RECORDING JUDGES: FILLING GAPS TO IMPROVE JUDICIAL DISCIPLINE

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A HYPOTHETICAL

Imagine a young attorney packing up a few papers in a courtroom as things are transitioning from one matter to the next. The attorney chats with the court reporter while preparing to depart. The judge's clerk talks with the bailiff. A few people mill around in the gallery. An attorney and party for the next matter enter the courtroom. The judge, who had taken a short break in chambers, partially opens the door to the courtroom, and calls out to the young attorney casually by name, inviting the attorney into chambers for a moment. Concerned, the young attorney looks around for any signs of guidance or objection from others, but receiving none, uncomfortably follows. What transpires in chambers is not recorded. The judge later characterizes it as brief and well-meaning mentoring of a young attorney appearing in the judge's court and having nothing to do with the case itself. The young attorney later characterizes it as including (a) an improper ex

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parte communication about the case, which the attorney attempted unsuccessfully to avert upon recognition of that fact; (b) an inappropriate and unwelcome advance, including an unwanted physical touching; and (c) speech indicative of the judge's bias on the basis of age, sex, and gender.

In later confidential conversation on the topic of whether to file/pursue a disciplinary complaint, a trusted mentor counsels the young attorney to think about the ongoing case and attendant risks to the current client; long-term risks in terms of reputational consequences to the attorney; and the challenge in the reality that it will be the attorney's word against the judge's. There is no hard evidence of what occurred—specifically, what the judge communicated by word, physical gesture, or implication, or how the attorney responded. There is even the risk that things might be turned around in some way to reflect poorly on the attorney. One in the young attorney's position is thus highly unlikely to file a disciplinary complaint, unless the attorney determined that the judge's misconduct had been harmful to the *client's case* (rather than just to the lawyer). Even when there is harm to the client's case, the attorney may judge that the risk is not worth it. The odds of any significant discipline being imposed are very low, especially without clear evidence to support what occurred. So the incentives are stacked against the attorney, especially in light of the practical and reputational risks to the attorney at every turn.

However, a recording of what happened would likely change this analysis. This article considers the gaps in pursuit and determination of judicial misconduct cases in the absence of audio or video recordings of judicial conduct, why they matter, and how they might be filled.

I. INTRODUCTION

In many routine matters—perhaps more than one might expect—no objective record is preserved of what occurred when a judge was present. No transcript is

kept. No audio or video recording is made. Many of these matters are seemingly mundane matters of scheduling or pretrial case management. Beyond these are the casual conversations that may well seem (or actually be) unrelated to matters before the judge in his or her official capacity. But apart from these more "expected" situations in which no record would be made, there are many instances in which judges preside on the bench as attorneys present arguments on substantive matters; attorneys submit evidence and offer witnesses; judges make rulings on substantive matters; and all without a formal record being made of the proceeding. As will be discussed further below, it depends on the jurisdiction and the type of proceeding whether there may be any rules requiring that a record be made, or whether those may be waived.[1] And this is compounded by an increasing shortage of court reporters to make records where they are required or requested.[2] Similarly, not all courtrooms are currently equipped with the technology or the personnel to manage video or audio recordings. These realities create significant gaps in the records of what transpired in any given instance when a judge engaged in an official capacity with attorneys and parties before the court. They are gaps that would be possible, and helpful, to fill to some extent.

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1. For an example of a discussion of the variety of approaches and rules on recording of formal proceedings, see Kimberly C. Simmons, Annotation, *Failure or Refusal of State Court Judge to Have Record Made of Bench Conference with Counsel in Criminal Proceedings*, 31 A.L.R. 5th 704 § 1[a] (1995) (addressing the issue on many fronts, noting, e.g., some courts require complete recording of all matters, some only of "substantive" matters, and some only require recording on request—"recording" here not necessarily meaning audio or video; rather, that a record be made, etc.). *See also* Sarah Lustbader, *States Are Blocking Courtroom Recording. But Reform Requires Transparency*, THE APPEAL (Jul. 23, 2019), https://theappeal.org/states-are-blocking-courtroom-recording-but-reform-requires-transparency/ (discussing such variations on the recording of formal proceedings, along with pilot recording programs, as well as access issues with respect to independent recordings).

