpose and the kind of pattern of misconduct that requires discipline may only be discernable if enough single incidents are reported.

There will be no rapid post-pandemic return to normal for the courts; long-term changes such as more technology and hand-washing will be required. Similarly, forgetting the recent lessons learned from the #MeToo and racial justice movements is not an option for the courts.



Since October 1990, Cynthia Gray has been director of the Center for Judicial Ethics, a national clearinghouse for information about judicial ethics and discipline that is part of the National Center for State Courts. (The CJE was part of the American Judicature Society before that organization's October 2014 dissolution.) She summarizes recent cases and advisory opinions, answers requests for information about judicial conduct, writes a weekly blog (at www.ncsjudicialethicsblog.org), writes and edits the Judicial Conduct Reporter, and organizes the biennial National College on Judicial Conduct and Ethics. She has made numerous presentations at judicial-education programs and written numerous articles and publications on judicial-ethics topics. A 1980 graduate of the Northwestern University School of Law, Gray clerked for Judge Hubert L. Will of the United States District Court of the Northern District of Illinois for two years and was a litigation attorney in two private law firms for eight years.

FLYING COLORS by Judge Vic Fleming

The theme answer's first parts signify purity, hardiness, and vigilance.

Across

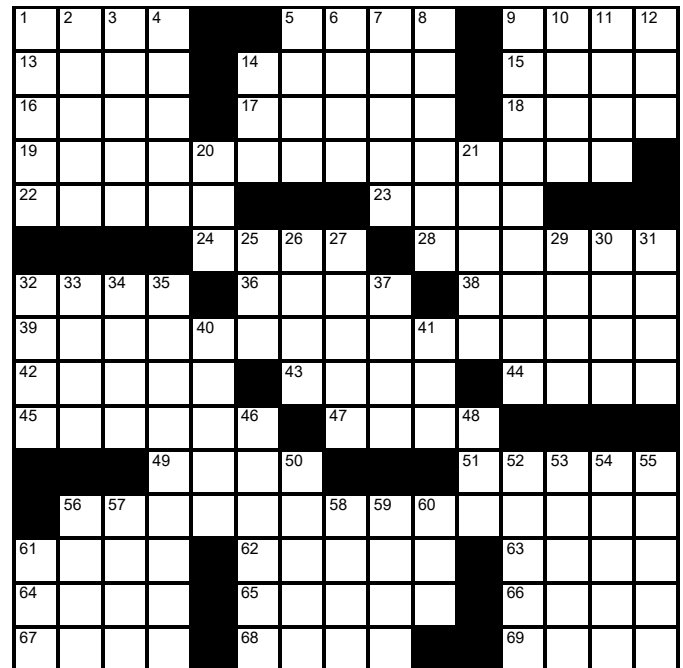
- 1 Grades that would get you kicked out of law school
- 5 Buds
- 9 First name in parenthood, often
- 13 First name in animation
- 14 Anti-flooding device
- 15 Significant stretches
- 16 Brunei's continent
- 17 Law firm's specialties
- 18 What snobs may put on
- 19 North Dakota region or cowboy folk song inspired thereby
- 22 Admiral's charge
- 23 Give off
- 24 Puppeteer Tony
- 28 Draw out, as facts from a witness
- 32 Pops, as questions to a witness
- 36 ___ the jury
- 38 Tickle the funny bone of
- 39 They are colorless, lack hemoglobin, and contain nuclei
- 42 ___ Dame
- 43 ___ it over
- 44 "Don't change," to editors
- 45 Earth's shape, roughly
- 47 Track competition
- 49 El ___
- 51 Ayn Rand's "___ Shrugged"
- 56 What many a wage earner does for a living
- 61 "Arrivederci" alternative
- 62 Midway alternative
- 63 "Casablanca" character
- 64 Land of the llama

- 65 Ambiance factor
- 66 Vending machine feature
- 67 Calligraphers' supplies
- 68 Early garden
- 69 Actress Daly

Down

- 1 Bud of Snow White
- 2 Exhibit prop
- 3 Omit from pronunciation
- 4 "Blank" look
- 5 Papa, in Paris
- 6 Assert, in a pleading
- 7 ___ of court
- 8 "Open ___"
- 9 Scheduled feedings
- 10 Singer India. ___
- 11 William & ___ Law School
- 12 "If the law supposes that, ... the law is a ___": Dickens
- 14 Loo
- 20 Part of FWIW
- 21 Spring bloom
- 25 Police alert, initially
- 26 Biscuit alternative
- 27 Cheerlessness
- 29 Have a ___ following
- 30 Capri or Wight
- 31 LSAT's "T"
- 32 Barley bristles
- 33 "Little ___ of Horrors"
- 34 ___ and kin
- 35 Taxing
- 37 Age-old tales
- 40 Like a moon-lit crop circle
- 41 '50s White House monogram
- 46 Cipher, as a message
- 48 Seadog
- 50 ___ and aahed
- 52 '60s dance
- 53 Candy on a stick, casually
- 54 Fire investigator's concern
- 55 Blade site
- 56 Muy ___
- 57 Bird symbolizing happiness
- 58 Netlike fabric

- 59 "Battlefield Earth" author Hubbard
- 60 ___ Lingus
- 61 "Market basket" cost meas.



Judge Fleming is a widely published cruciverbalist. Send questions and comments to judgevic@gmail.com.

Solution is on page 107.