

INITIAL REPORT: PROPOSED AMENDMENTS
LAW OF GEORGIA ON DISCIPLINARY LIABILITY AND DISCIPLINARY
PROCEEDINGS OF JUDGES OF GENERAL COURTS

General Comments

The proposed amendments provide specificity as to what is to be considered misconduct and grounds for discipline of judges of common courts of Georgia, as was recommended by the Joint Opinion of the Venice Commission and the Directorate of Human Rights of the Directorate General of Human Rights and Rule of Law of the Council of Europe, 14 October 2014. Such specificity is helpful to judges, disciplinary authorities and the public. The enumerated grounds are comprehensive and, as noted in the Definitions accompanying the amendments, well supported by international jurisprudence. Some of the grounds appear to track Georgia's Judicial Code of Conduct or other provisions of Georgian law; others do not.

As a preliminary matter, it would seem that the Judicial Code should cover all of the conduct that is grounds for disciplinary liability. Most notably, in my view, the current Judicial Code does not address disqualification (Bangalore Principles of Judicial Conduct, values 2.3, 2.5 and 4.4), allowing family, social or other relationships to improperly influence the judge's conduct (Bangalore Principles, value 4.8), misuse of the prestige of office (Bangalore Principles, value 4.9) and regulation of gifts (Bangalore Principles, values 4.14, 4.15 and 4.16). These are core ethical issues that should be addressed in a judicial ethics code. The notion that there could be grounds for discipline of judges for conduct not addressed in the Judicial Code suggests some discordance as to the standards to which judges are being held, which may undermine confidence in the disciplinary system.

The Explanatory Note and Definitions documents that accompany the proposed amendments provide considerable background and clarification concerning the amendments, including examples of what would and would not be considered grounds for discipline. This type of information is very valuable and, in the United States, is developed either in case law or set forth in commentary that accompanies a code of judicial ethics. Because of the time it can take to develop a body of case law defining the boundaries of the grounds for discipline, some consideration might be given to memorializing this information in some official manner. This raises the question regarding which body should have the responsibility for essentially clarifying ethical standards to be applied in determining disciplinary violations.

In California, some judicial standards are set in statutes adopted by the legislature. The majority, however, are contained in the California Code of Judicial Ethics, which has been promulgated by the California Supreme Court since 1995, pursuant to a constitutional amendment. (Prior to 1995, the Code of Judicial Conduct was promulgated by the California Judges Association, the judges' professional association, but it had no binding effect.) The California Supreme Court is also the reviewing court for any discipline imposed on a judge by the Commission on Judicial Performance, the disciplinary body. The Code of Judicial Ethics is comprised of the canons, (the rules of conduct), and commentary that does not impose additional rules but serves to explain the conduct rules. When the California Supreme Court became

responsible for promulgating rules of professional conduct, it established a standing committee to advise the Court on the Code of Judicial Ethics. The committee routinely considers changes to the code, based on changes to the American Bar Association's Model Code of Judicial Ethics, changes to other states' codes, recent disciplinary decisions by the Commission on Judicial Performance, ethics opinions issued by the California's official judicial ethics advisory committee and suggestions for revisions submitted to the committee. Before the committee recommends any changes to the Supreme Court for adoption, the proposed amendments are posted for public comment. When the committee makes recommendations to the Court about changes, the report regarding the proposals is accompanied by a public report that discusses the public comments received about the proposals. Because the Supreme Court in California is the body for review of disciplinary determinations by the Commission on Judicial Performance, their promulgation of the Code of Judicial Ethics with its commentary provides symmetry and important consistency between disciplinary case law and the ethical standards for judges.

In my opinion, it is appropriate to have the specification of disciplinary grounds for judges in legislation adopted by the Parliament, as the parliamentary process permits the engagement of judges, other legal professions, the High Council of Judges and other interested groups. Consideration should be given, in my opinion, to having any official commentary regarding the disciplinary grounds, done under the auspices of the Supreme Court, the ultimate review body in judicial discipline cases. Perhaps, as in California, this could be done by a committee advising the Court, to include representatives of the High Council of Judges, the Disciplinary Committee and the Disciplinary Chamber, the Conference of Judges and other interested groups.

Comments regarding Specific Provisions

In my opinion, all of the proposed grounds for discipline are appropriate, subject to certain caveats as noted. One significant area not referred to either in the grounds for discipline, or in the Judicial Code, are gifts. Perhaps gifts to judges are covered in some other regulation, but it is a core ethical issue, which in most jurisdictions is not totally covered by criminal law.

a) Infringement of impartiality and independence principles by a judge.

This is a broad category of misconduct as there are many ways that a judge's impartiality and independence may be compromised or appear to be compromised.

