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Judging and Emotion Work: Discipline Processes as Guidance

Sharyn Roach Anleu, Jennifer Elek & Kathy Mack

What constitutes good judging has long been a matter of discussion.¹ Models of good judging contain norms about judicial demeanor and emotion, especially in court, though typically not expressed in those terms.² The conventional model of the impartial judge characterises emotion as incompatible with, and potentially undermining, impartiality and so threatening the legitimacy of judicial authority and the rule of law.³ However, judicial work necessarily engages a wide range of emotions and requires considerable emotion capacities, which can (appear to) conflict with this expectation of dispassionate, impersonal, and detached judging.⁴ Performing judicial authority can entail considerable emotion work⁵ on the part of the judicial officer, managing the judicial officer's own felt and displayed emotion, as well as those of other courtroom participants.⁶

From a cognitive psychology perspective, Maroney and Gross argue that 'good judges should seek not to eliminate emotion entirely, but rather to manage emotion skillfully in light of the diverse professional challenges they face.'⁷ Similarly, Barrett points out: 'Rather than pretend that affect is absent, it's better to use affect wisely.'⁸

In the current challenging and uncertain climate of political polarization and a global public health crisis with its collateral consequences, the pressure on court users and judicial officers alike generates more, and more intense, emotion. One year in, many people are exhibiting the effects of "prolonged stress, exacerbated by the grief, trauma, and isolation" related to the pandemic.⁹ Judges are called upon to manage overwhelming workloads, growing case backlogs, and rising interpersonal tensions. Changes to

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Footnotes

1. See JENNIFER K. ELEK, DAVID B. ROTTMAN, SHELLEY SPACEK MILLER & LYDIA HAMBLIN, *ELEMENTS OF JUDICIAL EXCELLENCE: A FRAMEWORK TO SUPPORT THE PROFESSIONAL DEVELOPMENT OF STATE TRIAL COURT JUDGES* (2017); see also Andrew J. Wistrich, *Defining Good Judging* in *THE PSYCHOLOGY OF JUDICIAL DECISION MAKING* 249 (David E. Klein & Gregory Mitchell eds., 2010).
2. See Sharyn Roach Anleu, David Rottman & Kathy Mack, *The Emotional Dimension of Judging: Issues, Evidence, and Insights*, 52 *CT. REV.* 60 (2016); see also Kathy Mack & Sharyn Roach Anleu, *Performing Impartiality: Judicial Demeanor and Legitimacy*, 35 *LAW & SOC. INQUIRY* 137 (2010).
3. See Martin Krygier, *The Rule of Law: Pasts, Presents, and Two Possible Futures*, 12 *ANN. REV. L. & SOC. SCI.* 199 (2016); see also BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010).
4. STINA BERGMAN BLIX & ÅSA WETTERGREN, *PROFESSIONAL EMOTIONS IN COURT: A SOCIOLOGICAL PERSPECTIVE* (2018); Elek et al., *supra* note 1; Steve Leben, *Exploring the Overlap Between Procedural-Justice Principles and Emotion Regulation in the Courtroom*, 9 *ONATI SOCIO-LEGAL SERIES* 852 (2019); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 *CALIF. L. REV.* 629 (2011); Sharyn Roach Anleu & Kathy Mack, *Magistrates' Everyday Work and Emotional Labour*, 32 *J. L. & SOC.* 590 (2005); Sharyn Roach Anleu, Kathy Mack, Jennifer

Elek & David Rottman, *Judicial Ethics, Everyday Work, and Emotion Management*, 8 *J. L. & CTS.* 127 (2020); Jennifer A. Scarduzio, *Maintaining Order through Deviance? The Emotional Deviance, Power, and Professional Work of Municipal Court Judges*, 25 *MGMT. COMM'N. Q.* 285 (2011); *Judging, Emotion and Emotion Work*, 9 *ONATI SOCIO-LEGAL SERIES* (Stina Bergman Blix, Kathy Mack, Terry Maroney & Sharyn Roach Anleu, eds., 2019).

5. Several terms, used somewhat interchangeably, describe concepts relating to emotion and work. 'Emotional labor' (ARLIE R. HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (1983); Amy S. Wharton, *The Psychosocial Consequences of Emotional Labor*, 561 *ANNALS AM. ACAD. POL. & SOC. SCI.* (1999); Amy S. Wharton, *The Sociology of Emotional Labor*, 35 *ANN. REV. SOC.* 147 (2009)). 'Emotion work' (Arlie R. Hochschild, *Emotion Work, Feeling Rules and Social Structure*, 85 *AM. J. SOC.* 551 (1979)). 'Emotion management' and 'emotion regulation' (James J. Gross, *Emotion Regulation: Current Status and Future Prospects*, 26 *PSYCHOL. INQUIRY* 1 (2015); Terry A. Maroney & James J. Gross, *The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective*, 6 *EMOTION REV.* 142 (2014)). 'Emotional practices' (Monique Scheer, *Are Emotions a Kind of Practice (And Is That What Makes Them Have a History)? A Bourdieuan Approach to Understanding Emotion*, 51 *HIST. & THEORY* 193 (2012)). 'Emotional capital' (Marci D. Cottingham, *Theorizing Emotional Capital*, 45 *THEORY & SOC'Y* 451 (2016)). Related concepts include 'emotional intelligence' (DANIEL GOLEMAN, *WORKING WITH EMOTIONAL INTELLIGENCE* (1998)) and 'emotional granularity' (LISA F. BARRETT, *HOW EMOTIONS ARE MADE: THE SECRET LIFE OF THE BRAIN* (2017)). In this article, we use the term emotion work to convey the effort involved in managing one's own emotions and emotion display, as well as seeking to manage the emotions felt and displayed by others. See SHARYN ROACH ANLEU & KATHY MACK, *JUDGING AND EMOTION: A SOCIO-LEGAL ANALYSIS* (2021).
6. SHARYN ROACH ANLEU & KATHY MACK, *PERFORMING JUDICIAL AUTHORITY IN THE LOWER COURTS* (2017); ROACH ANLEU & MACK, *supra* note 5.
7. Maroney & Gross, *supra* note 5, at 143.
8. BARRETT, *supra* note 5, at 241.
9. *Stress in America 2021: Pandemic Stress One Year On*, AM. PSYCH. ASS'N. (Mar. 2021), <https://www.apa.org/news/press/releases/stress>; Katheryn Yetter & David X. Swenson, *Judicial Stress and Resiliency Survey: COVID-19 Update*, 57 *CT. REV.* 4 (2021).

court practices, including closures, virtual appearances, and other obstacles to access to justice, at a time when court users may find it especially difficult to comply with traditional court orders, all make patience and courtesy even more vital judicial qualities, and emotion work an essential judicial skill.¹⁰

How do judges learn 'to manage emotion skillfully'? Where do they find concrete practical guidance? While there are many sources which identify required, expected, or desired judicial conduct and demeanor, the American Bar Association (ABA) Model Code of Judicial Conduct (2011) (ABA Code) is an important and visible source of guidance in relation to impartiality, dispassion, and emotion.¹¹ ABA Canons 1 and 2 are relevant for judicial emotion display and emotion work. Canon 1 states: 'A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety'. Rule 1.2 elaborates: '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'. Canon 2 provides: 'A judge shall perform the duties of judicial office impartially, competently, and diligently'. Two subsections of Rule 2.8 implicitly address emotion as part of judicial work:

- (A) A judge shall require order and decorum in proceedings before the court.
- (B) 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.¹²

This emphasis on decorum, patience, dignity, and courtesy implicitly acknowledges the human relations and social interaction within the courtroom in which emotion emerges. Achieving, or at least displaying, these qualities may require emotion work on the part of the judicial officer. However, there is relatively little concrete guidance within the Code or its commentary for judges about how to achieve these desired qualities in the emotionally

demanding context of judicial work.¹³

The ABA Code has been adopted (or adapted with modification) by most U.S. states, and all states have a judicial conduct commission or similar body. These bodies investigate complaints against judicial officers,¹⁴ and, where conduct is found to violate Code provisions, impose disciplinary sanctions.¹⁵ The Arizona Commission on Judicial Conduct has a very large, transparent and comprehensive archive of complaints against judicial officers publicly available via its website.

