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Bullies on the Bench

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I. INTRODUCTION

Former United States District Judge Samuel B. Kent, who sat in Galveston, Texas, had little patience for lawyers he perceived as careless or incompetent.[1] He freely chastised such lawyers in his orders and, thanks to the legal media and the internet, some of his more colorful decisions attracted wide attention among members of the bar. Consider, for example, his order denying a defendant's motion to transfer venue in *Labor Force, Inc. v. Jacintoport Corp.*,[2] in which the hapless defense lawyer confused the transfer of a matter within divisions of a judicial district with a motion to transfer venue between districts, and, in doing so, apparently misread a federal venue statute. As Judge Kent angrily wrote in his order: "Manifestly, any person with even a correspondence-course level understanding of federal practice and procedure would recognize that Defendant's Motion [was] patently insipid, ludicrous and utterly and unequivocally without any merit whatsoever."[3] Continuing, Judge Kent quoted the portion of the statute that the defendant "hopelessly incorrectly interpreted and cited" and emphasized the relevant language, as the emphasis was "apparently needed by blithering counsel."[4] He then "emphatically" denied the defendant's "obnoxiously ancient, boilerplate, inane" motion and disqualified the defense lawyer "for cause . . . for submitting [such] asinine tripe."[5]

Consistent with his tone in the *Labor Force* case, Judge Kent allegedly used to brag about his ability to intimidate people and

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1. *See, e.g.*, Bradshaw v. Unity Marine Corp., 147 F. Supp. 2d 668, 670–72 (S.D. Tex. 2001) (mocking the work of the lawyers for both parties).

2. Order Denying Defendant's Motion to Dismiss or Transfer Venue and Ordering Substitution of Counsel-of-Record, Labor Force, Inc. v. Jacintoport Corp., et al., Civ. Action No. G-01-058 (S.D. Tex. June 7, 2001) (on file with the author).

3. *Id.* at 1.

4. *Id.* at 2.

5. *Id.*

reportedly boasted that "'everyone was afraid of him.'"[6] His judicial career eventually flamed out in spectacular fashion. He was accused of sexually assaulting two women on his staff and was sentenced to nearly three years in prison after he pled guilty to one count of obstruction of justice as part of a plea bargain in exchange for the dismissal of multiple sex crime charges.[7]

Another federal judge in Texas, Sam Sparks, caused a stir in August 2011 when his order concerning a party's poorly-conceived motion to quash a subpoena quickly went viral.[8] "You are invited to a kindergarten party," he announced in the order, a sarcastic mandate necessitated by the lawyers' inability "to practice law at the level of a first year law student."[9] He further wrote: "Invitation to this exclusive event is not RSVP. Please remember to bring a sack lunch! The United States Marshals have beds available . . . so you may wish to bring a toothbrush in case the party runs late."[10] Judge Sparks's sarcasm drew an e-mail rebuke from a Fifth Circuit colleague, who found the order "not funny," and described it as "so caustic, demeaning, and gratuitous" that it "cast[] more disrespect on the judiciary than on the now-besmirched reputation of the counsel."[11] Judge Sparks was unrepentant, saying he had received supportive e-mails from hundreds of federal and state judges.[12]

Mississippi Chancery Court Judge Talmadge Littlejohn achieved notoriety in October 2010 when he jailed a lawyer for criminal contempt after the lawyer failed to stand and recite the pledge of allegiance in court.[13] The lawyer, Danny Lampley, spent

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6. *Kent Sentenced to Almost 3 Years in Prison,* GALVESTON COUNTY DAILY NEWS, May 12, 2009, *available at* http://galvestondailynews.com/story/137512 (quoting Judge Kent's former case manager).

7. *Id.* (noting that Judge Kent had faced five charges for alleged federal sex crimes in addition to the obstruction of justice charge); *see also* Brenda Sapino Jeffreys, *Former Judge Samuel B. Kent Sentenced to 33 Months in Prison,* TEXAS LAWYER (May 11, 2009), http://www.law.com/jsp/tx/PubArticle FriendlyTX.jsp?id=1202430610099 (reporting the history and resolution of the case against Judge Kent).

8. Order, Theresa Morris v. John Coker et al., Case Nos. A-11-MC-712-SS to -715-SS (W.D. Tex. Aug. 26, 2011) (on file with the author).

9. *Id.* at 1–2.

10. *Id.* at 2.

11. John Council, *5th Circuit Judge Takes U.S. District Judge Sam Sparks to Task in an Email*, TEXAS LAWYER (Sept. 12, 2011), http://www.law.com/jsp/tx/PubArticleFriendlyTX.jsp?id=1202514158040.

12. *Judge Defends Kindergarten Order,* WALL ST. J. LAW BLOG (Sept. 27, 2011, 2:33 p.m. ET), http://blogs.wsj.com/law.

13. Holbrook Mohr, *Attorney Jailed for Not Reciting Pledge of Allegiance,* LAW.COM (Oct. 12, 2010), http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202473224805; Holbrook Mohr & Adrian Sainz, *Recite Pledge or Go to Jail? Mississippi Lawyer Locked Up,* TULSA WORLD, Oct. 8, 2010, *available at*

approximately five hours in jail before Judge Littlejohn released him so he could appear on behalf of another client.[14] As Judge Littlejohn later acknowledged, his action clearly violated Lampley's First Amendment rights.[15] The Mississippi Commission on Judicial Performance concluded that Judge Littlejohn violated five canons of judicial conduct and a section of the Mississippi Constitution.[16] Based on Judge Littlejohn's admission of error and his promise to make the recitation of the pledge in his courtroom voluntary in the future, the Commission recommended to the Supreme Court of Mississippi that it publicly reprimand Judge Littlejohn and fine him $100.[17] After expressing what might be viewed by some observers as insincere concern about the gravity of the judge's misconduct in light of the outcome,[18] the Mississippi Supreme Court adopted the disappointingly weak sanctions recommended by the Commission.[19]

Finally, consider the remarks of Justice Frederick L. Brown of the Massachusetts Appeals Court at oral argument in *Edwards v. Labor Relations Commission.*[20] In *Edwards*, George Edwards sued the National Association of Government Employees ("NAGE") for breaching its duty of fair representation when it did not represent him in an earlier proceeding.[21] The Massachusetts Labor Relations Commission dismissed Edwards's complaint against NAGE, and Edwards appealed. At oral argument, Justice Brown made a series of comments to the Commission's counsel critical of NAGE, its president, Kenneth Lyons, and Lyons's family.[22] Justice Brown

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http://www.tulsaworld.com/news/article.aspx?subjectid=13&articleid=20101008_13_A8_TUPELO336814.

14. Mohr, *supra* note 13; Mohr & Sainz, *supra* note 13.

15. *See* Phil West, *Tupelo Judge Reprimanded for Pledge of Allegiance Incident,* THE COMMERCIAL APPEAL, June 10, 2011, http://www.commercialappeal.com/news/2011/jun/10/tupelo-judge-reprimanded-for-pledge-incident/?print=1; *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

16. Commission Findings of Fact and Recommendation, Inquiry Concerning a Judge at 3, No. 2010-216 (Miss. Comm'n on Judicial Performance Nov. 30, 2010) (on file with the author).

17. *Id.* at 3–4.

18. *See* Miss. Comm'n on Judicial Performance v. Littlejohn, 62 So. 3d 968, 971–72 (Miss. 2011) (discussing the judge's misconduct).

19. *Id.* at 973.

20. 660 N.E.2d 395 (Mass. App. Ct. 1996).

21. *In re* Brown, 691 N.E.2d 573, 574 (Mass. 1998).

22. *Id.*

stated that Lyons kept his entire family on NAGE's payroll, complained that Lyons and his family were feathering their nests financially while NAGE members received nothing for their dues, claimed NAGE was a union run amok, and asserted NAGE did not truly represent anyone—its leaders collected members' dues "'and [kept] on stepping and [bought] more condos and [had] more expense accounts and [had] fancy banquets.'"[23] Lyons learned of Justice Brown's comments and, despite the fact the court affirmed the Commission's judgment for NAGE, complained about Justice Brown to the Massachusetts Commission on Judicial Conduct.[24] Ultimately, the Massachusetts Supreme Judicial Court publicly reprimanded Justice Brown for his misconduct at oral argument, calling his remarks "intemperate, excessive, unjustified by anything properly before the court, and gratuitously insulting of persons directly and indirectly implicated" in the *Edwards* case.[25]

Judges wield considerable power over lawyers and litigants who appear before them. As one judicial ethics scholar has explained:

> In litigation, the judge is the maximum boss. Everyone else is a supplicant, compelled to engage in stylized demonstrations of obeisance. We stand when the judge enters and leaves the room. Our "pleadings" are "respectfully submitted." Before speaking, we make sure that it "pleases the court." We obey the judge's orders and we even say "thank you" for adverse rulings.[26]

As the foregoing examples regrettably illustrate, however, these required trappings of respect do not ensure respectable behavior by the judges to whom they are offered.[27]

Regulating judges' demeanors is a difficult task. Judges are human and may occasionally display anger or annoyance. The crowded dockets and scarce judicial resources common to many courts seemingly assure some intemperate conduct from judges.[28] Even judges who enjoy impressive self-control and gracious bearings may sometimes lose patience with incompetent or uncivil lawyers, or especially difficult or disruptive litigants. Lawyers and

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23. *Id.* at 575 (quoting Justice Brown).
24. *Id.*
25. *Id.* at 576.
26. Steven Lubet, *Bullying from the Bench*, 5 GREEN BAG 2D 11, 12 (2001).
27. *Id.*
28. *But see* JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 3.02, at 3–8 (4th ed. 2007) ("Reviewing courts generally have been unwilling to consider in mitigation the notion that the judge's conduct was caused by the pressures of heavy court caseloads.").

litigants sometimes incite judges.[29] Moreover, judicial candor is a highly-valued trait and judges must be allowed some flexibility in criticizing the performance of lawyers who appear before them. In the same vein, trial and appellate lawyers are generally considered to have thick skins; indeed, tolerating judicial criticism is an ordinary rigor of litigation practice. It is therefore no wonder that judicial conduct commissions and supreme courts do not wish to micromanage judges' courtroom activities or scour their writings for evidence of possible misconduct. At the same time, judges are held to high standards of conduct,[30] and their inability to comply with established professional norms erodes public confidence in the judiciary.[31] As the *In re Brown*[32] court explained:

> For every litigation at least one-half of those involved are likely to come away sorely dissatisfied, and every citizen has reason to apprehend that one day he might be on the losing side of our exercise of judgment. Therefore, this arrangement requires an exacting compact between judges and the citizenry. It is not enough that we know ourselves to be fair and impartial or that we believe this of our colleagues. Our power over our fellow citizens requires that we appear to be so as well. . . . An impartial manner, courtesy, and dignity are the outward sign of that fairness and impartiality we ask our fellow citizens, often in the most trying of circumstances, to believe we in fact possess. . . .