Subsection (a.f) refers to "establishing undue relations with litigants." I understand that the intent of this provision is to capture associations with individuals involved in a case independent of ex parte communications, but the "undue relations" terminology seems vague. As noted earlier, the examples cited in the Definitions document are helpful, but without this explanation, the vagueness issue may not be overcome. The provision may also be too narrow. Also, does it apply to all litigants or just to those with cases pending before that judge? Does it include overly close associations with lawyers or just with litigants? The phrasing might be changed to refer to "establishing or maintaining personal interactions with litigants or lawyers in cases then pending before the judge that prejudices impartiality or that might reasonably give rise

to the suspicion or appearance of favoritism or partiality.” This would provide more clarity and would also pick up Bangalore principal, value 4.3, which is absent from Georgia’s Judicial Code.

(b) Failure to perform duties or inadequate performance by a judge

This is one of the thorniest areas of judicial disciplinary law – distinguishing between legal determinations that may be erroneous or otherwise objectionable and may or may not be considered misconduct. The proposed amendments strive to make critical delineations in order to not impinge upon judicial independence and judicial decision-making while capturing judicial determinations that would be deemed improper.

The need for some type of commentary is perhaps most compelling with respect to this ground for discipline. The Definitions document attempts to explain that legal mistake or inadequate fulfillment of judicial duties becomes misconduct only when it compromises justice by its character, prejudices fundamental right of the parties and shows non-bona fide conduct of a judge. It also states that all of the qualifying criteria set forth in the proposed amendment – the degree of damage, regularity of violation, recoverability of mistake, the judge’s motive – need all be present simultaneously. The Definitions document contains lists of both actions that would be considered a failure to fulfill duties or inadequate fulfillment of duties and those that would not. These lists are very illustrative and helpful in setting the scope of the grounds for discipline. The Definitions document also contains commentary about the advisability of not having a disciplinary measure be the only form of communication with a judge relating to difficulties with his or her practice and the importance of utilizing warnings before imposing discipline. All of this commentary provides important clarification and guidance. While it may develop over time in case law, it seems unfortunate not to incorporate it somewhere officially, either in commentary to the Judicial Code of Ethics or in the law governing disciplinary proceedings.

(c) Groundless Delay in Proceedings

Again, the Definitions document provides useful criteria, those used by the European Court of Human Rights, for determining what should be considered “groundless” delay, as well as other factors to be considered. If these criteria are not adopted or incorporated somewhere, the objective of consistency may be compromised.

(d) Regular Absence from Work without Justifiable Reason; also Regularly being Late for Sessions with no Justifiable Reason

The Definitions document notes that the violation of work norms as an independent ground for judicial liability has been removed, but notes the perception of lawyers, and perhaps other participants in court proceedings, that delay in starting sessions is still perceived as a severe problem. The proposed amendments purport to impose disciplinary liability only when the action is committed regularly, without justification and causing a significant impediment to court activities. The Definitions document states that at least three instances should be considered “regularly” and that cancellation of the session and failure to review motions subject to immediate review should be considered “significant impediment to court activities.” Again, if these proposed criteria are not adopted or incorporated, the risk of inconsistent applications is created

If the grounds for discipline require multiple instances for disciplinary liability to be imposed, the rules that govern the disciplinary proceedings should permit retention or reopening of a complaint of the variety that requires multiple incidents before it can be pursued, otherwise it will not usually be possible to establish the requisite pattern.

(e) Interference in Activities of a Judge or the Other Violations of Requirements stipulated under the Law of Georgia on the Procedure for Communication with Judges of Common Courts

This ground for discipline addresses ex parte communications, a common ground for disciplinary liability and a type of conduct that seriously impacts public confidence in the impartiality and integrity of the judiciary.

Again, the Definitions document sets forth important criteria for improper communications – based on the Law of Georgia on the Procedure for Communication with Judges of Common Courts, Article 3(1) – that the communication relate to a specific case or issue or potential outcome of a case and that it should be violating independence of the court or judge, impartiality and adversarial principles. The Definitions document also notes that improper communications can be either disclosure of information by a judge or receipt of information by a judge. A number of communications that would be considered prohibited are listed. It is also explained that the misconduct is complete when the communication occurs and that acting on the improper communication could subject the judge to liability for a separate and additional misconduct. All of this is important clarification that should be somehow retained.

In California, and in most of the United States, the prohibition on ex parte communications includes a judge independently investigating facts about a case pending before the judge. In some proceedings, such as Small Claims cases, the judge is permitted by law to do so. In most instances, since judges are to decide cases based on the record developed in the proceedings, judges are prohibited from independently investigating facts. This has been a problem in California and appears to be increasingly so, in part because of the Internet and ease of access to information. Accordingly, the California Code of Judicial Ethics, canon 3B(7) provides: “Unless otherwise authorized by law, a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed. This prohibition extends to information available in all media, including electronic.” In my opinion, the Georgia Judicial Code should contain a similar prohibition and ex parte investigation of facts in a case should be included as a ground for discipline of a judge.

