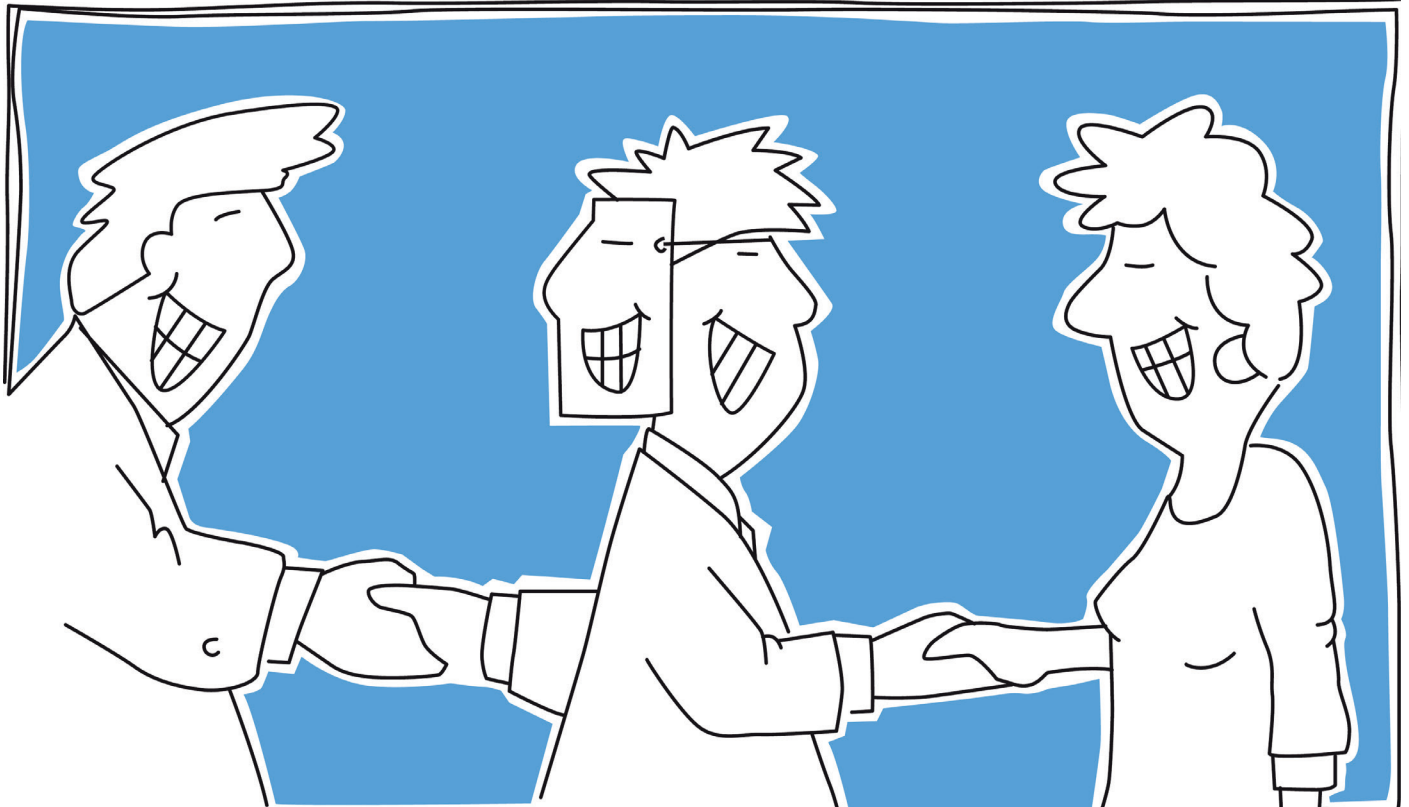


from THE CENTER FOR JUDICIAL ETHICS



Crossing the line?

Recent ethics cases show that the line between personal and judicial conduct can be blurred

Not all extrajudicial conduct on which the public may frown has been considered sanctionable in judicial discipline proceedings; after all, as Robert Louis Stevenson wrote in *The Strange Case of Dr. Jekyll and Mr. Hyde*, "All human beings, as we meet them, are commingled out of good and evil."

However, it asks a lot to expect the public to trust that a person could be Mr. Hyde off the bench but Dr. Jekyll on the bench, and, therefore, the code of judicial conduct requires a judge to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary." Although personal conduct must somehow reflect on official duties or judicial character

to warrant discipline, two recent discipline cases demonstrate how permeable and oblique the line between personal and judicial conduct is.