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29. A recent *New York Times* story described "a blistering courtroom session" in a priest abuse case in Philadelphia in which defense lawyers "engaged in shouting matches" with Court of Common Pleas Judge Renee Hughes. Katharine Q. Seelye, *Prosecution Requests Granted in Priests' Abuse Case*, N.Y. TIMES, Mar. 26, 2011, at A14, *available at* http://www.nytimes.com/2011/03/26/us/26philly.html. Judge Hughes reportedly "erupted in fury several times, accusing some of the defense lawyers of attacking her integrity and telling them to 'shut up.'" *Id.*

30. Disciplinary Counsel v. Russo, 923 N.E.2d 144, 147 (Ohio 2010) ("Judges are subject to the highest standards of ethical conduct."); *see also In re* Dempsey, 29 So. 3d 1030, 1033 (Fla. 2010) (stating that judges "'should be held to higher ethical standards than lawyers by virtue of their position in the judiciary and the impact of their conduct on public confidence in an impartial justice system'") (quoting *In re* McMillan, 797 So. 2d 560, 571 (Fla. 2001)); *In re* Alessandro, 918 N.E.2d 116, 122 (N.Y. 2009) (observing that judges are held to standards of conduct higher than those imposed on the public at large) (quoting *In re* Mazzei, 618 N.E.2d 123 (N.Y. 1993)).

31. Roger J. Miner, *Judicial Ethics in the Twenty-First Century: Tracing the Trends*, 32 HOFSTRA L. REV. 1107, 1108 (2004).

32. *In re* Brown, 691 N.E.2d 573 (Mass. 1998).

> Finally patience and courtesy are required of a judge toward those he deals with in his official capacity for the additional reason that a judge in that official capacity is granted the power to command silence and respect in his presence. . . . When a judge berates or acts discourteously to those before him—even if he cannot affect their interests as litigants—he abuses his power and humiliates those who are forbidden to speak back. . . . [T]here are times when a judge must and should admonish and express harsh judgment to those before him, but they must be limited to the necessities of the occasion, being neither gratuitous nor irrelevant to it.[33]

When judges move beyond occasional displays of anger, frustration, or impatience and intentionally abuse or denigrate those who appear before them, they may be fairly described as bullies. This label is apt because bullying is characterized by a power imbalance between bullies and their targets, and judges unquestionably wield great power over lawyers, litigants, jurors, and witnesses. When individual judges bully, they expose all judges to public contempt.[34] Although some intemperate behavior from judges is to be expected if not welcomed, and not all judicial discourtesy or undignified behavior merits professional discipline, there is no place for bullies on the bench. This does not mean that every abusive judge must be removed from the bench. But judicial conduct commissions and superior courts must deal convincingly with judges who are bullies. In some cases that may require the imposition of substantial discipline, including suspensions without pay and removal. More fundamentally, judges and lawyers who are inclined to find guilty pleasure in the sort of gratuitous abuse Judge Kent dished out in the *Labor Force* case need to adjust their thinking.[35]

This Article examines the limits on intemperate behavior by judges. Part II discusses the applicable rules of judicial ethics and the means by which judges' conduct is regulated. Part III addresses the phenomenon of judicial bullying in more detail, first offering

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33. *Id.* at 576 (footnote omitted).

34. *See* McBryde v. Comm. to Review Cir. Council Conduct & Disability Orders of the Judicial Conf. of the United States, 264 F.3d 52, 66 (D.C. Cir. 2001) ("Arrogance and bullying by individual judges expose the judicial branch to the citizens' justifiable contempt.").

35. *See* Lubet, *supra* note 26, at 12 (observing that many lawyers enjoyed Judge Kent's caustic wit and that judges delighted in his similarly harsh opinion ridiculing the lawyers for both parties in *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668 (S.D. Tex. 2001), discussed in detail at *infra* Part III.B).

obvious examples of such misconduct and then exploring the misuse of humor in judicial opinions, arguing that when attempts at judicial humor turn into ridicule they also count as bullying. In doing so, it uses one of Judge Kent's best-known opinions to illustrate the point.

II. REGULATING JUDICIAL COURTESY

Judges are required to treat all who appear before them with courtesy and dignity, and to similarly exhibit patience. Judges must also perform their duties fairly and impartially. A judge's failure in these respects may (a) subject the judge to discipline; or (b) cause a higher court to reverse the judge's decision and reassign the case upon remand.

A. Judicial Conduct Rules Governing Abusive, Discourteous, or Intemperate Behavior

The Model Code of Judicial Conduct furnishes standards for the ethical conduct of judges and establishes a basis for the regulation of judicial behavior by judicial conduct commissions and courts.[36] The Model Code is the successor to the Canons of Judicial Ethics adopted by the American Bar Association in 1924.[37] The ABA substantially revised the Model Code in 2007. Before the 2007 revision, the Model Code had not been comprehensively revised since 1990, although specific provisions were amended in 1997, 1999 and 2003.[38] The Model Code has long included provisions intended to aid in the regulation of judges' discourteous and intemperate behavior.[39] Prominently, Canon 3(B)(4) of the 1990 version of the Model Code established that a judge "shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity."[40] In 1999, the ABA amended Canon 3(B)(4)

36. MODEL CODE OF JUDICIAL CONDUCT Preamble at 1 (2011).

37. Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. ANN. SURV. AM. L. 497, 524 (2008).

38. MODEL CODE OF JUDICIAL CONDUCT Preface at xii (2011).

39. Although such cases are rare, judges may be disciplined for abusive or intemperate conduct directed at other judges. *See, e.g.*, *In re* Inquiry Concerning a Judge, 566 S.E.2d 310, 314, 316 (Ga. 2002) (retaliating against a subordinate judge); Nebraska *ex rel.* Comm'n on Judicial Qualifications v. Jones, 581 N.W.2d 876, 883–92 (Neb. 1998) (removing a judge from office for, among other offenses, repeated abuse of a fellow judge).

40. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(4) (1990).

to require judges to mandate "similar conduct of lawyers, and of staff, court officials, and others subject to the judge's control."[41] Rule 2.8(B) of the 2007 Model Code contains the identical requirement.[42] More generally, earlier versions of the Model Code provided in Canon 2(A) that a judge "shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[43] This requirement is captured in Rule 2.2 of the 2007 Model Code, which states that a judge "shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."[44]

The Code of Conduct for United States Judges contains similar provisions. Canon 2A of the Federal Code tracks both 1990 Model Code Canon 2(A) and 2007 Model Code Rule 2.2.[45] Canon 3B(3) of the Federal Code tracks Canon 3(B)(4) of the 1990 Model Code and Rule 2.8(B) of the 2007 Model Code.[46]

Judges have been sanctioned under these rules for engaging in a variety of discourteous behaviors.[47] In *Disciplinary Counsel v.*

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41. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(4) (1999).

42. MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (2007) ("A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers…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.").

43. MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) (1999).

44. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007).

45. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2A (2009).

46. *Id.* Canon 3A(3).

47. *See, e.g.*, *In re* Flournoy, 990 P.2d 642, 645 (Ariz. 1999) (finding that the judge's regular and well-known temper tantrums, frequent abuses of lawyers, and improper treatment of staff and witnesses, violated Canons 2(A) and 3(B)(4), among others); Dodds v. Comm'n on Judicial Performance, 906 P.2d 1260, 1269–70 (Cal. 1995) (rejecting judge's defense that his rudeness and disrespectful behavior merely evidenced his "assertive judicial style"); *In re* Newton, 758 So. 2d 107, 108–09 (Fla. 2000) (reprimanding a former judge who was repeatedly abusive, demeaning, rude, sarcastic and even vengeful toward lawyers, parties and witnesses who appeared before her); *In re* Shea, 759 So. 2d 631, 632–33, 638–39 (Fla. 2000) (finding that a judge violated Canon 3(B)(4), among others, through a pattern of abusive and hostile conduct toward lawyers, parties, witnesses, court personnel and other judges, and accordingly removing him from the bench); *In re* Perry, 586 So. 2d 1054, 1054–55 (Fla. 1991) (reprimanding a judge who "engaged in verbal abuse and intimidation of attorneys, witnesses, and parties" for violating Canons 2(A) and 3(A)(3), the latter being identical to Canon 3(B)(4) of the Model Code); *In re* Inquiry Concerning Fowler, 696 S.E.2d 644, 646, n.8 (Ga. 2010) (removing from office a probate judge who "routinely used rude, abusive, and insulting language towards parties"); *In re* Inquiry Concerning Holien, 612 N.W.2d 789, 793–98 (Iowa 2000) (removing a judge who had "frequent conflicts with almost all of the people with whom she came in contact" and whose broad and deep

Parker,[48] for example, an Ohio municipal court judge, George Parker, was conducting a probation violation hearing when the defendant's mother, who was in the gallery, raised her hand.[49] Judge Parker emphatically instructed the woman to leave the courtroom.[50] When she gently protested, he again told her to leave and threatened to jail her if she did not.[51] When she muttered in disbelief on her way out of the courtroom, Judge Parker immediately called her back, found her in contempt of court, sentenced her to one day in jail, and then allowed officers to take her away in handcuffs.[52] The Ohio Supreme Court concluded that Judge Parker "stained the integrity" of the judicial system through his "intemperate, unreasonable, and vindictive" decision to eject the woman from his courtroom and jail her for contempt, and determined that in doing so he violated Canons 2 and 3(B)(4), among others.[53]

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hostilities "must have touched every aspect of her judicial services," for violating, inter alia, Canon 3(A)(3), which is identical to Model Code Canon 3(B)(4)); *In re* Pilshaw, 186 P.3d 708, 709–12 (Kan. 2008) (censuring judge for angry outbursts at jurors); *In re* Lamdin, 948 A.2d 54, 65–68 (Md. 2008) (suspending judge for 30 days without pay for repeated instances of discourteous and intemperate behavior); *In re* Brown, 691 N.E.2d 573, 576–78 (Mass. 1998) (finding that judge violated Massachusetts Canons 2(A) and 3(A)(3), the latter being identical to Canon 3(B)(4) of the Model Code, for harshly critical comments directed at a non-party involved in the litigation); *In re* Moore, 626 N.W.2d 374, 392–93 (Mich. 2001) (suspending a judge for among other violations, "impatient, discourteous, critical, and sometimes severe attitudes toward jurors, witnesses, counsel, and others present in the courtroom"); *In re* Ramirez, 135 P.3d 230, 231, 234 (N.M. 2006) (disciplining a judge who "raised his voice" with a defense attorney appearing before him, "prevented the attorney from making her full objections for the record, and admonished her in front of her client"); Disciplinary Counsel v. Campbell, 931 N.E.2d 558, 564 (Ohio 2010) (finding that a judge who became angry with lawyer in a chambers conference and told the lawyer that he was "behaving like a horse's ass" violated Canons 2 and 3(B)(4)); *In re* Walsh, 587 S.E.2d 356, 360–61 (S.C. 2003) (removing a judge for repeated incidents of intemperance for violating Canons 2(A) and 3(B)(4), among many others); *In re* Fuller, 798 N.W.2d 408, 413–15, 421–22 (S.D. 2011) (disciplining a trial court judge who was demeaning, disrespectful and rude to lawyers and others in his court, including one incident in which gave a lawyer "the bird" in open court, causing the lawyer's client great concern about the judge's fairness); *In re* Disciplinary Proceeding Against Eiler, 236 P.3d 873, 882–83 (Wash. 2010) (suspending a judge for the repeated verbal abuse of pro se litigants).