In a previous article, we proposed several research questions about judging and emotion, including: 'What are the formal rules and informal norms that govern emotions in the performance of the judicial role?'.¹⁶ This article addresses that question by asking whether judicial disciplinary cases could help clarify the scope and extent of these norms. Although disciplinary cases represent a very small subset of judicial conduct overall, studying such extreme cases can be valuable.¹⁷ They are visible occasions, which activate explicit consideration of norms and values applied to a concrete situation, in contrast to the more aspirational generalities of the ABA Code.

This article first reviews the overall pattern of complaints and dispositions from the Arizona Commission on Judicial Conduct over a six-year period from 2010 to 2015. It then undertakes a detailed examination of four cases that resulted in a public reprimand. This analysis identifies important norms about emotion, emotion work, and appropriate emotion display or demeanor. However, the study concludes that such material has limited value as practical guidance for judicial emotion work.

JUDICIAL DISCIPLINE IN ARIZONA

Arizona has adopted the ABA Canons 1 and 2 and Rules 2.8(A) and (B) as quoted above.¹⁸ The status of the Arizona Code of Judicial Conduct is articulated as follows:

This code establishes standards for the ethical conduct of

"How do judges learn 'to manage emotion skillfully'? Where do they find concrete practical guidance?"

10. *Coronavirus and the Courts*, NAT'L CTR. FOR STATE CTS. (2021), <https://www.ncsc.org/newsroom/public-health-emergency>; *accord Coronavirus and Judicial Wellbeing*, JUD. COLL. OF VICTORIA <https://www.judicialcollege.vic.edu.au/resources/coronavirus-and-judicial-wellbeing-0>; Jamey H. Hueston, *The Compassionate Court: Reforming the Justice System Inside and Outside*, 57 CT. REV. 108 (2021).

11. Sharyn Roach Anleu, Jennifer Elek & Kathy Mack, *Judicial Conduct Guidance and Emotion*, 28 J. JUD. ADMIN. 226 (2019); *see also* Roach Anleu et al., *supra* note 2.

12. *Rule 2.8: Decorum, Demeanor, and Communication with Jurors*, A.B.A. (Feb. 14, 2020), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule_2_8decorumdemeanorandcommunicationwithjurors.

13. Roach Anleu et al., *supra* note 2; ROACH ANLEU & MACK, *supra* note 5; Anleu et al., *supra* note 11;

14. Judicial conduct disciplinary organizations have different names in different states. For example, 'Commission on Judicial Performance'

in California, 'State Commission on Judicial Conduct' in Texas, 'New York State Commission on Judicial Conduct' in New York, 'Commission on Judicial Conduct' in Kansas, 'Court on the Judiciary' in Delaware, and the 'Judicial Inquiry and Review Commission' in Virginia.

15. Cynthia Gray, *How Judicial Conduct Commissions Work*, 28 JUST. SYS. J. 405 (2007).

16. Roach Anleu et al., *supra* note 2.

17. Bent Flyvbjerg, *Five Misunderstandings About Case-Study Research*, 12 QUALITATIVE INQUIRY 219 (2006); *see also* Lisa L. Miller, *The Use of Case Studies in Law and Social Science Research*, 14 ANN. REV. L. & SOC. SCI. 381 (2018).

18. There are some variations, but none apply to the issues discussed in this article. For example, Rule 2.5(C) states: 'a judge shall participate actively in judicial education programs and shall complete mandatory judicial education requirements.' Rule 2.5(C) has no parallel in the A.B.A. code. This is potentially significant when considering disciplinary processes, as an order may require participation in judicial education.

“This investigation of judicial disciplinary processes is part of a large, cross-national project examining emotion and judging.”

judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the code. The code is intended, however, to provide guidance and assist judges in maintaining the highest standards of

judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.¹⁹

This statement directly links the code provisions to discipline, while confirming that the code is not ‘exhaustive’ and that other resources or ‘standards’ can be drawn on in ‘governing ... judicial ... conduct.’

Arizona set up a conduct commission via a state constitution provision creating the Arizona Commission on Judicial Conduct in 1970. In 1988 the Commission was established as ‘an independent state agency responsible for investigating complaints against justices and judges on the supreme court, court of appeals, superior court, justice of the peace courts, and municipal courts.’²⁰ The Commission has authority to investigate complaints involving violations of the Arizona Code of Judicial Conduct as well as other aspects of judicial behaviour including: ‘willful misconduct in office, willful and persistent failure to perform duties, habitual intemperance [e.g., alcohol or drug abuse], [and] conduct prejudicial to the administration of justice that brings the judicial office into disrepute.’²¹ The Commission does not have jurisdiction to review the substance of a judge’s decision, and it cannot overturn a judge’s rulings, intervene in a case, or award damages or other monetary relief.

The range of dispositions available to the Commission are: dismissal, dismissal with comments, which can include an advisory letter or a warning letter,²² informal sanctions including a reprimand, or directions to participate in counseling or judicial education.²³ The Commission may also initiate confidential consultation with a judge to discuss voluntary retirement or resignation,²⁴ and it is also possible for discipline to be imposed by con-

sent.²⁵ The Commission can recommend formal sanctions of censure, suspension, or removal, which can only be imposed under the authority of the Supreme Court of Arizona.²⁶ A recommendation of censure is final unless a petition to modify is filed with the Court.²⁷ Recommendations for other formal sanctions may be reviewed by request of the judge, the disciplinary counsel, or the Court’s own motion.²⁸

The Commission is made up of 11 members—six judges, two attorneys, and three public members—and is supported by staff including an executive director and disciplinary counsel.²⁹ Commission staff undertake the initial screening of each complaint and make recommendations as to the disposition.³⁰ If the complaint is not recommended for dismissal, then a preliminary investigation is undertaken, under the auspices of the disciplinary counsel. If the Commission decides to recommend informal sanctions, without formal charges, it sends an ‘informal disposition order.’³¹ Either the judge or the complainant can seek reconsideration, or the judge can seek a formal hearing.³² There are several stages of possible further investigation, depending on the findings at each step,³³ including requesting a response from the judge, appointment of an investigative panel, and filing formal charges for the judge to answer, which may entail a hearing to determine if the judge has committed misconduct. Further processes are available where there are allegations of judicial physical or mental incapacity.³⁴

During the early investigation stages, Commission proceedings are confidential,³⁵ as is the case in all states.³⁶ In Arizona, there is a clear statement that ‘[a]s a general rule, complaints against judges shall be available to the public following ... final disposition.’³⁷ The timing and the scope of information available varies with the nature of the Commission’s disposition, and the seriousness of the misconduct. For example, where the complaint is dismissed, only the complaint and the Commission’s order are made publicly available, and all identifying information about the court and any individual are deleted. At the other extreme, where formal charges are laid, the record, as defined in the rules, becomes public after the judge has responded. There is authority for further disclosure in the Commission’s discretion.³⁸

JUDICIAL CONDUCT COMPLAINTS AND OUTCOMES

This investigation of judicial disciplinary processes is part of a large, cross-national project examining emotion and judging.³⁹

19. Arizona Code of Judicial Conduct, Ariz. Sup. Ct. (2009), <https://www.azcourts.gov/Portals/137/rules/Arizona%20Code%20of%20Judicial%20Conduct.pdf>.

20. *Commission on Judicial Conduct: About Us*, ARIZ. COMM’N ON JUD. CONDUCT (2020), <https://www.azcourts.gov/azcjc/Inside-the-CJC/About-Us>.

21. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 6 (2019).

22. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 16 (2019).

23. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 17 (2019).

24. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 16(c) (2019).

25. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 30 (2019).

26. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 18 (2019).

27. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 29(a) (2019).

28. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 29(a) (2019).

29. See ARIZ. CONST. art 6.1, § 1; see also ARIZ. COMM’N ON JUD. CONDUCT,

COMMISSION RULES r. 3(a), 3(b) & 4(a) (2019).

30. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 21 (2019).

31. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 23(b) (2019).

32. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 23(b) (2019).

33. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 22, 23, 24 (2019).

34. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 33 (2019).

35. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 9 (2019).

36. Gray, *supra* note 15.

37. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 9(a) (2019).

38. ARIZ. COMM’N ON JUD. CONDUCT, COMMISSION RULES r. 9(c) (2019).

39. The Changing Judicial Performance: Emotion and Legitimacy project is supported by the Australian Research Council Discovery Project Grant (DP150103663), including International Collaboration Awards with the National Center for State Courts. For further description of this project see Roach Anleu et al., *supra* note 2.

The study of Arizona’s disciplinary procedures began by locating all complaints and any supporting information publicly available on the Commission website, as well as identifying the outcome of complaints for each year including dismissals, dismissals with comments, reprimands, or formal sanctions (that is, censure, suspension or removal).

Table 1 provides information about the disposition of all formal complaints filed, by year, for each of the six years reviewed in this study. From 2010 through 2015, the Arizona Commission on Judicial Conduct disposed of a total of 2,143 formal complaints. Of these 2,143 complaints disposed, 1,879 (87.7%) were dismissed outright and 193 (9.0%) were dismissed with comment. Of the 193 complaints dismissed with comment, the Commission issued a confidential advisory letter to the judge⁴⁰ regarding his or her behavior in 134 cases (6.3% of all dispositions). In the remaining 59 cases disposed as dismissed with comment (2.8% of all dispositions), the judicial officer in question received a private warning from the Commission regarding his or her behavior. For dismissals, the Commission website provides limited information regarding the nature of the complaint and the grounds on which it was dismissed, precluding further analysis. According to the website, most complaints are dismissed because the facts do not support the allegations, or the alleged misconduct does not constitute unethical conduct. Complaints based on alleged legal errors are routinely dismissed, as are complaints alleging judicial bias based only on unfavorable rulings. A party dissatisfied with a judge’s rulings, whether alleging legal error or bias, may pursue appellate remedies, but the Commission lacks jurisdiction to require a judge to alter a ruling.

During the six-year time period under review, the Commission issued a sanction in 71 cases (3.3% of all dispositions). In 59 of these 71 cases (2.8% of all dispositions), the Commission issued an informal public reprimand. The Commission imposed/recommended a formal sanction in response to 12 complaints (0.6% of all dispositions). In nine of these cases, the judge was formally censured; in one case, the judge was suspended without pay; and in two cases, the Commission recommended that the Supreme Court remove the judge from office. In some matters, the judge under review may have retired or resigned before the Commission’s disposition of the case. In such instances, the Commission might categorize the judge’s decision to withdraw from office as a removal disposition, though a judge’s decision to withdraw from office was specifically referenced in some case documentation as a mitigating factor.

The next step in the research was to review the available documentation for all 71 cases in which sanctions were imposed. The aim was to identify those in which unmanaged or inappropriate judicial emotion, especially in the interactive context of the courtroom, was or appeared to be an aspect of the conduct giving rise to the complaint.

Rather than discuss all 71 sanctions found for the study period, this article will focus on the most recent year in the review, 2015, and on the reprimands (n=6) issued in that year

(see Table 1). Reprimands are the most common type of sanction issued across the six years of the review (n=59), though the actual number in any year varies considerably (from 6 to 23). There is sufficient information available in relation to reprimands to support investigating the apparent role of emotion, if any, but without the considerable volume, detail and complexity of the documentation and issues for the more serious formal sanctions.

In general, the material on the website for cases resulting in a reprimand includes, at a minimum:

- Complaint against the judge
- Judge’s response to the complaint
- Commission order disposing of complaint

“A party dissatisfied with a judge’s rulings, may pursue appellate remedies, but the Commission lacks jurisdiction to require a judge to alter a ruling.”

TABLE 1: ARIZONA COMMISSION ON JUDICIAL CONDUCT: DISCIPLINARY CASES, 2010-2015

ACTIONS/ PROCEDURES (N)	YEAR						TOTAL
	2010	2011	2012	2013	2014	2015	
Complaints	361	313	361	342	412	354	2,143
Complaints dismissed outright	306	263	305	311	384	310	1,879
Complaints dismissed with comments	45	39	32	22	17	38	193
– Warnings	16	10	8	6	6	13	59
– Advisory letters	29	29	24	16	11	25	134
Sanctions	10	11	24	9	11	6	71
Informal sanctions							
– Reprimands	6	8	23	9	7	6*	59
Formal sanctions							
– Censures	4	2	1	0	2	0	9
– Suspensions	0	0	0	0	1	0	1
– Removals	0	1	0	0	1	0	2

* These six reprimands are discussed below.

Source: These data were retrieved from the annual reports provided by the Arizona Commission on Judicial Conduct, available at <https://www.azcourts.gov/azcjc/publicDecisions/2015.aspx> (last accessed August 10, 2020).

40. The term ‘judge’ is used here to encompass the full range of judicial roles in the Arizona court system, as it is used in the Arizona Code of Judicial Conduct. ‘Judge’ is defined therein as ‘any person who is authorized to perform judicial functions within the Arizona judi-

ciary, including a justice or judge of a court of record, a justice of the peace, magistrate, court commissioner, special master, hearing officer, referee, or pro tempore judge.’

“Examples of such emotion-related conduct include . . . arrogance and making demeaning comments . . . being sarcastic . . . being rude . . . and being aggressive . . . ”

In some cases, additional documents are available, especially if there is a motion from the judge for reconsideration of the reprimand:

- Judge’s Motion for Reconsideration
- Disciplinary Commission’s Response to Motion for Reconsideration (from disciplinary counsel)
- Decision or order of the Commission on the Motion for Reconsideration

Sometimes material is referred to that is not available on the Commission website. For example, an initial ‘complaint’ submission to the Commission may refer to an audio or video recording of a courtroom incident, which is not available. Moreover, there might not be a substantive written summary about or characterization of the precipitating event or judicial behavior. In another case, there is a list of eight attachments at the end of the judicial officer’s response to the complaint, none of which were available on the website.

Table 1 shows that in 2015 the Commission issued six informal public reprimands as the only sanctions in that year. The Commission determined that the judicial behavior in each case violated one or more rules of the Arizona Code of Judicial Conduct:

- Rule 1.1: Compliance with the Law (in three of six reprimands)
- Rule 1.2: Promoting Confidence in the Judiciary (in three of six reprimands)
- Rule 2.2: Impartiality and Fairness (in two of six reprimands)
- Rule 2.5: Competence, Diligence, and Cooperation (in two of six reprimands)
- Rule 2.6: Ensuring the Right to be Heard (in two of six reprimands)
- Rule 2.8: Decorum, Demeanor, and Communication with Jurors (in four of six reprimands)
- Rule 2.9: Ex parte Communications (in two of six reprimands)

Rule 2.8 is the most frequently identified rule violated in 2015, cited in four of the six reprimands issued by the Commission that year.

CASE ANALYSIS

Six cases⁴¹ resulted in reprimands in 2015. Four violating Rule 2.8 are reviewed in the present analysis:

- Case A involves a male Justice of the Peace found to have violated Rule 2.8 (and Rule 1.2).
- Case B involves a male Justice of the Peace found to have violated Rule 2.8 (as well as Rules 1.1, 2.2, and 2.5A).
- Case C involves a female Court Commissioner/Judge pro tempore found to have violated Rule 2.8 only.
- Case D involves a male Justice of the Peace found to have violated Rule 2.8 only.