Another issue not addressed but which, in my opinion warrants consideration, involves communications between a litigant or lawyer with a judge about a case being heard by another judge in that judge’s court. Is it acceptable for the judge to discuss a case being heard by a judicial colleague? To provide advice to the lawyer or litigant about a case being heard by a colleague? This has been a problem in California, and undermines confidence in the impartiality and integrity of the judiciary. Both the Judicial Code and the grounds for discipline might include communications by a judge with litigants, counsel, witnesses or others involved in a case pending before another judge.

(f) Violation of Secrecy of Deliberations

The Definitions document states that the violation of the secrecy of deliberations can be committed intentionally or negligently. This standard should be memorialized officially.

(g) Public Expression on a Case to be Reviewed or Under Review

Again, the Definitions document provides important clarification that should be retained.

(h) Improper Action of a Judge, which Prejudices Authority of the Court or Threatens Public Confidence in It

This disciplinary ground, common to many judicial ethics in the United States and Europe, is broad and, some believe, vague. The Definitions document also recites the Bangalore Principles' criteria for assessing improper action and provides a list of actions that should be considered improper action so long as judicial authority is actually prejudiced and confidence in the court diminished. These are critical criteria and should be adopted in some format, with any modifications believed appropriate.

(i) Provision of False Information in an Official or Public Statements

This disciplinary ground is straightforward and is intended to maintain confidence in judicial integrity. The Definitions document offers the important qualifier that providing false information applies only to the deliberate dissemination of incorrect factual information. This standard should be included in the grounds for discipline or embodied in some form of official commentary.

(j) Application of Court Resources for Personal Purposes as Detriment of the Office

While apparently not common, this ground for discipline has been used frequently in California and addresses conduct that undermines public confidence in the integrity of the judiciary. The Definitions document notes two important clarifications, namely that misuse of resources can involve both staff and tangible resources and that a de minimis use of court resources shall not be considered misconduct. These should be memorialized officially.

(k) Abuse by a Judge of Official Position to Gain Unlawful or Unjustified Advantage for the Judge or Someone Else

This ground for discipline is very prevalent and well justified. Again, the Definitions document provides important clarification regarding the scope of the prohibition (for example, abuse of position can take place in relations with public and private organizations) and give examples that are useful and should be captured officially.

(l) Disrespectful, Insulting Treatment of Parties of Trial, Colleagues, Court Staff or the Other Persons as well as Threatening, Pressurizing or Harassing Them

The examples of prohibited conduct are helpful illustrations and should be retained officially. The Definitions document notes that provocation can be a mitigating factor. This should also be memorialized, if acceptable.

(m) Interference in Activities of Disciplinary Body or Disrespectful Attitude Against It

Again, the examples of what would be considered interference with the disciplinary proceedings are helpful and should be retained.

In California, a judge has an obligation to cooperate with the disciplinary body but can assert the privilege not to testify if the testimony might incriminate the judge in criminal proceedings. Not providing an explanation when called for by the highest governance body of the judicial branch, to some extent, necessarily undercuts the authority of that body, especially if the explanation sought has nothing to do with a specific case and therefore, cannot impinge on judicial independence.

(n) Pursuing Activity Incompatible with Judicial Position or Conflict of Interest with Judicial Duties

This provision has some interplay with conflict of interest prohibitions that form the basis for administrative or criminal liability. The Definitions document lists various actions that should constitute a violation of this ground for disciplinary liability and states that if an administrative penalty is found for the same act, disciplinary liability should not be imposed for the same act. The assessment of multiple penalties for the same act is largely a policy issue. To the extent that a judge engages in conduct that warrants and administrative or criminal penalty (that is not of the level that warrants removal from office), that conduct has some relevance to the judge's fitness for office and, in my opinion, should be able to be considered by disciplinary authorities either as a disciplinary case or in a subsequent disciplinary case if the judge's fitness for office is being considered. However the policy issue is resolved, because of the interplay with administrative and criminal law, the resolution, as well as examples of this category of judicial misconduct and any clarification should be officially retained.

(o) Failure to Properly React to any Violation of Norms of Professional Ethics Made by Court Officials, the Parties or Their Representatives

Again, the definition of "properly react" furnished by the Definitions document provides important clarification about the range of actions a judge might take when faced with someone else's violation of ethical norms. In California, it is in the commentary to the Code of Judicial Ethics. It should be officially retained somewhere.

(p) Failure to Protect Order in the Courtroom, which Affects the Judge's Dignity and Court Authority

This tracks the Judicial Code of Ethics. There is a reference to judges' obligations to warn the participants about the necessity of following the judge's instructions and sanctions that can be imposed on those who violate the order of the court, under the Code of Civil Procedure. Again, this would be helpful to have memorialized in the Judicial Code or elsewhere.

(q) Political Activity, Membership in a Political Party or the Other Association or Public Expression of Political Views

The list of actions that might constitute disciplinary liability violations is helpful and should be retained.

(r) Going on Strike or Appealing to Others to Do So

I am not familiar with this ground for disciplinary liability or the extent of the need for it. Often high level officials and professionals are prevented by contract or statute from striking, where the interruption of their services would severely disadvantage social order. If that is the case, the grounds for discipline may be rationalized.