48. Disciplinary Counsel v. Parker, 876 N.E.2d 556 (Ohio 2007).
49. *Id.* at 560.
50. *Id.*
51. *Id.* at 560–61.
52. *Id.* at 561.
53. *Id.*

Judge Parker, like so many other judges disciplined under Canons 2 and 3(B)(4), was a serial bully.[54] In another case, he attempted to intimidate a prosecutor into accepting a guilty plea to a misdemeanor charge, a lower charge than the prosecutor was willing to accept.[55] In a domestic violence case, he both humiliated the victim and demonstrated bias against her husband in open court.[56] In many other cases over a two-year period, Judge Parker "routinely mistreated those who appeared before him."[57] Among other bizarre incidents, he asked a teenage defendant, who was Jewish, why he attended a Catholic high school; forced defendants who were accused of alcohol-related offenses to admit in open court that they were alcoholics; refused to return the cane of a defendant—who therefore had to request assistance to leave the witness box—on the basis that the defendant had used the cane to damage a vehicle, was a repeat offender, and was "snake-bit mean;" belittled a prosecutor in a drunk-driving case and essentially called her stupid in open court; repeatedly insulted a victim–witness advocate; and finally, insisted that a victim of domestic violence tell him whether she had forgiven her husband.[58]

For Judge Parker's many violations of Canons 2 and 3(B)(4), the Ohio Supreme Court suspended him from practice and from serving as a municipal judge for eighteen months without pay.[59] In an interesting attempt to mitigate his discipline, Judge Parker established that his misconduct was attributable to a mental disability—narcissistic personality disorder ("NPD").[60] Because his expert psychologist testified that NPD was not readily treatable, however, the Court declined to afford it significant mitigating effect.[61]

Similarly, the judge in *In re Sloop*[62] committed several serious acts of misconduct, one of which involved a "condescending

54. *See* ALFINI ET AL., *supra* note 28, § 3.02, at 3-5 (noting that "most judges who have been sanctioned for violating Canon 3 exhibited a pattern of misconduct"); *see also supra* note 47 (listing numerous cases in which the judge being disciplined was a serial offender).

55. *Parker*, 876 N.E.2d at 561–62.

56. *Id.* at 563–64.

57. *Id.* at 565.

58. *Id.* at 565–66.

59. *Id.* at 574.

60. *Id.* at 567–69. NPD is "a condition in which people have an inflated sense of self-importance and an extreme preoccupation with themselves." Narcissistic Personality Disorder, PUBMED HEALTH (Nov. 14, 2010), http:// www.ncbi.nlm. nih.gov/pubmedhealth/PMH0001930.

61. *Parker*, 876 N.E.2d at 569–70.

62. 946 So. 2d 1046 (Fla. 2007).

tirade" directed at a defendant, Ms. Mercano.[63] Judge Sloop was "rude, abrupt, and abusive" in his dealings with Ms. Mercano, and acted more like a prosecutor than a judge during her appearance.[64] He oddly defended his conduct as purposeful and also argued that he had not lost his temper.[65] The Florida Supreme Court was unsure which explanation was worse, but concluded that, either way, he had violated Canon 3(B)(4) of the Florida Code of Judicial Conduct.[66] Although Judge Sloop's conduct toward Ms. Mercano, standing alone, might have warranted punishment short of removal, that incident was "merely the latest episode in a judicial career marred by displays of anger that ha[d] resulted in warnings by the [Judicial Qualifications Commission] and fellow judges to Judge Sloop concerning his temper."[67] Accordingly, and because more serious misconduct followed this incident just two months later, the Court removed him from office.[68]

Although *Parker* and *In re Sloop* involved judges who were accused of multiple instances of misconduct, courts are sometimes willing to sanction judges for single incidents of intemperate behavior that are sufficiently serious.[69] For example, in *In re Ochoa*,[70] an Oregon judge, Joseph Ochoa, became enraged when a defense lawyer, Edward Dunkerly, went "behind his back" to obtain a continuance of a trial so that Dunkerly could accompany his family on a European trip.[71] Judge Ochoa left Dunkerly a voicemail message rescinding the continuance, ordered Dunkerly's client to appear unrepresented while Dunkerly was in Europe, and at that hearing disparaged the lawyer to his client.[72] Judge Ochoa

63. *Id.* at 1057.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1058–60.
69. Judges have also been disciplined for a single incident of intemperate behavior where they had a prior disciplinary history. *See, e.g.*, *In re* Ellender, 16 So. 3d 351, 358–60 (La. 2010) (suspending a judge for a single incident of discourteous behavior while noting that it was the judge's third disciplinary sanction, which the court described as "most troubling").
70. 51 P.3d 605 (Or. 2002).
71. *Id.* at 606. Dunkerly had attempted to obtain a continuance from Judge Ochoa, even going to the courthouse to hand-deliver his motion. When Dunkerly learned that Judge Ochoa had left the courthouse and would not return for five days, however, he was in a tough spot because he needed a speedier ruling on his request for a continuance in order to make his travel plans. He thus approached the presiding judge who, in turn, directed him to another judge. That judge granted Dunkerly's request for a continuance in Judge Ochoa's absence. *Id.*
72. *Id.*

told the client that Dunkerly wanted a continuance so that he could go to Europe "and was probably using the thousands of dollars paid to him by the [client's] family to go to Europe rather than try the [client's] case."[73] Dunkerly rushed back from Europe as soon as he retrieved Judge Ochoa's message, but he was forced to withdraw from the representation because the judge's conduct irreparably harmed his relationship with his client.[74] When charged with misconduct as a result of this incident, Judge Ochoa admitted his misconduct and consented to censure.[75] The Oregon Supreme Court approved the agreement and censured him.[76]

In re Hannigan[77] is another case in which a single instance of intemperate behavior by a judge justified discipline. The opinion in *In re Hannigan* resulted from an administrative proceeding before the New York Commission on Judicial Conduct. The judge had presided over plea discussions between a prosecutor and a teenage defendant in which he called the defendant's life a "garbage pit," accused her of being stupid and dishonest, mocked her receipt of public assistance, and "sarcastically referred to the defendant's 'constitutional right[s] to leave school, to have the community support you, to relax, to lay back, . . . to have babies, [and] . . . to be stupid."[78] The Commission determined that through "this intemperate diatribe" the judge had breached his duty "to be patient, dignified, and courteous and conveyed the appearance of bias."[79] Declaring it "wrong for a judge to engage in name-calling and dehumanizing remarks, particularly to a litigant," the Commission observed that "[e]ven a single instance of intemperate language" may support a finding of misconduct.[80] Because the judge had enjoyed a long and unblemished career on the bench and the charged misconduct was an isolated incident, the Commission concluded a public warning or admonition was an appropriate sanction.[81]

Despite their broad wording, Canons 2(A) and 3(B)(4), and Rules 2.2 and 2.8(B), are rules of reason.[82] Not all discourteous or

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73. *Id.*
74. *Id.*
75. *Id.* at 607.
76. *Id.*
77. 1997 WL 809945 (N.Y. Comm'n Jud. Conduct, Dec. 17, 1997).
78. *Id.* at *1–3.
79. *Id.* at *4.
80. *Id.*
81. *Id.*
82. *See* MODEL CODE OF JUDICIAL CONDUCT Scope [5] (2011) (stating that "[t]he Rules of the Model Code of Judicial Conduct are rules of reason"); *see also* Green & Roiphe, *supra* note 37, at 541–542 (elaborating on this view).

undignified behavior by judges directed at lawyers, parties, witnesses, or others will justify discipline or even charges of misconduct.[83] Courts and judicial conduct commissions weighing judges' alleged violations should generally consider the context in which the challenged conduct took place.[84] In *Turner v. Turner,*[85] for example, the Alaska Supreme Court determined that although a trial judge had expressed anger and frustration with a pro se litigant during a divorce proceeding, the judge's conduct did not cross the "threshold of impropriety."[86] The Court reached this conclusion for two reasons. First, the litigant provoked the judge's comments.[87] Second, the litigant took some of the judge's comments out of context and misconstrued others.[88] The remarks the litigant misconstrued were in fact awkward attempts at humor intended to demonstrate empathy.[89]

In re Hocking[90] nicely illustrates courts' consideration of the facts surrounding judges' alleged intemperance and their willingness to accommodate some unfortunate conduct. In that case, the Supreme Court of Michigan evaluated two instances in which Judge Hocking's discourtesy was allegedly unethical.[91] The first incident involved an exchange between the judge and the prosecutor during a sentencing hearing in a sexual assault case.[92] The hearing proceeded properly for substantial time; both sides fully argued their positions without interruption.[93] As is often the case, the prosecution argued the court should adhere to Michigan sentencing guidelines, which would result in a long prison term for the defendant, and the defendant urged the court to deviate from the guidelines and impose a much lighter sentence.[94] Although the defense and the prosecution had scored the sentencing guidelines

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83. *In re* Ellender, 16 So. 3d 351, 359 (La. 2010).

84. MODEL CODE OF JUDICIAL CONDUCT Scope [5] (2011) (stating that the rules contained in the Model Code should be applied "with due regard for all relevant circumstances").

85. No. S-12405, 2009 WL 415586 (Alaska Feb. 18, 2009).

86. *Id.* at *8.

87. *Id.* at *9.