Two other cases (E: a female Justice of the Peace; and F: a female Superior Court Judge) are not considered further, as the nature of the judicial conduct resulting in the reprimand does not indicate emotion or inadequate emotion regulation as factors. Neither judicial officer was found to have violated Rule 2.8. Judge E was found to have lacked competence in the law (Rules 1.1, 1.2, 2.2, 2(C), and 2.6(A), and Judge F was disciplined for improper ex parte communication (Rule 2.9).

The four cases involving violations of Rule 2.8, which relates to decorum and demeanor, are the most strongly indicative of judicial emotion and lack of self-regulation or insufficient emotion work. These cases illustrate the difficulty of accessing and using the materials available for future guidance. In these matters, the judicial conduct complained of took place in court and appears to implicate emotion and emotional conduct as part of courtroom interaction. Examples of such emotion-related conduct include: apparent arrogance and making demeaning and derogatory comments (A); being sarcastic, abrupt, and impatient (B); being rude, harsh, brusque, intimidating (C); and being aggressive, accusing, and expressing disgust (D). The complaints arose in a variety of proceedings including a judgment debtor’s examination (A), an eviction hearing (B), a criminal matter (C) and one where the nature of the underlying proceeding is unclear (D). In Cases A, B, C and possibly D, the judicial officer had received at least one previous sanction or reprimand for similar conduct. Judge C had resigned before the Commission’s decision and Judge D resigned and returned to private legal practice before the complaint was formally filed. In only one matter (A) was the complaint brought by a court participant; in the others it was brought to the Commission’s attention by the presiding judge (B) and (D) or by the ‘General Counsel’ of the county Superior Court (C).

Case A

A close analysis of Case A illustrates many aspects of judicial emotion and emotion work, in relation to the judicial officer himself and others, as well as issues relating to the accessibility and usefulness, or not, of disciplinary materials as sources of practical guidance for other judicial officers.

The conduct complained of arose during a judgment debtor’s exam conducted by Judge A, a justice of the peace. The public file in the disciplinary matter consists of a two-page handwritten complaint from the complainant (the debtor), a six-page letter

41. Documents related to each of these cases are available on the Commission’s website at <https://www.azcourts.gov/azcjc/PublicDecisions/2015.aspx>. Although the actual names of the judges whose cases are considered can be identified from the Commission’s website,

they have been anonymized here by using the letters A, B, C, D, E, and F. While the judicial officers involved in these matters have different roles, the title “Judge” has been used throughout for easier reading and to reflect the normal usage for judicial titles.

from Judge A in response, the Commission's order imposing the public reprimand, the judge's motion for reconsideration, the disciplinary counsel's response, and the Commission's order denying reconsideration. The complaint refers to an attached document, which is not part of the publicly available material. The judicial officer's letter refers to the audio recording of the hearing and attaches several documents mainly relating to the debtor's underlying debt and bankruptcy, as well as 'biographical information' related to the judicial officer. None of this material is available via the Commission's website.

The hearing, at which the conduct complained of occurred, lasted about 20 minutes and arose out of an earlier judgment against the debtor for unpaid rent and then failing to pay the judgment for that debt.⁴² The plaintiff, attempting to collect the debt, appeared by telephone. The debtor was unrepresented, accompanied by his wife, and according to his complaint, he is a 75-year-old veteran. It appeared that the debtor had sought bankruptcy, so that the exam should have been stayed. However, because the pending bankruptcy was not clearly apparent from the court's file, the matter proceeded with the debtor's wife as the nominal witness, as she was not protected by that bankruptcy, though most of the interaction involved Judge A, the debtor, and the plaintiff, including various personal attacks from the plaintiff towards the debtor.

The complainant describes the judge as responding 'arrogantly' when told of the existing bankruptcy and wrote: 'I feel treated unfairly.'⁴³ In his response, Judge A describes his emotion before the hearing as 'frustrated and in the wrong state of mind' because he was not expecting to hear this matter and was interrupted while undertaking other work as part of a 'high volume' court.⁴⁴ This circumstance meant that he 'did not read the entire case file,' and so did not see the bankruptcy notice. He describes his manner as 'terse' at the beginning, but the proceeding as having 'a committee meeting format' and being 'conversational' including '[a]t one point, everyone ... laughing.' He identifies several specific comments as inappropriate and apologized and acknowledged that he 'display[ed] animosity.' For example, Judge A said to the debtor 'You act as though you are proud of being broke' and 'You should not be living where you are living [at a country club]. You don't deserve that.' Judge A expressly recognizes the importance, especially with self-represented litigants that they 'feel that they were treated fairly.' He acknowledges that the complainant 'understandably feels he was not treated fairly.' He attempts to demonstrate by independent evidence that his conduct that day was 'an aberration' but is unable to do so, as the Arizona judicial performance review data on 'temperament' is not collected for the court in which he sits. He uses emotion words and language in his response:

I recognize and acknowledge that many of the state-

ments I made during the [exam] were completely inappropriate. ... I am usually able to maintain self-control and am embarrassed that I did not do so on this occasion. I felt bad about what had happened before lunch that day. ... I am truly sorry.

"Judge made arrangements to transfer the case so that the [party] would be 'mad at me' rather than the court system."

Judge A made arrangements to transfer the case so that the debtor would be 'mad at me rather than the court system.' In reacting to the complaint, Judge A describes his own feelings of being 'embarrassed,' that he 'felt bad' and was 'truly sorry' about his behavior. He also anticipates the debtor's possible feelings—'mad'—as a result of the judge's conduct.

In its initial order imposing the reprimand, the Commission characterizes Judge A's comments as 'mocking and demeaning.'⁴⁵ The Commission recognizes that there are 'extenuating circumstances' to explain Judge A's failure to be aware of the bankruptcy filing, but once he was aware, it determined the exam should not have gone forward. It credits the judge with taking 'responsibility for his unprofessional demeanor' but emphasizes his previous public reprimand in determining that this conduct on this occasion merits a public reprimand.

Judge A's motion for reconsideration again acknowledges the inappropriateness of his conduct (he admitted his comments were 'cringe-worthy'), but emphasizes the lack of substantive harm to the complainant, in terms of outcome of the proceeding.⁴⁶ He attempts to justify the conduct for which he was previously reprimanded ('lost my temper with an extremely difficult litigant' who had to be evicted from a property by a SWAT team), explaining he 'was a new judge ... and had not yet developed tactics to respond to litigants who scream at me.' He repeats his experience of being 'overtasked.' The judge also claims that the sanction in this case is 'not consistent with other Commission actions.'

The disciplinary counsel's response emphasizes that the complainant 'had to endure a judge mocking and demeaning his failure to pay' in a hearing that should never have taken place, but which proceeded partly as a result of the judge's lack of preparation where he 'conducted himself in an unprofessional manner.'⁴⁷ While Judge A has apologized, he 'does not address what he will do to better prepare' in the future, and the disciplinary counsel notes that Judge A did not take adequate 'corrective measures concerning his temper' following the previous reprimand for similar conduct. This suggests that the disciplinary counsel doubted that the apology amounted to remorse and was not persuaded of the potential for change. Disciplinary counsel also

42. This first summary paragraph is derived from reading all the available documents together. Later discussion contains specific reference to or quotes from particular documents.