2. *See Understanding the National Court Reporter Shortage and What It Means for Your Firm*, U.S. LEGAL SUPPORT BLOG (Feb. 11, 2021), https://www.uslegalsupport.com/court-reporting/understanding-the-national-court-reporter-shortage-and-what-it-means-for-your-firm/.

When questions arise involving a judge's conduct—particularly the judge's *communicative* conduct[3]—the lack of a record adds an unnecessary layer of uncertainty. When it comes to judicial conduct, as with almost any area of law, there are already baseline disagreements about whether regulatory lines are drawn in the correct places or for the correct purposes.[4] Similarly, there are, of course, already interpretive disagreements about whether observed behavior falls within regulatory bounds once they are established. It is unnecessarily problematic, therefore, to leave open additional questions of what conduct actually occurred as a matter of objective fact in a particular instance. To do so not only impedes the ability to properly regulate judicial conduct, it also invites more questions about the substance of the conduct and about the process of regulating it. Such questions only further impair public confidence, compounding the underlying problems.

What is most important to address is the underlying problem of misconduct itself. The ideal is to fix that—but in order to do so, the misconduct has to be known. The facts about the occurrence of misconduct must be clear, or at any rate objectively observable, for those who are in a position to make an official determination. The lack of consistent records is problematic not only for the fact that it renders such determinations more difficult. It leads to more gaps in reporting as well (knowing that there will be no record to rely on, reporting is less likely). Common problems of influence and of skewed self-perception that pervade and surround the judicial role make the lack of recordings of some judicial misconduct challenging to capture, assess, and resolve.

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3. I use the phrase "communicative conduct" to encompass not only the actual language a judge uses, but also the demeanor, tone, volume, physicality, and other circumstances that accompany such language. Additionally, a judge may engage in communicative conduct without using words at all (e.g., with gestures, with looks, with silence, etc.).

4. The particulars of recusal standards are a common area of disagreement in the field. Whether the Supreme Court of the United States requires a specific code to govern it—and if so, how and why this should be accomplished—is another matter of disagreement.

This article explores opportunities for improvement in the regulation of judicial conduct with a particular focus relevant to complaints about judicial misconduct related to communication of judges in the state courts of the United States. As discussed below, there are aspects of these issues that are common at some level to many different legal systems around the world, but even within the United States (in fact even to some degree within a single state), local rules, norms of practice, and available infrastructure dictate not only that the issues manifest differently, but that the precise solutions would be different. Therefore, there is no single proposed legal prescription for change here, but rather a general shift in approach and purpose which would require adaptation to any given jurisdiction's law and factual circumstances.

As noted above, much judicial misconduct is already "missed" on transcripts because plenty of the work judges do is conducted outside of formal proceedings seated on the bench. They conduct informal meetings with counsel in chambers or in conference rooms in addition to their courtrooms; they meet with clerks, bailiffs, or other courthouse staff (judicial attorneys, administrators, security personnel, secretarial assistants, etc.) in any of these spaces or others throughout the courthouse. As may be noted from many instances of judicial misconduct related to ex parte communications, judges might engage with people in these roles, as well as with parties and other members of the public, both inside and outside the courthouse (from as nearby as the courthouse parking lot to as far away as golfing in foreign countries). Misconduct can happen in any of these settings, but one certainly would not expect transcripts or recordings to be available for all such incidents.

One might imagine that written transcripts would already cover many of the scenarios at issue, but in fact: (1) not all matters of judicial misconduct transpire in official proceedings in which a transcript is produced;[5]

5. *See* Simmons, *supra* note 1.

and (2) even where a transcript has been produced, access to it may be quite costly.[6] (3) Furthermore, even transcripts, though helpful, at their very best may fail to preserve a fully accurate and objective record of what has transpired, and on the whole a transcript cannot convey the fullness of disputed matters of communication such as tone, volume, timing, and physical context. Even where an official "on the record" proceeding *is* captured, in a traditional court transcript rendered by a court reporter, this is less than a perfect recording of what actually occurred.[7] The human element of transcription introduces human error.[8] While some of this human error may be attributable in certain instances to lack of skill or simple carelessness, other errors are attributable to cross-cultural difficulties in comprehension or implicit bias.[9] A written transcript does not provide stage directions (except perhaps those that arise as a matter of stated objections about how an individual is behaving), but even if this were attempted, these would be a matter of the subjective interpretation of the one drafting the transcript, and would still not be able to fully convey those aspects of communicative conduct and context in the way that an audio or visual recording can.