88. *Id*. at *9 n.32.

89. *See id.* at *9 n.32 (discussing one of the offending remarks).

90. 546 N.W.2d 234 (Mich. 1996).

91. The judge was accused of violating several Michigan canons of judicial conduct, including Canon 3(A)(3), which provided in pertinent part that a judge "should be patient, dignified and courteous . . . to lawyers," and Canon 3(A)(8), which provided that a judge should "avoid interruptions of counsel in their arguments except to clarify their positions, and should not be tempted to the unnecessary display of . . . a premature judgment." *Id.* at 246 nn. 31–32.

92. *Id.* at 238–39, 241.

93. *Id.* at 241.

94. *Id.*

identically, it was apparent that "Judge Hocking had decided to lower the scoring."[95] As Judge Hocking began to pronounce the sentence, it became clear he intended to depart significantly from the sentencing guidelines because he believed they did not adequately address the facts of the case.[96] The prosecutor, Pamela Maas, argued "the scoring of the guidelines was not at issue."[97] In a flash, Judge Hocking angrily ordered Maas to sit and stated that she could appeal if she did not like what he had to say.[98] Then, just as quickly, the judge's demeanor returned to normal and he explained why he believed that the sentencing guidelines did not control his decision in this case.[99]

The second incident involved Judge Hocking's treatment of a lawyer, Elaine Sharp, in post-judgment custody proceedings. Sharp represented the father in the case and, after the judge terminated the father's joint custody, she filed a motion for reconsideration. After losing that motion, she moved to reinstitute joint custody.[100] While the parties were arguing the second motion, Judge Hocking immediately told Sharp that he considered her latest motion to be "simply a disguised second motion for rehearing," and he demanded to know in what way the motion was different.[101] Sharp responded, "[a]ll right, fine," and then brusquely asked the judge what evidence supported his custody determination and inquired whether he considered the father's relationship with the child in reaching his decision.[102] Saying "that's enough," Judge Hocking denied the motion to reinstitute joint custody as a frivolous motion for reconsideration, and ordered Sharp to pay the mother's attorney's fees and costs as a sanction.[103] Sharp and Judge Hocking then embarked on a series of disagreeable and disrespectful exchanges, in which both accused the other of being on or from another planet (the judge made the first such remark), and which concluded with Judge Hocking sentencing Sharp to five days in jail and imposing a $250 fine for contempt of court.[104]

A majority of the Michigan Judicial Tenure Commission concluded that Judge Hocking was guilty of misconduct for being rude and discourteous to Maas and Sharp, and that those events

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95. *Id.*
96. *Id.* at 238.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 243.
101. *Id.*
102. *Id.* at 244.
103. *Id.*
104. *Id.*

and other misconduct not presently relevant warranted a thirty-day unpaid suspension from office.[105] Judge Hocking challenged the commission's recommendation in the Michigan Supreme Court.[106]

Returning to the Maas exchange, Judge Hocking and the Court agreed that the judge lost his temper and should have handled Maas's interruption of his pronouncement more graciously.[107] But, the court noted, not every "angry retort or act of discourtesy" from a judge qualifies as misconduct.[108] Rather, the facts of each incident must be evaluated separately, and judges are subject to discipline only if their conduct is "clearly prejudicial to the administration of justice."[109] That was not the case here.[110] Maas, who had been given ample opportunity to explain her views to the court on an appropriate sentence, breached established courtroom decorum when she interrupted the judge.[111] This lapse was perhaps understandable given her surprise at the judge's apparent intent to depart downward from the confinement range specified in the sentencing guidelines, but her interruption of the judge's remarks clearly breached the "unwritten rules of courtroom etiquette."[112] Judge Hocking's reaction to the interruption, although admittedly too strong, was understandable under the circumstances.[113] Although the Michigan Supreme Court did not condone Judge Hocking's intemperate comments to Maas, it determined that the comments did not rise to the level of judicial misconduct.[114]

Judge Hocking's "caustic and abusive" exchange with Sharp was another story.[115] While agreeing that the judge had not abused his contempt authority, the court characterized his behavior as "shockingly injudicious."[116] The court found that Judge Hocking instigated the confrontation with Sharp by challenging her to explain why her motion was not frivolous, made "caustic comments in an abusive tone, and personally attacked" her.[117] Unlike his exchange with Maas, in which he was abrupt and

105. *Id.* at 236–37.
106. *Id.* at 237.
107. *Id.* at 241.
108. *Id.*
109. *Id.* at 242 (quoting MICH. CT. R. 9.205 (West, Westlaw through 2011)).
110. *Id.* ("Having reviewed the videotape of the . . . sentencing, we find that the exchange with Ms. Maas was not clearly prejudicial to the administration of justice.").
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 245.
115. *Id.* at 243.
116. *Id.* at 244.
117. *Id.*

momentarily biting, the judge's persistent exchange with Sharp reflected "a total lack of self-control and an antagonistic mindset predisposed to unfavorable disposition."[118] Although Sharp behaved improperly, the judge unquestionably had the ability to regulate her conduct through traditional means, up to and including citation for contempt.[119] Instead, Judge Hocking behaved so rudely that his misconduct was prejudicial to the administration of justice.[120]

The Maas and Sharp incidents were but two of six instances of the judge's alleged misconduct that the court reviewed.[121] Principally for his conduct toward Sharp, the supreme court suspended the judge from office for three days without pay.[122] A dissenting justice would have exonerated Judge Hocking altogether, inasmuch as he lost his temper but once and only then with a lawyer who was herself contemptuous and discourteous.[123] "An isolated incident of rudeness," the dissent contended, should be privately reprimanded and, "hopefully, prevented from recurring."[124] Although the dissenting justice did not condone Judge Hocking's behavior, and would certainly censure drastic or repeated instances of discourteous behavior, he reasoned that the court did the judiciary a disservice when it "condemn[ed] human failings as judicial misconduct."[125] What the generally thoughtful dissent apparently failed to recognize, of course, is that *any* act of misconduct can be characterized as a "human failing."

B. Reassignment of Cases Based on Abusive, Discourteous, or Intemperate Conduct

Courts may also police judges' intemperate conduct outside the disciplinary process. For example, an appellate court in remanding a case may order that the case be transferred to a different judge.[126]

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118. *Id.* at 245.
119. *Id.*
120. *Id.* at 245–46.
121. *Id.* at 236–37.
122. *Id.* at 246.
123. *Id.* at 247 (Cavanagh, J., concurring in part and dissenting in part).
124. *Id.* (Cavanagh, J., concurring in part and dissenting in part).
125. *Id.* (Cavanagh, J., concurring in part and dissenting in part).
126. Federal appellate courts have the authority to reassign cases to different district judges as part of their general supervisory powers. Cobell v. Kempthorne, 455 F.3d 317, 331 (D.C. Cir. 2006) (quoting United States v. Microsoft Corp., 56 F.3d 1448, 1463 (D.C. Cir. 1995)). Statutory authority for reassignment rests in 28 U.S.C. § 2106 (2005), which states: "The Supreme Court or any other court of appellate jurisdiction may . . . remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such

In other instances, an appellate court may actually reverse a trial court judgment as a result of judicial misconduct.[127] Two recent cases, *In re United States*,[128] and *People v. Leggett*,[129] are illustrative.

In re United States arose out of an evidentiary dispute. The district court had repeatedly refused to admit certain evidence the government offered, thus leading the government to petition for a

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further proceedings to be had as may be just under the circumstances." *See* Arthur D. Hellman, *The Regulation of Judicial Ethics In the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 204 (2007) (stating that section 2106 provides statutory authority for appellate courts' reassignment of cases to different district judges upon remand). Judicial reassignment may be appropriate where personal bias or unusual circumstances are established. TriMed, Inc. v. Stryker Corp., 608 F.3d 1333, 1344 (9th Cir. 2010) (citing Smith v. Mulvaney, 827 F.2d 558, 562 (9th Cir. 1987). In determining whether unusual circumstances exist, a court considers (1) "whether the original judge would reasonably be expected upon remand to have substantial difficulty" disregarding previously-expressed findings or views "determined to be erroneous or based on evidence that must be rejected"; (2) "whether reassignment is advisable to preserve the appearance of justice"; and (3) whether any duplication or waste attributable to reassignment would outweigh "any gain in preserving the appearance of fairness." *Id.* (quoting Smith v. Mulvaney, 827 F.2d 558, 563 (9th Cir. 1987)). Reassignment may further be required if "reasonable observers could believe that a judicial decision flowed from the judge's animus toward a party rather than from the judge's application of law to fact." *Cobell*, 455 F.3d at 332. Appellate courts tend to exercise their reassignment authority sparingly. *Id.* (reserving such authority for "extraordinary cases").

127. *See, e.g.,* Simmons v. State, 803 So. 2d 787, 788–89 (Fla. Dist. Ct. App. 2001) (reversing conviction and remanding case for a new trial where the trial judge's rebuke of the defense lawyer prejudiced the jury against defense counsel and deprived the defendant of a fair trial); State v. Hayden, 130 P.3d 24, 35 (Kan. 2006) (reversing defendant's convictions because trial judge's pervasively intrusive, rude, and sarcastic behavior directed at lawyers deprived the defendant of a fair trial); Schmidt v. Bermudez, 5 So. 3d 1064, 1074 (Miss. 2009) (reversing and remanding case for a new trial before a new judge based on the then-presiding judge's "combative, antagonistic, discourteous and adversarial" treatment of the plaintiff, which deprived her of a fair trial and was "wholly inconsistent with substantial justice"). Of course, not every comment by a judge indicating displeasure with a lawyer constitutes grounds for reversal. State v. Hak, 963 A.2d 921, 929–30 (R.I. 2009) (quoting State v. D'Alo, 477 A.2d 89, 92 (R.I. 1984)). For a judge's intemperate treatment of a lawyer to require reversal, the judge's comments must so prejudice the jury against the lawyer's client that the client is deprived of a fair trial. People v. James, 40 P.3d 36, 42–43 (Colo. App. 2001); *Schmidt,* 5 So. 3d at 1074; Commonwealth v. Jones, 912 A.2d 268, 287 (Pa. 2006) (quoting Commonwealth v. England, 375 A.2d 1292, 1300 (Pa. 1977)).

128. 614 F.3d 661 (7th Cir. 2010).