43. Complaint Against a Judge, Case 15-085, Ariz. Comm'n on Jud. Conduct (Mar. 30, 2015).

44. Response to Complaint, Case 15-085, Ariz. Comm'n on Jud. Conduct (Apr. 16, 2015).

45. Order, Case 15-085, Ariz. Comm'n on Jud. Conduct (June 22, 2015).

46. Motion for Reconsideration, Case 15-085, Ariz. Comm'n on Jud. Conduct (July 2, 2015).

47. Response to Motion for Reconsideration, Case 15-085, Ariz. Comm'n on Jud. Conduct (July 15, 2015).

“The judicial officer has a significant role in setting . . . the emotional climate in a court proceeding, and in enabling appropriate emotional . . . communication with all participants.”

pointed out that the comparison to previous Commission sanctions ‘lacks a factual basis,’ that Judge A’s conduct harmed the debtor who experienced unfair treatment, and ‘public confidence in the judiciary also suffered’. Moreover, because the judge has previous experience as disciplinary counsel for the Commission, he ‘should be well-versed in his ethical obligations under the Code.’ The Commission denied Judge A’s motion for reconsideration.⁴⁸

Case A illustrates several themes: the ways emotion mani-

fest in judicial work; the scope, meaning, and application of formal rules and informal norms regarding judging and emotion; and the usefulness of disciplinary materials as guidance for good judging.

Emotion manifests in judicial work in several ways in this case. Judge A describes the presence of judicial emotion before the proceedings, acknowledging he was ‘frustrated and in the wrong state of mind’ as his preparation for other matters was interrupted by the need to hear this case. There was also considerable apparent judicial emotion during the hearing, as shown by words and demeanor toward the debtor that implied feelings of animosity, and were assessed by the Commission as mocking and demeaning. Judge A also attributed an emotion (pride) to the debtor, which was inappropriate and perhaps inaccurate. As Barrett points out, ‘[p]erceptions of emotion are guesses, and they’re ‘correct’ only when they match the other person’s experience,’⁴⁹ though ‘some guesses are more informed than others.’⁵⁰ This tension arises through the interactive, dynamic quality of emotion experience and display; for all court participants, especially when a judicial officer is dealing with lay participants. The judicial officer has a significant role in setting or regulating the emotional climate in a court proceeding, and in enabling appropriate emotional as well as procedural or legal communication with all participants.

Judge A points to occasions where other court participants laughed at his comments and jokes, as evidence of success at maintaining a positive emotional courtroom climate. In contrast to this interpretation, such laughter and joking may only affirm the status differential between the judicial officer and courtroom participants who feel obliged to laugh at comment from the bench, but which they may not perceive as funny.⁵¹

This analysis of the disciplinary materials also provides insight into the scope, meaning, and application of formal rules and informal norms regarding judging and emotion. The Commission recognizes, as does Judge A, that the debtor, as an unrepresented party, may require special consideration to experience a feeling of being treated fairly. While Judge A apologizes and states he is ‘truly sorry,’ suggesting remorse, this is not seen as sufficient to avoid the application of the Commission’s disciplinary power, especially as Judge A’s behavior has not changed. This implies that awareness of the special needs of some court participants, and evidence of remorse on the part of the judicial officer who has not effectively managed emotion, are part of the norms governing judicial conduct.

Judge A points to the substantial workload and time pressures in this instance—not able to read the file in advance, not scheduled for that proceeding, and more generally by giving information about the types and numbers of cases. He presents these circumstances as beyond his control, generating stress and frustration that affected his conduct. However, the Commission did not accept these details as excusing inadequately regulated judicial emotion-related conduct.

The judge engages in moral credentialing, pointing to his previous good character, conduct and good works, but this does not outweigh the nature of his conduct as a breach of norms, especially in light of previous sanctions. Judge A’s attempt to use previous cases to establish normative boundaries for judicial conduct was rejected by the disciplinary counsel and by the Commission. The judicial officer also appears to experience emotion or concern with being labeled unethical, which may imply a considered choice, when emotion is understood as spontaneous and reactive. The Commission’s interest in what he would do to avoid this conduct in the future frames Judge A’s conduct as something that can be anticipated and managed. This is also implied by his comment in relation to an earlier complaint, that he had ‘not yet developed tactics’ for dealing with an emotionally demanding situation, that is, he had not learned emotion management skills. However, he also attempts to normalize his conduct in terms of probability: ‘I cannot guarantee anyone that at some point during the next 185,000 cases, that I won’t become frustrated with a litigant and say something inappropriate.’

The usefulness of these disciplinary materials as guidance for good judging and emotion work is limited, first because several documents including transcripts or AV records are not available via the Commission website. This makes it harder to understand what actually occurred and so reduces the potential insight that can be gained. Second, while Judge A uses some emotion words to describe other participants (that the debtor might be ‘mad’) or

48. Order Denying Respondent Judge’s Motion for Reconsideration and Request to Appear Before the Commission, Case 15-085, Ariz. Comm’n on Jud. Conduct (Aug. 14, 2015).

49. BARRETT, *supra* note 5, at 195.

50. *Id.*, at 246; see also SUSAN A. BANDES, *Introduction, THE PASSIONS OF LAW 1* (Susan A. Bandes ed., 2001).

51. Michael Kirby, *Foreword*, in JUDGES, JUDGING AND HUMOUR (Jessica Milner Davis & Sharyn Roach Anleu eds., 2018); see also Michael J. Lovaglia, Christabel L. Rogalin, Shane D. Soboroff, Christopher P. Kelley & Jeffrey W. Lucas, *Humor and the Effectiveness of Diverse*

Leaders, in SOCIAL STRUCTURE AND EMOTION 331 (Dawn T. Robinson & Lynn Smith-Lovin eds., 2008); see also Sharyn Roach Anleu & Kathy Mack, *Judicial Humour and Inter-Professional Relations in the Courtroom*, in JUDGES, JUDGING AND HUMOUR 141 (Jessica Milner Davis & Sharyn Roach Anleu eds., 2018); see also Sharyn Roach Anleu, Kathy Mack & Jordan Tutton, *Judicial Humour in the Australian Courtroom*, 38 MELB. U. L. REV. 621 (2014); see also Jennifer A. Scarduzio & Sarah J. Tracy, *Sensegiving and Sensebreaking Via Emotion Cycles and Emotional Buffering: How Collective Communication Creates Order in the Courtroom*, 29 MGMT. COMM. Q. 331 (2015).

himself (Judge A is ‘embarrassed’, ‘felt bad’, ‘sorry’ and identifies ‘animosity’ in his conduct), there are few emotion words and limited characterization of judicial obligations as entailing emotion work from Judge A or the disciplinary counsel or the Commission.

Case B

Case B illustrates several of the same issues as Case A, in a different context and with different emphases. Judge B’s case involves an unrepresented plaintiff seeking rent from an elderly defendant, also unrepresented. The complaint alleges that Judge B ‘displayed inappropriate courtroom demeanor and did not ensure the litigant’s right to be heard.’⁵² Commission documents describe the judge’s conduct toward each party as falling short of the expected standard.

When [Judge B] commenced the trial, he was either oblivious to or deliberately ignored the fact that the elderly defendant [using a walker] was having a difficult time in finding a chair that would accommodate her. She likely did not hear him request her opening statement, and instead of patiently waiting for her to get situated at the table, he forfeited her right to an opening statement. [Judge B] was very curt and abrupt with the plaintiff, who was clearly a struggling self-represented litigant. ... [Judge B] told the plaintiff to call her first witness. After the plaintiff made a brief statement of the relief she was requesting [her house and rent], he asked “You’re done. Really?” in a sarcastic tone.⁵³

Judge B then dismissed the plaintiff’s case. Neither the transcript nor an AV record of the court hearing is available for this matter via the website.