THEY "DID NOT ACT"

Two Illinois judges argued their affair may have been immoral, but it was private and, therefore, not a judicial ethics violation. The Illinois Courts Commission agreed that an extramarital affair alone could not be sanctioned but nevertheless suspended Judge Scott Drazewski for four months without pay and censured Judge Rebecca Foley. *In re Drazewski and Foley*, Order (Illinois Courts Commission March 11, 2016) ([\[Orders%20from%20Courts%20Commission/JudgesDrazewskiFoley.Order.pdf\]\(#\)\).](http://www.illinois.gov/jib/Documents/</p></div><div data-bbox=)

The commission emphasized that Judge "Drazewski allowed the affair to extend into his official capacity when he chose not to recuse himself" from cases in which Judge Foley's husband represented a party and when he attempted to mislead the chief judge about the relationship. With respect to Judge Foley, the commission found:

Although respondent Foley had knowledge of respondent Drazewski's misconduct and his continuing failure to recuse himself from matters involving Mr. Foley, she did not act. She

did not disclose the affair to Mr. Foley or insist that respondents reveal their relationship. She did not urge respondent Drazewski to recuse himself, seek help or advise the Chief Judge of the facts. In sum, she did not take or initiate any disciplinary measures when she had an ethical obligation under Canon 3 to do so.

The commission also concluded that, because “[j]udges, attorneys and court personnel were concerned about the respondents’ relationship, and it was a distraction to the administration of justice in McLean and Livingston County . . . the respondents’ relationship . . . has had a negative effect upon the integrity of, and respect for, the judiciary.”

“TO SERVE, NOT DEMEAN”

When the insensitive and inappropriate emails he exchanged with friends and professional acquaintances using a Yahoo email address were disclosed, then-Justice Michael Eakin of the Pennsylvania Supreme Court apologized, but he defended against judicial misconduct charges by arguing the emails were private and personal and he had not intended or foreseen that they would be made public. He also maintained, and no evidence contradicted him, that his “opinions were never driven by, reflective of, or tonally affected by color or gender” but “were based on the facts of the cases before him and the law.”

The Pennsylvania Court of Judicial Discipline sanctioned him despite those arguments, fining the now-former justice \$50,000 (he resigned after the court rejected a consent disposition in the case). *In re Eakin*, Opinion (Pennsylvania Court of Judicial Discipline March 24, 2016) (<http://www.pacourts.us/assets/files/setting-4647/file-5075.pdf?cb=876174>). The court concluded that the justice’s actions,

... [T]he common thread of the emails . . . is arrogance and the belief that an individual is better than his or her peers. Such beliefs are antithetical to the privilege of holding public office, where the charge is to serve, not demean, our citizens.

“although they occurred outside of deciding cases or holding sessions of court, still can be fairly considered to be ‘on-bench’ conduct” because he sent the emails using his Commonwealth-issued computer equipment, others with whom he was exchanging emails were using their government-supplied computers and email servers, and, in some of the emails, the justice made sexually suggestive comments about employees in his judicial office. Further, the court noted that his “position as a justice of the Supreme Court conferred upon him not only the duty to decide cases, but also significant administrative responsibilities for our justice system.”

Emphasizing that the justice’s conduct “drastically damaged the reputation of the state judiciary” and “dramatically lessened public confidence in the integrity and impartiality of the entire judiciary,” the court concluded:

We acknowledge the context in which many of these communications occurred, Respondent’s

expectation that they would remain private, and that humor is often expressed in poor taste and rooted in the extreme. However, the pattern evidenced by the body of all of the emails demonstrated a misjudgment by Respondent, both in his understanding of how electronic communications work, as well as the substantive content of those communications.

. . . When these emails became public, all the more probable since he was using government equipment, and, at times, judicial and government internet servers, it resulted in harsh criticism ranging from private citizens to community leaders to legal and governmental officials. His actions were likewise widely reported in the news media both statewide and nationally.

The court stated that “the common thread of the emails, with their imagery of sexism, racism, and bigotry, is arrogance and the belief that an individual is better than his or her peers. Such beliefs are antithetical to the privilege of holding public office, where the charge is to serve, not demean, our citizens.”

As the Pennsylvania Supreme Court itself held several years earlier when concluding that a judge could be sanctioned for a road rage incident, “One aspiring to, or holding, the office cannot reasonably expect to be a rogue in his or her private life without thereby staining the integrity of the position.” *In re Carney*, 79 A.3d 490 (Pennsylvania 2013).

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