129. 908 N.Y.S.2d 172 (N.Y. App. Div. 2010).

writ of mandamus.[130] On appeal, the Seventh Circuit observed that the transcript of the district judge's remarks revealed "a degree of anger and hostility toward the government that [was] far in excess of any provocation" discernible from the record.[131] The judge suspected the government of tampering with evidence, although he acknowledged that his supposition of misconduct was "speculative," which the Seventh Circuit branded "an understatement,"[132] and later described as "implausible speculation."[133] Outside the presence of the jury, the judge repeatedly accused the prosecutors of lying, and he further threatened to convene hearings concerning the prosecutors' perceived misconduct.[134] Moreover, the judge apparently failed to consider the prosecutors' explanations for why his suppositions were mistaken.[135]

The Seventh Circuit concluded the challenged evidence should be admitted and, more importantly for present purposes, determined that on remand the case should be reassigned to a different district judge.[136] The court reasoned reassignment was required because "[n]o reasonable person would fail to perceive a significant risk that the judge's rulings in the case might be influenced by his unreasonable fury toward the prosecutors."[137]

While the decision in *In re United States* was based on the district judge's extraordinary anger, *People v. Leggett* involved a trial judge's pervasive denigration of a defense lawyer in front of the jury.[138] As a result, the court in *Leggett* reversed the defendant's conviction for carjacking and ordered a new trial.[139]

Problems began during defense counsel's cross-examination of the sole eyewitness to the carjacking. The judge interposed his own objection to the defense lawyer's questions, calling the examination of the witness "irrelevant" and "silly."[140] By calling the cross-examination "silly," the judge disparaged the defense lawyer and negated the line of questioning.[141] Things further deteriorated during the parties' closing arguments. During closings, the judge told the defense lawyer that his argument over

130. *In re United States*, 614 F.3d at 664–65.
131. *Id.* at 665.
132. *Id.*
133. *Id.* at 666.
134. *Id.* at 665.
135. *Id.*
136. *Id.* at 666.
137. *Id.*
138. 908 N.Y.S.2d 172 (N.Y. App. Div. 2010).
139. *Id.* at 173.
140. *Id.* at 173–74.
141. *Id.* at 174.

the prosecutor's speaking objections was "turning . . . into a comedy."[142] When the defense lawyer objected during the prosecutor's closing, the judge not only overruled the objection but said to the defense lawyer, "[w]ould you behave like a professional, please and not a clown."[143] When the defense lawyer subsequently moved for a mistrial and protested that the judge's treatment of him during closing arguments was outrageous, the court denied the motion and further responded, "you're outrageous."[144] The judge also improperly asked the defense lawyer in the jury's presence whether he "wished to behave like a gentleman" or be escorted out of the courtroom.[145]

The *Leggett* court acknowledged that trial judges are sometimes required to admonish lawyers but explained that judges should either do so at a sidebar or first excuse the jury.[146] The court further explained that when a judge errs and makes an injudicious remark about a lawyer in front of the jury, he should issue a curative instruction.[147] In *Leggett*, the judge's many intemperate remarks about defense counsel in the jury's presence, and especially the comment that the defense lawyer was acting like a clown, were "simply inexcusable" and mandated a new trial before a different judge.[148]

C. Summary

Judges are required to be patient, dignified, and courteous when interacting with jurors, lawyers, parties, witnesses, and others in an official capacity.[149] More generally, judges must perform their duties fairly and impartially.[150] Despite their absolute and seemingly inflexible wording, judicial conduct rules governing courtesy do accommodate some intemperate behavior by judges.[151]

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142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 175.
148. *Id.*
149. MODEL CODE OF JUDICIAL CONDUCT R. 2.8(B) (2011).
150. *See id.* R. 2.2.
151. *See, e.g.*, *In re* Disqualification of Corrigan, 826 N.E.2d 302, 303–04 (Ohio 2004) (deciding that while "[t]he judge's use of the word 'jackasses' when evidently referring to attorneys who behave foolishly or who resolve cases too slowly was unfortunate, and his reference to the clothing and jewelry worn by some attorneys who practice in the domestic-relations field was unnecessary," such remarks did not justify the judge's disqualification); *In re* Hamrick, 512 S.E.2d 870, 872–73 (W. Va. 1998) (declining to discipline a

Courts are more likely to find a judge guilty of misconduct where the judge has exhibited a pattern of discourteous or abusive behavior.[152] Isolated incidents of discourtesy or abuse generally must be quite serious to justify discipline by state authorities or the reassignment of a case by a higher court. In addition, lawyers or litigants sometimes provoke judges' intemperate behavior.[153] The trend, however, is to hold judges strictly accountable for intemperate conduct in court, and it is plain that judges' disrespectful conduct toward parties and bullying of counsel are increasingly "meeting with zero tolerance."[154] These are positive tendencies, as judges themselves agree.[155]

The next step, then, is to ask what type of response by judicial conduct commissions and higher courts "zero tolerance" describes. To their credit, state supreme courts have in a number of cases significantly punished judges who bullied lawyers, parties, and others.[156] In too many other cases, though, high courts have

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family law master who angrily rebuked a litigant who apparently misrepresented facts, while cautioning that the master's actions "were not appropriate and definitely bordered on the need for discipline").

152. *See, e.g.*, *In re* Inquiry Concerning Fowler, 696 S.E.2d 644, 646 & n.8 (Ga. 2010) (involving a probate judge who "routinely used rude, abusive and insulting language towards parties"); *In re* Jenkins, 503 N.W.2d 425, 426–27 (Iowa 1993) (reprimanding a judge for multiple instances of demeaning and cruel characterizations of persons who appeared before him and offering as an example the judge's description of a witness as "a 'beer-bellied, full-bearded, unemployed, seedy, coverall-clad lout'"); *In re* Walsh, 587 S.E.2d 356, 361 (S.C. 2003) (removing judge from the bench for his history of intemperate courtroom behavior and his failure to modify his behavior despite being given the opportunity to do so); *In re* Disciplinary Proceeding Against Eiler, 236 P.3d 873, 879 (Wash. 2010) ("One or two rude, impatient, or even condescending comments might be understandable—after all, no jurist is perfect. But more than a dozen such instances is not understandable; rather, it evidences an unacceptable pattern of misbehavior.").

153. *But see* McCartney v. Comm'n on Judicial Qualifications, 526 P.2d 268, 287 (Cal. 1974) (rejecting judge's defense that public defender's practice of filing affidavits challenging his fairness and accordingly seeking his recusal provoked his hostility toward members of that office), *overruled on other grounds by* Spruance v. Comm'n on Judicial Qualifications, 532 P.2d 1209 (Cal. 1975); *In re* Barnes, 2 So. 3d 166, 171 (Fla. 2009) (stating that alleged misconduct by others does not excuse a judge's departure from the Code of Judicial Conduct).

154. Miner, *supra* note 31, at 1122.

155. *Id.*

156. *See, e.g.*, *In re* Shea, 759 So. 2d 631, 632–33, 638–39 (Fla. 2000) (finding that a judge violated Canon 3(B)(4), among others, through a pattern of abusive and hostile conduct toward lawyers, parties, witnesses, court personnel and other judges, and accordingly removing him from the bench); *In re* Inquiry Concerning Fowler, 696 S.E.2d 644, 646 & n.8 (Ga. 2010) (removing from

responded timidly to proven misconduct.[157] Judges who admit misconduct and promise to reform are allowed to stipulate to light sanctions that higher courts uphold.[158] Unfortunately, courts credit apologies and promises of personal transformation in cases where the judge's misconduct is so obviously wrong that remorse and reformation are no answer.[159]

There is certainly room for compassion, flexibility, leniency, and rehabilitation in judicial discipline. All judicial discipline cases, like all lawyer discipline cases, rise and fall on their facts. It is also true that agreed resolutions of disciplinary matters are a necessity for disciplinary systems to function efficiently. But judicial conduct commissions and courts must recognize that protecting the public and the bar, and inspiring confidence in those groups, requires firmness when confronting judicial bullying.

III. RAW JUDICIAL BULLYING TO PURPORTED HUMOR

At some point, a judge's anger, annoyance, or impatience with a lawyer, litigant, juror, or witness crosses from simply regrettable or unfortunate conduct to judicial misconduct. In most cases this transformation is obvious; much like pornography, judicial conduct

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office a probate judge who "routinely used rude, abusive and insulting language towards parties . . . ."); *In re* Inquiry Concerning Holien, 612 N.W.2d 789, 793, 797 (Iowa 2000) (removing a judge who had "frequent conflicts with almost all of the people with whom she came in contact" and whose broad and deep hostilities "must have touched every aspect of her judicial services," for violating, inter alia, Canon 3(A)(3), which is identical to Model Code Canon 3(B)(4)); *In re* Lamdin, 948 A.2d 54, 65–68 (Md. 2008) (suspending judge for 30 days without pay for repeated instances of discourteous and intemperate behavior); *In re* Walsh, 587 S.E.2d 356, 360–61 (S.C. 2003) (removing a judge for repeated incidents of intemperance for violating Canons 2(A) and 3(B)(4), among many others).

157. *See, e.g.*, *In re* Disciplinary Proceeding Against Eiler, 236 P.3d 873, 882 (Wash. 2010) (suspending for a mere five days a judge who had been previously reprimanded, who defended her abusive behavior as a matter of judicial philosophy, and who stated that she did not "believe that the canons [of judicial conduct] [were] binding on her behavior in the courtroom").

158. *See, e.g.*, *In re* Perry, 586 So. 2d 1054, 1054 (Fla. 1991) (accepting stipulation to a public reprimand where the judge "apologize[d] for his conduct and agree[d] to refrain from similar conduct in the future"); Miss. Comm'n on Judicial Performance v. Littlejohn, 62 So. 3d 968, 972–73 (Miss. 2011) (accepting very light sanctions agreed upon by the parties where the judge admitted his serious misconduct and promised not to do it again).

159. *See, e.g.*, *Littlejohn,* 62 So. 3d at 970 (involving a judge who jailed a lawyer for criminal contempt after the lawyer refused to say the pledge of allegiance in open court).

commissions and higher courts know bullying when they see it. Instead of simply expressing emotion, the judge under scrutiny has intentionally denigrated someone or purposefully trampled on a person's rights. The more frequent or extreme a judge's intemperance, the greater the likelihood of intervention by responsible authorities or higher courts.[160] In other instances, a judge's conduct ostensibly presents a closer call, as when an attempt at humor in a proceeding is better characterized as ridicule.