Similar to Case A, the Commission finds that the judge was sarcastic to an unrepresented litigant and that his ‘tone during the trial was not “patient, dignified, and courteous.”’⁵⁴ However in this case, Judge B disagrees with many of the statements alleged and with the Commission’s characterization of what occurred, claiming the complainant misstates the record.⁵⁵ The judge insists that the plaintiff’s testimony ended with the statement ‘and that would be all,’ followed by his question ‘you’re done. Really?’ Judge B claims that the Commission’s version—‘he told her to return to the table’—is a misstatement, and that the record shows that he said, ‘you may step down. Thank you.’ The judge argues that the ‘misstatement may be considered rude, but the record version is polite’. He asserts that ‘I actually said,’ ... Good luck to you all, court stands adjourned.” ... I have said good luck to you all, thousands of times. I consider it a courtesy to the litigants ... I respectively [sic] DENY that I was “rude and de-grading” (emphasis in original). This interchange illustrates

the sometimes sharp differences in perception of emotion within social relations.⁵⁶ In the one interaction, the judicial officer felt he acted ‘courteously,’ and normalized his approach by saying he has done that ‘thousands of times,’ while the complainant interpreted the judicial behavior as impatient, abrupt and sarcastic. The disciplinary counsel notes that while the judicial officer may have said ‘good luck to you all’ at the close of the hearing, ‘his general tone throughout the actual trial was sarcastic.’⁵⁷

“ . . . the Commission finds that the judge was sarcastic to an unrepresented litigant and that his ‘tone during the trial was not patient, dignified, and courteous.’ ”

As with Case A, the Commission recognizes the dynamic, reactive nature of the emotional conduct, but regards Judge B’s actions as something that can be controlled, and rejects the demanding nature of the court context as a justification. Though Judge A may have expressed remorse and Judge B does not, in each case, the Commission seeks concrete demonstrations of the individual judicial officer’s capacity for change to justify not imposing discipline.

The Commission criticizes Judge B because he did not ‘provide the litigants any guidance as to how the trial would proceed.’⁵⁸ In his motion for reconsideration, the judicial officer raises the high-volume time-pressured nature of the court’s work as at least partial justification for the conduct: ‘5,000 such actions are filed every month in ... [county] ... As a practical matter, even 5 minutes of procedural guidance per case would swamp the lower courts.’ As in Case A, the Commission does not find this sufficient justification to avoid discipline.⁵⁹

The disciplinary counsel’s emphasis on the special needs of the unrepresented parties implies that judicial officers should be aware that the court environment is unfamiliar for the litigants. Even such ordinary acts as finding a chair and sitting at a table can be challenging. The normative emotion expectation articulated in this case is that the judicial officer should show more patience and courtesy when addressing litigants directly.

Judge B’s lack of remorse, in part based on his denial of the facts alleged, contrasts with Judge A’s acceptance of the allegations, apologies and expressions of contrition. Judge B denies the described conduct, stating ‘I simply don’t see my error.’ According to the disciplinary counsel: ‘Respondent fails to acknowledge that his conduct and manner in the hearing were even remotely improper courtroom demeanor. He shows no introspection.’ The information in the disciplinary proceedings suggests a mismatch

52. Order at 1, Case 15-125, Ariz. Comm’n on Jud. Conduct (Aug. 14, 2015).

53. Response to Motion for Reconsideration at 4-5, Case 15-125, Ariz. Comm’n on Jud. Conduct (Aug. 27, 2015).

54. Order at 1, Case 15-125, Ariz. Comm’n on Jud. Conduct (Aug. 14, 2015).

55. Response, Case 15-125, Ariz. Comm’n on Jud. Conduct (May 27, 2015); see also Motion for Reconsideration, Case 15-125, Ariz. Comm’n on Jud. Conduct (Aug. 20, 2015).

56. BARRETT, *supra* note 5; see also Ian Burkitt, *Decentering Emotion Regulation: From Emotion Regulation to Relational Emotion*, 10 EMOTION REV. 167 (2018).

57. Response to Motion for Reconsideration at 5, Case 15-125, Ariz. Comm’n on Jud. Conduct (Aug. 27, 2015).

58. Order at 1, Case 15-125, Ariz. Comm’n on Jud. Conduct (Aug. 14, 2015).

59. Order Denying Respondent Judge’s Motion for Reconsideration, Case 15-125, Ariz. Comm’n on Jud. Conduct (Sept. 25, 2015).

“A lack of apparent warmth, and perceived harshness or intimidation, deviates from gender norms as well as judicial conduct norms.”

cer had been reprimanded for improper courtroom demeanor involving ‘similar behavior’: ‘for being argumentative, not allowing litigants to be heard, and aggressively cutting off the litigants’ comments.’

Case C

In this matter, Judge C was presiding at a preliminary procedure in which the defendant was waiving the right to a probable cause hearing. Although there was no formal role for a victim, the victim was present, along with a lawyer acting as advocate. The Commission found that when the lawyer/victim advocate attempted to speak, Judge C, regarding her as a disruptive layperson, ‘cut her off, and, in a very harsh tone, told her to sit down and to only address the court when she was told to do so.’⁶¹ The Commission determined that, at the end of the hearing, the judicial officer was again ‘rude, telling the attorney in a very loud and harsh tone to leave the courtroom or she would summon a deputy’ to have her removed. The Commission order describes the judicial officer as ‘impatient, harsh, and intimidating’ and in violation of Rule 2.8(B) as she ‘was not patient, dignified, and courteous.’

Judge C’s response to the complaint arising from this incident was to argue that her ‘stern’ tone is necessary ‘for a judge to be forceful with uncooperative laypersons to maintain control of the courtroom ... an obligation under Rule 2.8(a).’⁶² Though she describes herself as ‘regretful,’ Judge C seeks to neutralize or nor-

malize her actions, undercutting any claim to genuine remorse.⁶³ Her response letter repeats that she ‘mistakenly thought’ that she was dealing with ‘an unruly layperson (an all too familiar circumstance in the criminal arena)’ and further explains her misperception by emphasizing that victims’ advocates do not usually have a role in this type of hearing, thus suggesting her actions in the courtroom were reasonable. She attempts to shift blame to the attorney for failing to identify herself to the clerk or prosecutor in advance, and ‘added fuel to the fire’ by not following the judicial officer’s instruction, confirming the judge’s assessment that the ‘defiant refusal to sit down’ meant she was ‘dealing with a disruptive layperson.’

Judge C acknowledges her history of ‘sometimes-intemperate demeanor,’ claiming she has been actively taking steps to deal with this, and regretted that ‘all her hard work and progress was undone in the span of a few minutes.’ She indicates that when she learned the identity of the attorney, she sought her out to apologize, but the attorney had left the building. Judge C resigned her judicial position after the complaint, so issues of future judicial (mis)conduct did not arise. Like Judge A, Judge C attempts a comparative argument to show discipline is unwarranted, pointing out that as her conduct was neither profane nor involved racial epithets it was not as serious as in other complaints that resulted in the Commission’s sanction or censure of the judge. In applying the requirements of Rule 2.8, the Commission stated that, regardless of the status of the participant, she should have been treated in accordance with the Rule, in a way that was ‘patient, dignified and courteous’ and so discipline—the public reprimand—was warranted.⁶⁴

This case suggests that behavior described as rude, harsh and loud, combined with a previous reprimand, supports a characterization of a judicial officer as unable to control her emotions. It may be the case that this female judicial officer is being held to different standards compared with her male counterparts. A lack of apparent warmth, and perceived harshness or intimidation, deviates from gender norms as well as judicial conduct norms.⁶⁵ However, the material available is insufficient to make strong inferences about gender and judicial behavior.

malize her actions, undercutting any claim to genuine remorse.⁶³ Her response letter repeats that she ‘mistakenly thought’ that she was dealing with ‘an unruly layperson (an all too familiar circumstance in the criminal arena)’ and further explains her misperception by emphasizing that victims’ advocates do not usually have a role in this type of hearing, thus suggesting her actions in the courtroom were reasonable. She attempts to shift blame to the attorney for failing to identify herself to the clerk or prosecutor in advance, and ‘added fuel to the fire’ by not following the judicial officer’s instruction, confirming the judge’s assessment that the ‘defiant refusal to sit down’ meant she was ‘dealing with a disruptive layperson.’

60. See Mary Holmes, *The Emotionalization of Reflexivity*, 44 SOC. 139 (2010); see also Mary Holmes, *Researching Emotional Reflexivity*, 9 EMOTION REV. 61 (2015); see also Sharyn Roach Anleu & Kathy Mack, *A Sociological Perspective on Emotion Work and Judging*, 9 OÑATI SOCIO-LEGAL SERIES 831 (2019).

61. Order at 1, Case 15-192, Ariz. Comm’n on Jud. Conduct (Nov. 13, 2015). An audiovisual recording showing part of the proceeding is available online. See Megan Cassidy, *Commissioner Throws Attorney out of Courtroom, Resigns Day Later*, AZ CENTRAL (July 23, 2015), <https://www.azcentral.com/story/news/local/phoenix/2015/07/22/maricopa-county-courtroom-outburst-julie-newell-resignation/30541427/>.

62. Response to Complaint at 3, Case 15-192, Ariz. Comm’n on Jud. Conduct (Aug. 21, 2015).

63. Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664 (1957).

64. Order, Case 15-192, Ariz. Comm’n on Jud. Conduct (Nov. 13, 2015).

65. There is a longstanding tight social and cultural association of women with emotion and ‘deep-rooted stereotypes about which gender is best suited for particular kinds of jobs’; Amy S. Wharton, *The Sociology of Emotional Labor*, 35 ANN. REV. SOC. 147, 149 (2009). Even where women work in traditionally male-dominated occupations such as the judiciary, they may still experience gendered expectations regarding their capacity and willingness to provide emotion work; see Kathryn J. Lively, *Client Contact and Emotional Labor: Upsetting the Balance and Evening the Field*, 29 WORK & OCCUPATIONS 198 (2002); see also JENNIFER PIERCE, *GENDER TRIALS: EMOTIONAL LIVES IN CONTEMPORARY LAW FIRMS* (1995); see also Francesca Polletta & Zaibu Tufail, *Helping without Caring: Role Definition and the Gender-Stratified Effects of Emotional Labor in Debt Settlement Firms*, 43 WORK & OCCUPATIONS 401 (2016); see also Zaibu Tufail & Francesca Polletta, *The Gendering of Emotional Flexibility: Why Angry Women Are Both Admired and Devalued in Debt Settlement Firms*, 29 GENDER & SOC’Y 484 (2015); compare with Bergman Blix & Wettergren, *supra* note 4, at 4.

Case D

This matter involves a long-standing conflict, still generating intense emotion in Judge D, in relation to an attorney, such that it was the judge's practice to recuse himself in any matter involving the attorney. When Judge D realized the attorney was appearing in a case before him, the Commission found he stated: 'I remember you ... I recuse myself from your cases ... you are the gentleman who yelled at the lady who is now my wife.'⁶⁶ Judge D 'went on to state that the attorney was disrespectful to other women based on rumors he had heard in the community, stated he was concerned the attorney was a "misogynist," and advised he would never hear that attorney's cases. [Judge D] then brusquely ordered the attorney from his courtroom.'

The Commission concludes that the judge 'acted in an undignified and discourteous manner in a judicial proceeding' and 'was not patient, dignified, or courteous to the attorney ... rather his tone was accusatory, aggressive, and expressed disgust with the attorney's alleged conduct' violating Rule 2.8(B). This characterization uses specific emotion words, especially 'disgust', to describe Judge D's conduct, indicating that his words and actions displayed feelings that judicial officers are not allowed to express, or perhaps not even to experience.

Although retired from judicial office, Judge D responded to the allegations.⁶⁷ He denies misconduct, justifying his refusal to hear from the attorney as needing to put the reasons for the recusal on the record, and the need to control the courtroom. The judicial officer explains that the attorney 'interrupted the Court at least five times' during his attempt to make a record, 'until I finally had to order him out of my courtroom.' Judge D appeals to law to explain his conduct: 'Rule 611 of the Arizona Rules of Evidence allowed me to exercise reasonable control over my courtroom ... Rule 2.8 mandates a judge **shall** require order and decorum in proceedings before the court. That means the judge serves as an enforcer of this exact conduct by lawyers' (emphasis in original).

This is also a situation, as in Case B, where the judicial officer's perceptions of his feelings and emotion display are at odds with the Commission's findings. Judge D insists he tempered his interaction and sought to control the courtroom, yet the Commission determines his conduct warrants public reprimand. The judge insisted that his manner and voice were 'tempered': 'I tempered my words to him and was dignified from the bench.' (No audio recording of the proceeding in which the alleged misconduct took place was available on the website.)

As with Judges A and C, Judge D also argues that his demeanor was less objectionable than in other disciplinary matters: 'My judicial behavior was not remotely near what this Commission has previously held to be sanctionable.' Again, the attempt to benchmark the complained behavior against past Commission decisions did not aid the argument against discipline.

DISCUSSION

- Findings from this investigation generate insight into the
- emotion demands and opportunities in judicial work;

- application of formal rules and implicit norms about judicial emotion, emotion work, and appropriate emotion display or demeanor; and
- value and limits of discipline materials as a source of practical guidance for judicial emotion work.

"A judicial officer's assessment of a court participant's conduct . . . can pose emotion challenges."

Emotion demands and opportunities in judicial work

Cases A, B, C, and D each involve circumstances described as occurring frequently in lower courts: unrepresented litigants (A and B), a disruptive layperson (though actually an attorney) (C), or an attorney seeking to interrupt court process (D). Emotion can be experienced by the target of the judicial conduct or by the judge before or apart from the events, in the moment of the conduct complained of, and later, in recalling and reflecting on the conduct and engaging with the Commission.⁶⁸ These cases involve apparent expressed judicial emotion in the moment (A, 'animosity'; D, 'expressed disgust') as well as feelings articulated in later reflection (A, embarrassed; C, 'especially regretful').

A judicial officer's assessment of a court participant's conduct as distracting from, delaying or interrupting the time-pressured everyday work of the court, can pose emotion challenges. These circumstances may also entail feelings and emotion displays of various kind on the part of the litigants or attorneys. The judicial officers in cases A and B each raise specific concerns that judicial capacity to meet the practical and emotional needs of the unrepresented litigants, especially in busy lower courts, is necessarily limited. Cases C and D involve an observed judicial display apparently entailing emotion, in response to an attorney, whose actions the judicial officer either misinterpreted (C) or were viewed as disrupting judicial work (D), perhaps also reflecting the distinctive emotion demands of lower court work.⁶⁹

The application of formal rules and implicit norms

The four cases chosen for detailed analysis all involved determinations that Rule 2.8 was violated, as these appear more likely to involve emotion. The Rule requires that the judge maintain 'order and decorum' and 'shall be patient, dignified, and courteous.' The meanings of these rules for judicial emotion and emotion work are not expressly articulated, but clearly implied. Some of these cases illuminate emotion in judicial conduct that breaches formal rules and deviates from the model courteous and patient judge. The Commission characterises the judicial conduct for which discipline was imposed as: 'mocking and demeaning' (A), 'sarcastic' (B), 'harsh' and 'rude' (C), and 'accusatory, aggressive and expressed disgust' (D). Each of these words or phrases identifies a specific and unacceptable emotion or implies emotion on the part of the judicial officer, displayed toward others in the courtroom.

66. Order, Case 15-267, Ariz. Comm'n on Jud. Conduct (Feb. 5, 2016).
67. Response to Notice of Complaint, Case 15-267, Ariz. Comm'n on Jud. Conduct (Nov. 11, 2015).