A. Judges Bullying Lawyers, Parties and Others

It seems likely that an appreciable percentage of cases in which judges bully lawyers are not reported to judicial conduct commissions or appealed on that basis because the lawyers appear before the offending judges with sufficient frequency that they must be concerned about possible retribution.[161] As an alternative to reporting or appealing, lawyers may respond to judicial misconduct by using procedural mechanisms to avoid those judges in subsequent cases.[162] Most lawyers have to be pushed quite hard before they will consider reporting judges' uncivil behavior to authorities.[163] It takes "significant courage" for lawyers who appear in front of abusive judges, and who may be required to do

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160. *See* ALFINI ET AL., *supra* note 28, § 3.02, at 3–4 ("Generally, a reviewing body will sanction a judge not only for major incidents, but also for an accumulation of minor, seemingly innocuous incidents that, when considered together, demonstrate a pattern of conduct unbecoming a member of the judiciary.").

161. *See* David Pimentel, *The Reluctant Tattletale: Closing the Gap in Federal Judicial Discipline,* 76 TENN. L. REV. 909, 934 (2009) ("'Suicidal' is the adjective that comes to mind when thinking about an attorney's report of judicial misconduct. While that term is certainly hyperbolic . . . the consequences of filing complaints against judges could well threaten an attorney's career."); *see also*, *Attorneys Say They Fear Retribution From Tenn. Judges,* LAW.COM (Oct. 12, 2010), http://www.law.com/jsp/law/LawArticle Friendly.jsp?id=1202473228336 (reporting that Tennessee lawyers were afraid to file complaints against some judges or to move to recuse them because judges retaliated by dismissing cases, accusing lawyers of civil contempt, and filing complaints against lawyers).

162. Rules of civil procedure in some states permit parties to take a change of judge as a matter of right. *See, e.g.*, MO. SUP. CT. R. 51.05(a) ("A change of judge shall be ordered in any civil action upon the timely filing of a written application therefor by a party.").

163. *See* Pimentel, *supra* note 161, at 920 ("The reluctance of attorneys to complain about judicial misconduct appears throughout the history of judicial ethics."); Don Sarvey, *Confronting Judicial Misconduct,* PA. LAW. (Nov./Dec. 2009), at 97 (noting "the natural and understandable caution lawyers feel about speaking up against judges, especially local judges, given the power they wield").

so again, to report those judges' misconduct to judicial conduct commissions or similar authorities.[164] Litigants who feel that a judge bullied them are more likely to complain, perhaps because they are not repeat players in the accused judge's court and thus do not fear retaliation as a lawyer might, or because they believe the judge's conduct impaired their rights and they are determined to achieve vindication. In any event, there are a disturbing number of reported cases in which judges have plainly bullied lawyers, litigants, and others. Some exemplary cases follow.

McBryde v. Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States pitted Northern District of Texas District Judge John McBryde against the Judicial Council of the Fifth Circuit.[165] The Council sanctioned Judge McBryde after hearing evidence of his abusive treatment of other judges and lawyers spanning many years.[166] United States Attorneys from two affected districts made the complaint of abuse that triggered these proceedings.[167] The *McBryde* decision is predominantly focused on the judge's constitutional challenge to his discipline, but one of the incidents of misconduct described in the opinion is illustrative.

Judge McBryde had a standing pretrial order which required that all parties appear at settlement conferences.[168] A lawyer had defended a corporation and its employee in a sexual harassment case.[169] The lawyer did not have the individual defendant attend the settlement conference because she justifiably thought his presence would be counterproductive, he had no assets that would enable him to contribute to any settlement, and he had authorized the lawyer to settle on his behalf.[170] Nonetheless, Judge McBryde was displeased and sanctioned the lawyer for her client's failure to

164. *In re* Fuller, 798 N.W.2d 408, 419 (S.D. 2011).
165. 264 F.3d 52 (D.C. Cir. 2001).
166. *Id.* at 54.
167. Pimentel, *supra* note 161, at 931.
168. *McBryde*, 264 F.3d at 67.
169. *Id.*
170. *Id.* The lawyer's belief that the individual defendant's presence at the settlement conference would be unhelpful was objectively valid. The plaintiffs were a mother and her ten-year old daughter. The individual defendant was accused of terrorizing the child by popping out his glass eye and putting it in his mouth in front of her. *Id.* Given those facts, many lawyers might think that the individual's presence might alarm the child or anger the mother or both, and thus inhibit settlement. Moreover, the individual defendant was not financially able to contribute to a settlement. *Id.* Any settlement would have to be paid by the corporate defendant, which presumably sent a representative with settlement authority to the conference as required.

appear.[171] After chastising the lawyer, he ordered her to attend a reading comprehension course and submit an affidavit swearing to her compliance.[172] The lawyer obeyed and submitted an affidavit attesting to the fact she had attended a course for three hours per week for five weeks.[173] This did not satisfy the judge, who questioned her truthfulness and required her to submit a supplemental affidavit listing each day that she attended the course, identifying the location of the course on each day of her attendance, specifying the duration of her attendance each day, and providing the name of a person who could confirm her attendance on each day listed.[174] The lawyer again complied.[175] The special committee of the Council that investigated Judge McBryde's conduct characterized this incident "as reflecting a 'gross abuse of power and a complete lack of empathy.'"[176] The court accepted the committee's assessment, describing the lawyer as "hapless counsel bludgeoned into taking reading comprehension courses and into filing demeaning affidavits, all completely marginal to the case on which she was working."[177]

Judge McBryde's mandate that parties attend settlement conferences generally promotes settlement and is common practice. The lawyer should have recognized the need to file a motion asking that the court forego the individual defendant's appearance, or to have otherwise sought to have him excused. Failing that, Judge McBryde might reasonably have been expected to scold the lawyer or to reschedule the settlement conference to permit the individual defendant's attendance and perhaps even require the lawyer to bear any delay-related expenses. The judge's angry reaction, however, was wildly disproportionate to the lawyer's misjudgment. The sanction he imposed was designed to humiliate the lawyer rather than to induce compliance with his standing pretrial order, and his requirement of the second affidavit defied all reason. Sadly, this incident was perfectly in character with Judge McBryde's alleged reputation.[178]

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171. *Id.*
172. *Id.* at 68.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *See generally* Christine Biederman, *Temper, Temper*, DALLAS OBSERVER (Oct. 2, 1997), *available at* http://www.dallasobserver.com/1997-10-02/news/temper-temper (discussing Judge McBryde's reputation and, to acknowledge his supposed fairness, quoting a lawyer who described the judge as "an equal opportunity tyrant").

The New York judge in *In re Mulroy* resorted to bullying a prosecutor because he did not like sitting in Utica, where the underlying case was tried, and wanted to return to his home in Syracuse.[179] Describing Utica as a "'f---ing black hole,'" the judge accused the prosecutor of over-charging the case as a felony and pressed her to accept a guilty plea to a misdemeanor so that he could get back to Syracuse for a "'men's night out.'"[180] The judge threatened to declare a mistrial if the prosecutor refused to plea bargain.[181] The prosecutor apparently held her ground and the judge never made good on his threat of a mistrial. When charged with misconduct, the judge acknowledged that he had not acted in a courteous and dignified manner, but contended that his "banter" was merely an expression of concern about a possible trial error.[182] The referee assigned to the matter rejected the judge's argument and the court upheld that determination.[183] The court ultimately removed the judge from the bench.[184]

Many cases of judicial discourtesy involve denigration, ridicule, or other mistreatment of parties and, in particular, pro se litigants.[185] Misdemeanor criminal defendants and litigants and witnesses whose lifestyles displease some judges are also frequent targets of bullying, as *In re Hammermaster*[186] illustrates. The municipal judge charged with misconduct in *In re Hammermaster* regularly asked Hispanic defendants if they were "legal" and frequently "ordered them to enroll in English classes," or to either become citizens or leave the country within specified times.[187] The judge often threatened defendants with life imprisonment or indefinite incarceration until they paid fines or costs.[188] He ridiculed a defendant who was suffering from bipolar disorder when the defendant attempted to explain his condition at sentencing.[189] In another case, he criticized a defendant's

179. 731 N.E.2d 120, 122 (N.Y. 2000).
180. *Id.* at 122 (quoting the judge).
181. *Id.*
182. *Id.*
183. *Id.* at 122–23.
184. *Id.* at 123.
185. *See, e.g.*, *In re* Moroney, 914 P.2d 570, 571–72 (Kan. 1996) (finding that the judge violated Canon 3(A)(3), which tracks Model Code Canon 3(B)(4), when he belittled a pro se litigant); *In re* Ellender, 16 So. 3d 351, 352–53 (La. 2010) (involving a judge's rude and impatient treatment of pro se litigants); *In re* Disciplinary Proceeding Against Eiler, 236 P.3d 873, 879 (Wash. 2010) (involving judges' repeated abuse of pro se litigants).
186. 985 P.2d 924 (Wash. 1999).
187. *Id.* at 927, 933–34.
188. *Id.* at 928.
189. *Id.* at 932–33.

"meretricious relationship" with his fiancée, which supposedly impaired the defendant's ability to pay his fine because the woman was "freeloading off" him.[190] To encourage what he considered to be more responsible behavior by the defendant, the judge threatened to order the fiancée to sell her car if it was not timely licensed and insured.[191] For these and other instances of bullying, the Washington Supreme Court suspended the judge without pay for six months.[192]

In *In re Judicial Disciplinary Proceedings Against Michelson,*[193] a defendant appearing before Wisconsin municipal court judge Robert Michelson told the judge she could not pay her fine because she had to care for her two grandchildren as a result of her daughter's illness.[194] Judge Michelson responded that he could not accept that excuse because the woman had no legal obligation to support her grandchildren.[195] The judge then asked the woman why the children's father could not support them.[196] The woman responded that the older child's father could not be located and the identity of the younger child's father was unknown.[197] Upon hearing that response, Judge Michelson "became angry and said, 'I suppose it was too much to ask that your daughter keep her pants on and not behave like a slut.'"[198] Judge Michelson then declared the daughter should not have had children if she could not support them.[199] He ultimately established a monthly payment plan to allow the woman to pay her fine.[200] Agreeing with a judicial conduct panel that the judge's remarks were discourteous, intemperate, and undignified, and further evidenced socioeconomic bias, the Wisconsin Supreme Court reprimanded him.[201]

B. From Humor to Ridicule

The judicial bullying described in the *McBryde*, *In re Mulroy*, *In re Hammermaster*, and *Michelson* opinions was glaring. Other

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190. *Id.* at 933.
191. *Id.*
192. *Id.* at 943.
193. 591 N.W.2d 843 (Wis. 1999).
194. *Id.* at 844.
195. *Id.*
196. *Id.* at 844–45.
197. *Id.* at 845.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.* at 845–46.

instances of bullying may be less obvious initially, as where judges use purported humor in their opinions to cruel effect. This is not to say that humor in judicial opinions is uniformly undesirable.[202] Humor and figurative language may demystify the law, crystallize issues or illustrate points, help place issues in context, animate facts, and make opinions more readable.[203] Unfortunately, judges' attempts at humor often suggest to some litigants that the court did not take their cases seriously or decide them fairly, serve only to offend or ridicule the participants, or are at best insensitive. It is a rare judge who can effectively employ humor in an opinion.[204] On the other hand:

> If one accepts the proposition that a judge who directs biting humor at a litigant or an attorney commits an act of aggression, it is easy to see why humor is offensive. It is not a fair fight: The judge gets to have the first and last word on the matter. The subject of the judge's ridicule has no recourse but to accept the joke and the accompanying humiliation.[205]

High courts generally discourage and disfavor humor in opinions. As the Iowa Supreme Court once observed, "[f]lamboyance in decorum and attempts at clever ridicule are not admired characteristics" in a judge.[206]

For a textbook example of judicial bullying in the guise of humor, we return to the court of former U.S. District Judge Samuel B. Kent to examine his caustic opinion in *Bradshaw v. Unity Marine Corp*.[207] In *Bradshaw*, Judge Kent persistently ridiculed two lawyers whose performance he considered inadequate. The plaintiff, John

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202. *See* Adalberto Jordan, *Imagery, Humor, and the Judicial Opinion*, 41 U. MIAMI L. REV. 693, 699–701 (1987) (offering some benefits of employing humor and figurative language in judicial opinions).

203. *Id.* at 700–01.

204. One who does effectively employ humor in opinions is Judge Alex Kozinski of the Ninth Circuit. *See* Gerald Lebovits, *Judicial Jesting: Judicious?*, 75 N.Y. ST. B.J. 64 (Sept. 2003) (discussing Judge Kozinski's rare talent and suggesting that most judges should not attempt to write like him). The late Terence Evans of the Seventh Circuit was another.

205. Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 272 (2008) (footnotes omitted).

206. *In re* Jenkins, 503 N.W.2d 425, 427 (Iowa 1993).

207. Bradshaw v. Unity Marine, 147 F. Supp. 2d 668 (S.D. Tex. 2001). Many lawyers who read Judge Kent's opinion in *Bradshaw* found it humorous. One who did not was Northwestern University law professor Steven Lubet, a judicial ethics expert, who characterized Judge Kent as a "martinet" and properly described his opinion in *Bradshaw* as "bullying." Lubet, *supra* note 26, at 15, 12.

Bradshaw, was a seaman on a tugboat who was injured when he attempted to climb from the boat onto a Phillips Petroleum Company dock.[208] Phillips initially moved for summary judgment, arguing that Bradshaw's first amended complaint, which brought Phillips into the case, was untimely because it was filed after the Texas two-year statute of limitations for personal injury claims had run.[209] Bradshaw, on the other hand, insisted his claim against Phillips was timely because it was governed by the three-year federal statute of limitations for maritime personal injuries.[210] This left the court to decide whether maritime law or state law controlled Bradshaw's claims.[211] In short, this was a straightforward personal injury case requiring simple application of the *Erie* doctrine. Many cases like it had surely come before. Indeed, as Judge Kent noted, the answer to the question presented at summary judgment could be "readily ascertained."[212] It is therefore reasonable to question why Judge Kent would designate his opinion for publication unless he wanted to publicly humiliate the lawyers for Bradshaw and for Phillips.[213] Humiliate them he did.

After briefly outlining the facts of the case and framing the issue for decision, Judge Kent launched his assault on the lawyers. He began:

> Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact—complete with hats, handshakes and cryptic words—to draft their pleadings entirely in crayon on the back side of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care

208. *Bradshaw,* 147 F. Supp. 2d at 669.
209. *Id.*
210. *Id.*
211. *Id.* at 671–72.
212. *Id.* at 671.
213. *See* Lubet, *supra* note 26, at 13 ("[T]he only possible purpose for publication was to add to the embarrassment of the attorneys.").

> laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.[214]

Continuing, Judge Kent stated the standard for granting summary judgment and briefly explained the burden-shifting that takes place at summary judgment. He then resumed his assault on the lawyers, asserting that Phillips's counsel had begun a "descent into Alice's Wonderland" by citing but a single case in Phillips's summary judgment motion—a case that basically stated the *Erie* doctrine—without explaining its relevance.[215] Moreover, the judge complained, Phillips's lawyer did not even cite to the Texas statute of limitations that Phillips claimed governed the case.[216] "A more bumbling approach [was] difficult to conceive," Judge Kent wrote before signaling his intent to criticize Bradshaw's lawyer by stating, "but wait folks, There's More!"[217]

Bradshaw reportedly answered Phillips's "deft, yet minimalist analytical wizardry with an equally gossamer wisp of an argument," although Judge Kent did acknowledge that Bradshaw's lawyer at least cited the federal statute establishing the limitation period for maritime personal injury claims.[218] Bradshaw's lawyer's work was hardly stellar, however, as Judge Kent made clear:

> Naturally, Plaintiff also neglects to provide any analysis whatsoever of why his claim versus Defendant Phillips is a maritime action. Instead, Plaintiff "cites" to a single case from the Fourth Circuit. Plaintiff's citation, however, points to a nonexistent Volume "1886" of the Federal Reporter Third edition and neglects to provide a pinpoint citation for what, after being located, turned out to be a forty-page decision. . . . The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff's counsel chose the opinion by throwing long range darts at the Federal reporter (remarkably enough hitting a nonexistent volume!).[219]

After that comparatively gentle rebuke, Judge Kent turned to Bradshaw's supplemental briefing, which, while containing relevant authority, still failed to explain why Bradshaw's claim against Phillips sounded in maritime law. Bradshaw seemed to argue that he had sufficiently pled a maritime personal injury claim

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214. *Bradshaw,* 147 F. Supp. 2d at 670.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.* at 670–71.

against Phillips because he had adequately alleged such a claim versus his employer and the vessel on which he worked. That reasoning was doomed to fail because admiralty law must be invoked against each defendant individually.[220] Despite this critical flaw, Judge Kent sarcastically commended Bradshaw "for his vastly improved choice of crayon—Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotched about [Bradshaw's] briefing."[221] "But at the end of the day," the court continued, "even if you put a calico dress on it and call it Florence, a pig is still a pig."[222]

Finally, Judge Kent reached the core of Philips's motion, introducing his analysis by writing, "[n]ow, alas, the Court must return to grownup land."[223] Describing the pivotal issue as whether state law or maritime law controlled Bradshaw's claim against Phillips—an answer that could be "readily ascertained"—Judge Kent explained that under Fifth Circuit precedent, a dock owner's duty to the crew of a vessel using its dock is clearly defined by state law.[224] As a result, Bradshaw's claim against Phillips was subject to the two-year statute of limitation provided by Texas law and was therefore time-barred.[225] The court mockingly sustained Phillips's summary judgment motion.

> After this remarkably long walk on a short legal pier, having received no useful guidance whatsoever from either party, the Court has endeavored, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties' briefing (and the inexplicable odor of wet dog emanating from such) the Court believes that it has satisfactorily resolved this matter.[226]

That conclusion did not terminate Judge Kent's torment of Bradshaw's counsel, however, since Bradshaw still had a claim against his employer, Unity Marine Corporation.

> Plaintiff retains, albeit seemingly to his befuddlement and/or consternation, a maritime law cause of action versus . . . Unity Marine. . . . However, it is well known around

220. *Id.* at 671.
221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at 672.
226. *Id.*

> these parts that Unity Marine's lawyer . . . has been writing crisply in ink since the second grade. Some old-timers even spin yarns of an ability to type. . . . [O]ut of caution, the Court suggests that Plaintiff's lovable counsel had best upgrade to a nice shiny No. 2 pencil or at least sharpen what's left of the stubs of his crayons for what remains of this heart-stopping, spine-tingling action.[227]

The court concluded this passage with a footnote containing yet another insult of Bradshaw's lawyer derived from the "No. 2 pencil" and crayon-sharpening comments: "[T]he Court cautions Plaintiff's counsel not to run with a sharpened writing utensil in hand—he could put his eye out."[228]

There is nothing funny about the *Bradshaw* opinion. It is principally a collage of mixed metaphors and disconnected juvenile taunts. Several of the judge's attempts at humor make no sense whatsoever.[229] The opinion is discourteous, disrespectful, and undignified, and in writing it, Judge Kent plainly violated Canon 3A(3) of the Code of Conduct for United States Judges.[230] It is worth examining the opinion further, however, to understand why its issuance is properly characterized as bullying.

To start, let's assume that the quality of the summary judgment briefing in the *Bradshaw* case was as amateurish as Judge Kent suggested. Further assume that grossly substandard legal writing imposes a burden on courts for the simple reason that even the most diligent courts rely on counsel for the parties to provide the majority of the legal argument in litigated cases.[231] Judge Kent had options short of public ridicule to improve the quality of the lawyers' work and, in so doing, enhance the quality of his decision-making. For example, he could have required the parties

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227. *Id.* (footnote omitted).

228. *Id.* n.4.

229. Why, for example, would summary judgment briefing so bad as to be described as "child-like" cause the judge to offer or experience "a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration"? *Id.* at 670.

230. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3A(3) (2009) ("A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.").

231. *See* DOUGLAS R. RICHMOND ET AL., PROFESSIONAL RESPONSIBILITY IN LITIGATION 462 (2011) ("No matter how diligent they may be, judges and law clerks can never know as much about cases as the lawyers do. As a result, courts necessarily rely on lawyers to present most facts and argument."). This assumption does not actually apply here because the issue presented at summary judgment could be "readily ascertained." *Bradshaw,* 147 F. Supp. 2d at 671. Even so, the assumption is worth making for illustrative purposes.

to withdraw their motion papers and resubmit them, or he might have ordered them to file supplemental briefing and, either way, made clear in respectful terms his great unhappiness with the quality of the work originally submitted. He could have held oral argument on Phillips's motion and forced the lawyers to clearly articulate their positions and to substantiate them with citations to authority. If he simply wanted to penalize the lawyers for their abysmal efforts, he possibly could have sanctioned them using his inherent powers,[232] or perhaps he could have invoked 28 U.S.C. § 1927 to sanction them.[233] A show cause order requiring the lawyers to demonstrate why they should not be sanctioned for their slipshod briefing probably would have been equally effective.[234] For that matter, if the judge thought that the lawyers' performance was truly incompetent, he could have filed ethics complaints against them.[235] Milder, but nonetheless significant, punitive options might have included castigating them in a letter, or chastising them at oral argument or in a chambers conference.