68. Roach ANLEU & MACK, *supra* note 5.

69. See Roach ANLEU & MACK, *supra* note 5; see also Roach ANLEU & MACK, *supra* note 6.

“One key insight . . . is that emotion matters and that failures of judicial emotion . . . can lead to public sanctions . . .”

An important concept in judicial emotion and related conduct is temperament. Maroney suggests: ‘How well or poorly a particular judge lives up to the temperamental expectations of judicial office depends to no small degree on his or her tendencies toward particular patterns of emotional experience and regulation.’⁷⁰ In cases B and C, the Commission was influenced by previous disciplinary findings and

apparent continued failure of the judicial officers to change their conduct. This may be an implicit indication that the Commission formed a view that these judicial officers lacked an appropriate judicial temperament.

One key insight that these cases generate is that emotion matters and that failures of judicial emotion regulation can lead to public sanctions for judicial misconduct as violation of Rule 2.8. In making the determinations in these cases, the Commission interprets and applies the very general, abstract, and aspirational words of the rule, clarifying its scope and meaning. Similarly, the ways the judge frames the motion for reconsideration, and how the disciplinary counsel frames the response, provide guidance regarding the norms or feeling rules that inform the Commission’s decision.

In describing or explaining their own conduct and emotion, only one judicial officer comes close to expressing remorse: Judge A offers an apology and expresses embarrassment and contrition. Others do not acknowledge error (Judge B) or seek to neutralize or normalize their conduct in the context of the busy lower courts that deal with many unrepresented litigants/defendants (Judges C and D).

There is a recognition of the special needs of some court participants, such as the elderly unrepresented litigant distracted by finding a chair and perhaps confused by the unfamiliarity of the court and so deserving of special patience. However, in two of the four cases the judicial conduct was directed at attorneys, confirming that lawyers and laypersons alike deserve treatment that is patient, dignified, and courteous. In two cases, the judicial officers highlighted their work contexts—a busy court, a heavy workload, large numbers of cases, time pressure, and a need to control the courtroom—as explanations of their conduct and statements; however, in each instance, the Commission discounted these explanations. It is also worth noting that all the judges in these four cases were Justices of the Peace or pro tem judges, who typically lack the same professional legal training of full-time judges yet who preside in busy courts where many citizens have their experience of the court system.

Value of material as guidance

The material generated through these disciplinary processes is gathered for the specific purpose of determining whether a breach of the Code has occurred and whether any sanction

should be imposed. This inevitably shapes what is available for guidance and research purposes.

Accessibility is limited by several factors:

- organized by year, listed by complaint/case
- information available is limited, either for reasons of confidentiality or practicality, e.g., AV recordings, transcripts, or supporting documentation
- no searchable database by rule, or type of conduct
- amount of time required to conduct a review of data, identify relevant characteristics, review original documentation
- very few matters from which to generate insights

The result is that these materials provide relatively little accessible practical guidance for judicial emotion work. To review the universe of complaints for potentially pertinent cases, then to read and analyze them to distill any lessons to be learned, requires substantial time investment. Interestingly, attempts by judicial officers in cases A, C, and D to seek a lesser penalty by comparing their conduct to other cases where reprimands were imposed were unsuccessful. This also suggests limited assistance can be derived from this material for future guidance.

In considering what can be learned from these discipline cases, it is important to be mindful of the limitations of the data. Very few judges in Arizona are the subject of formal complaint, and most complaints are dismissed; so the few reprimand cases are not an indicator of the full range of judicial behavior. Moreover, given the small number of cases, each is quite different—in terms of the complaint, the participants, the proceeding—making general inferences difficult. It is also important to note that these cases are, by definition, extreme cases and are backward looking, examining conduct that occurred in the past for a particular legal, disciplinary purpose. In addition, there is considerable filtering and transformation of the material available. For example, in cases B and D, the complaint was made by the county presiding judge, rather than by a court participant. After a case is brought to the Commission, the material is described or characterized by the disciplinary counsel, the Commission itself and the judicial officer involved, as well as by this research.

There are other potential sources of guidance about judicial emotion and emotion work. For example, Arizona has a Judicial Ethics Advisory Committee. The opinions produced provide clarifications of what is required under the Code. However, a review of the 200 opinions issued since 1976 finds that very few address in-court judicial conduct of the kind considered in this article.⁷¹ The opinions are predominantly concerned with a judicial officer’s personal, social, business, or community activities outside the judicial role and outside the courtroom. Where opinions address in-court conduct, they primarily address issues of bias and the substance of the decision. The only opinion that appears to address Rule 2.8 involves how a judge might respond to a person who makes threats, suggesting that the judge ought to consult his/her ‘own conscience and emotions to determine

70. Terry A. Maroney, *(What We Talk About When We Talk About) Judicial Temperament*, 61 B.C. L. REV. 2085, 2152 (2020).

71. The review was conducted by (i) perusing the title of each opinion,

which would clearly indicate the subject matter of each opinion, and (ii) conducting broad keyword searches of a database of the opinions maintained by Westlaw.

whether [he or she] harbors any bias or prejudice' against a party.⁷² Although occasions of unmanaged emotion can have considerable consequences for judicial discipline and public confidence, these are not covered by available guidance.

CONCLUSION

This article commenced with the questions: How do judges learn to manage emotion skillfully, to be good judges? Where do they find concrete practical guidance regarding their own emotion experience and display, and those of court users? Specifically, the article investigates the meaning of Rule 2.8(A) and (B) of the Arizona (and ABA) Codes of Judicial Conduct, requiring judicial officers to be 'patient, dignified and courteous' and to maintain 'order and decorum.' These rules are enforced by disciplinary processes of the Arizona Commission on Judicial Conduct. Data from the Commission's large, publicly available and comprehensive archive of disciplinary proceedings has been analyzed to provide insight into the occasions for judicial emotion work, the meaning of the applicable norms and the value of these disciplinary materials to assist judicial officers to manage emotion skillfully.

The task of the Commission is a legal one: to determine whether the conduct complained of breaches the Code (or other norms) or not; there is little analysis of judicial conduct in terms of emotion and emotion work. However, because the conduct complained of is investigated and considered closely, especially when a motion for reconsideration is filed, some potential guidance can be distilled, as discussed in detail in relation to the four cases analyzed and summarized in the discussion above. While such materials are not readily available or easy to use as guidance for judicial emotion work, they do have potential value.

Disciplinary material could be of more value in supporting judicial emotion work if information about dismissals were available, especially for cases in which the Commission found that undesirable conduct did occur, but was not sufficiently inappropriate to breach the Code or to deserve sanction. This information could be valuable in two ways: (i) where the conduct is found to have occurred, but was not bad enough to be sanctioned, to establish a boundary between acceptable and unacceptable conduct; and (ii) even in cases where the conduct was found not to have occurred, these could be potentially instructive to determine what types of situations or interactions can lead to ethical complaints or perceptions among the public and the court community of improper behavior.

Perhaps the more useful role for these materials is in a structured educational setting in which illustrative cases are reviewed and selected for judges to discuss in depth. This approach may be especially useful if the facilitator has more complete case information than is publicly available. This can provide a launch pad for discussion of issues that judges may face in everyday work—to provide regular, routine opportunities to discuss practical problems of judicial emotion and emotion work, to bring home the everyday reality of emotion challenges judges may face—to

help judges better anticipate and avoid potential issues. Such programs would be better able to address changes and challenges to the emotion environment of the court, such as those presented by public health crises like the COVID-19 pandemic, and others which will inevitably emerge. Courtesy and patience, and the emotion work needed to achieve them, may be even more important today, even as it may become more challenging for judges to conduct intrapersonal and interpersonal emotion work skillfully.



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72. JUDICIAL ETHICS ADVISORY COMMITTEE (ARIZ.), FORMAL ADVISORY ETHICS OPINION 16-01: THREATS: TAKING APPROPRIATE ACTION; DISQUALIFICATION (2016).