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232. Courts have inherent authority to sanction the misconduct of lawyers practicing before them. Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991) (discussing inherent powers of federal district courts); Kaina v. Gellman, 197 P.3d 776, 782–83 (Haw. Ct. App. 2008) (quoting Bank of Haw. v. Kunimoto, 984 P.2d 1198, 1213 (Haw. 1999)); Cimenian v. Lumb, 951 A.2d 817, 820 (Me. 2008); Dronen v. Dronen, 764 N.W.2d 675, 693 (N.D. 2009). The scope of courts' inherent authority varies between jurisdictions. *See, e.g.,* Vidrio v. Hernandez, 92 Cal. Rptr. 3d 178, 186 (Cal. Ct. App. 2009) (noting that California trial courts' inherent powers do not include imposing monetary sanctions). In extreme circumstances, however, it may include the discretion to dismiss a case. Salmeron v. Enter. Recovery Sys., Inc., 579 F.3d 787, 793 (7th Cir. 2009) (quoting Montano v. City of Chicago, 535 F.3d 558, 563 (7th Cir. 2008)).

233. Lubet, *supra* note 26, at 13. That statute provides: "Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927 (2006).

234. Presumably the lawyers would have defended against the imposition of sanctions on any basis by arguing that they had not acted in bad faith in filing their deficient motion papers. *See In re* Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 278 F.3d 175, 188 (3d Cir. 2002) (requiring "willful bad faith" to impose attorneys' fees under § 1927); Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 518 (D. Md. 2010) (stating that a district court's inherent authority "only may be exercised to sanction 'bad-faith conduct'") (quoting Chambers v. NASCO, Inc., 501 U.S.32, 50 (1991)).

235. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

Shunning all those reasonable alternatives, Judge Kent settled on public shaming, which principally served to showcase his wit.

The two lawyers who were the target of Judge Kent's derision were unable to effectively defend themselves, as the judge certainly knew. There was no hearing at which the lawyers could address the court in their defense. Had they filed a motion to reconsider or some other pleading challenging the court's characterization of their performance, they would have exposed themselves to further ridicule. Any related suggestion that the judge had violated judicial ethics rules by denigrating them might well have provoked some form of retribution by the judge. Although lawyers may appeal from final orders imposing non-monetary sanctions, critical statements in opinions generally cannot be appealed under the final judgment rule.[236] Even appellate courts that take comparatively lenient approaches to allowing lawyers to appeal from scoldings administered by lower courts still require (1) that judicial criticism be expressly denominated as a reprimand and thus appropriately characterized as a sanction; or (2) that the trial court make specific findings of professional misconduct.[237] At the time of the *Bradshaw* decision the Fifth Circuit followed the second approach, as it does to this day.[238] In any event, Judge Kent did neither of those things in his summary judgment order. No courts permit lawyers to appeal from routine judicial criticism or commentary on their performance.[239]

Bradshaw must have been stunned by the opinion. Judge Kent's snide comment about a "remarkably long walk on a short legal pier" had to be particularly galling since Bradshaw was injured when disembarking from a boat onto a dock.[240] The judge's reference to the "odor of wet dog"[241] that emanated from the parties' pleadings trivialized Bradshaw's claims.[242] Little in the opinion would have suggested to Bradshaw that Judge Kent even took his case seriously. Instead, the opinion might well have ruined Bradshaw's relationship with his lawyer, who Judge Kent had

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236. *See* United States v. Williams (*In re* Williams), 156 F.3d 86, 90 (1st Cir. 1998) (stating the "abecedarian rule that federal appellate courts review decisions, judgments, orders, and decrees—not opinions, factual findings, reasoning, or explanations").

237. Douglas R. Richmond, *Appealing from Judicial Scoldings*, 62 BAYLOR L. REV. 741, 771 (2010).

238. Walker v. City of Mesquite, 129 F.3d 831, 832–33 (5th Cir. 1997).

239. Richmond, *supra* note 237, at 783.

240. Bradshaw v. Unity Marine Corp., 147 F. Supp. 2d 668, 672 (S.D. Tex. 2001).

241. *Id.*

242. Lubet, *supra* note 26, at 14.

clearly and publicly branded incompetent. Any such harm would have had immediate consequences, inasmuch as Bradshaw had to consider the prospects of success on his claims against the remaining defendant, Unity Marine. Given Judge Kent's opinion, how could Bradshaw reasonably have confidence in his lawyer going forward? Regardless, Bradshaw could not force Judge Kent to vacate his opinion.[243] Because Judge Kent's grant of summary judgment to Phillips appears to have been legally correct,[244] Bradshaw had no valid basis for appeal. There being no apparent ground for reversal, this was not a case in which the Fifth Circuit could have used its supervisory powers to assign a different judge upon remand.

Granted, the lawyers or Bradshaw could have complained about Judge Kent's conduct to the Judicial Council of the Fifth Circuit, but that option was unlikely to afford them satisfaction. From the lawyers' standpoint, the damage was done as soon as the opinion became available on Westlaw and LexisNexis; the Council would never have acted so hastily as to prevent the opinion's electronic publication or, for that matter, its print publication in the Federal Supplement—assuming the Council would have in fact determined that Judge Kent committed misconduct and that the opinion should be withdrawn. With all due respect to the many fine judges on the Fifth Circuit, that is not a reliable assumption. Consider that when Judge Kent was originally found to have committed two acts of serious sexual misconduct involving his former case manager, Cathy McBroom, which ultimately led to his indictment, the Council reprimanded him, suspended him with pay for four months, and relocated his chambers from Galveston to Houston.[245] That relatively light penalty for arguably impeachable misconduct hardly inspires confidence that the Council would have sanctioned Judge Kent for his distemper in *Bradshaw*. Furthermore, the lawyers had to be concerned that making a complaint against Judge Kent would expose them and their clients to his wrath in any other cases that came before him. They could not have avoided that risk by seeking his recusal in those cases. Although 28 U.S.C. § 455(b)(1) requires a district judge to

243. David McGowan, *Judicial Writing and the Ethics of the Judicial Office*, 14 GEO. J. LEGAL ETHICS 509, 573 (2001).

244. *Bradshaw,* 147 F. Supp. 2d at 671–72.

245. Order of Reprimand and Reasons at 2, In re Complaint of Misconduct Against United States District Judge Samuel B. Kent Under the Judicial Conduct and Disability Act of 1980, Docket No. 07-05-351-0086 (5th Cir. Judicial Council Sept. 28, 2007) (on file with the author); *Judicial Panel to Reopen Kent Misconduct Probe*, GALVESTON COUNTY DAILY NEWS (Feb. 14, 2009), *available at* http://galvestondailynews.com/story/131578.

disqualify himself "where he has a personal bias or prejudice concerning a party,"[246] such an infirmity must arise from an extrajudicial source.[247] That was not the case here.[248] While 28 U.S.C. § 455(a) requires a judge to disqualify himself where "his impartiality might reasonably be questioned,"[249] Judge Kent's denigration of *both* lawyers in *Bradshaw* militated against any claim of partiality.[250]

Long story short, the lawyers and plaintiff in *Bradshaw* were essentially powerless to prevent their deliberate humiliation by Judge Kent. Judge Kent held all the cards. Although there are cases in which lawyers may be embarrassed deservedly by a court's comments on their conduct, as where sanctions are imposed or contempt is found, there is a vast difference between a judge's necessarily harsh condemnation of a lawyer's work or conduct and the publication of gratuitous insults.[251] There is never a place for the latter. No matter how flawed the lawyers' performances in *Bradshaw*, their errors were mild in comparison to Judge Kent's.[252]

IV. CONCLUSION

Regulating judges' demeanors is a difficult task. Judges are human, and they may occasionally display anger or annoyance. Even judges who enjoy impressive self-control may sometimes lose patience when dealing with incompetent or uncivil lawyers, or unusually difficult or disruptive litigants. Lawyers and litigants sometimes incite judges. Moreover, judicial candor is a highly valued trait and judges must enjoy some flexibility in criticizing the performance of lawyers who appear before them. We generally consider trial and appellate lawyers to have thick skins; indeed, tolerating judicial criticism is an ordinary rigor of trial and appellate practice. At the same time, judges are held to high standards of conduct, and their inability to comply with professional norms erodes public confidence in the judiciary.

If some intemperate behavior by judges is to be expected and even tolerated up to a point, there is no justification for judges

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246. 28 U.S.C. § 455(b)(1) (2006).
247. Hook v. McDade, 89 F.3d 350, 355 (7th Cir. 1996).
248. *See* ALFINI ET AL., *supra* note 28, § 4.05A, at 4–17 (indicating that "occurrences in the context of a court proceeding" are not extrajudicial sources that would support a judge's disqualification).
249. 28 U.S.C. § 455(a) (2006).
250. Lubet, *supra* note 26, at 12 n.2.
251. *See id.* at 13 (making this point in reference to the *Bradshaw* opinion).
252. *See id.* at 16 ("[S]lipshod lawyering can be a problem. But in the end, an incompetent lawyer is far less dangerous than a judicial bully.").

behaving like bullies. Judges who abuse lawyers, litigants, jurors, witnesses, and others who appear before them do great damage to the judiciary as a whole. Parties, jurors, and witnesses who do not regularly appear in court and who are bullied when they do are likely to form lasting negative impressions about the justice system. Targets of judicial bullying may be left with the impression that they were treated unfairly, that the court did not take their cases seriously, or that "justice" is the province of a privileged few. Judicial bullying may chill zealous advocacy. For example, lawyers who reasonably apprehend abuse or ridicule by a judge known for such behavior may be tempted to avoid making good faith arguments for the extension, modification, or reversal of existing law out of the concern that their reward for doing so will be denigration or public humiliation.[253] Lawyers who do confront judicial bullies risk retaliation against them and their clients in that case and others.

Fortunately, courts and judicial conduct commissions are increasingly demonstrating their willingness to curb the bullying of the minority of judges who engage in it. They must continue to do so. In some cases, significant disciplinary action such as suspension without pay and removal from the bench may be required. It is clearly insufficient, for example, for a vengeful judge such as Talmadge Littlejohn, who jailed a lawyer for refusing to recite the pledge of allegiance, to escape with a public reprimand and a paltry $100 fine.[254] Among other problems, the failure to meaningfully discipline judges who engage in serious misconduct discourages lawyers from reporting such incidents to appropriate authorities. It is also worth considering whether there is a need for more proactive measures, such as continuing education programs, that may be effective in avoiding or reducing abusive conduct by judges. One way or the other, there is simply no room for bullies on the bench.

253. *Id.* at 15.
254. See *supra* notes 13–19 and accompanying text.