Even audio-only recordings can offer evidence of tone, volume, and timing beyond what can be seen on paper. Video is admittedly imperfect in what it captures

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6. In many courts, it is the obligation and the financial burden of a party to undertake the record-keeping. These costs go beyond the purely financial. *See generally* Stephen J. Schultze, *The Price of Ignorance: The Constitutional Cost of Fees for Access to Electronic Public Court Records*, 106 GEO. L.J. 1197 (2018) (discussing how the federal courts' fee structure forecloses the right of public access to court proceedings).

7. John Southerst, *The Benefits of Digital Court Recording*, 82 JUDICATURE 133, 134 (1998).

8. Perfect accuracy is not required or expected for certification as a court reporter. For example, the National Court Reporting Association requires 95% accuracy in transcription for its various certifications. *Registered Professional Reporter (RPR)*, NATIONAL COURT REPORTERS ASSOCIATION, https://www.ncra.org/certification/NCRA-Certifications/registered-professional-reporter (last visited Aug. 12, 2023).

9. Taylor Jones et al., *Testifying While Black: An Experimental Study of Court Reporter Accuracy in Transcription of African-American English*, 95 LANGUAGE e216, e245–46 (2019).

(e.g., not every angle may be seen at all times, there is potential for distortion of images, and so on). However, by comparison, each of these recording types adds to the potential of what can be captured, improving on what would otherwise be lost. The bottom line is that there often is not a transcript at all, but even when there is, it is not necessarily of a nature to provide sufficient evidence of the communicative conduct in question.[10]

Audio recordings, by contrast, provide the benefit of more context than a written record to judge more fully what communication transpired. Video recordings provide more still and offer an increasingly easy technology to manage. While still imperfect, video recordings in particular present a many-faceted opportunity: to clarify facts, to improve judicial self-awareness, and to reveal a fuller context.[11] Jurisdictions range widely in the degree to which they default to, permit, or prohibit recordings in official proceedings (and as to which types of recordings and which types of proceedings), whether those recordings are officially managed by court personnel or independently created at the expense and direction of parties, etc.[12] This, in turn, has an effect on whether and how recordings are available for review in judicial misconduct proceedings. The more official and regularized recordings become, and the more clearly tied in purpose to clarifying judicial

10. The best of all possible worlds would be having the human court reporter backed up by full coverage of high-quality audio-visual recording. The advantage of having a human court reporter present is that the reporter can remind people to speak up when they are inaudible, can remind people not to speak over each other, and can make sure that equipment is functioning properly. Then, when and if there is any confusion about what was said, or later debate about context or conduct accompanying the words themselves, the recording will amplify the work of the human court reporter. *See* Jospeh Darius Jaafari & Nicole Lewis, *In Court, Where Are Siri and Alexa?*, THE MARSHALL PROJECT: JUSTICE LAB (Feb. 14, 2019, 6:00 AM), https://www.themarshallproject.org/2019/02/14/in-court-where-are-siri-and-alexa.

11. Even video recordings have the potential for imperfections: they cannot capture every angle at once, and they may not capture all audio perfectly depending on placement of microphones or quality of other equipment, etc. Furthermore, in certain contexts there is the potential for so-called "deepfakes," which can be difficult to identify.

12. *See* Lustbader, *supra* note 1.

conduct, the richer and more immediate the opportunities will be not only to correct problems, but to improve public confidence in the system as a whole.

This article will assess how the absence of objective real-time recordings (in either audio or video form) has created gaps, and how such recordings might improve not only the determination of misconduct, but also present opportunities for judicial training and courtroom management. It proceeds in three further sections. Part II gives relevant background on the landscape of judicial discipline to illuminate basic context for where the proposal and discussion points fit into a broader picture of judicial discipline.[13] Part III explores specific examples from cases from various states within the United States, and then looks abroad for a brief comparison with the situations in other common law jurisdictions (New Zealand, Canada, and England and Wales) as viewed through the lens of annual reports on judicial discipline cases.[14] The examples discussed involve matters both with and without recordings, matters where recordings were both official and unofficial, and reports that speak to the broader role that recordings play in the determination of judicial misconduct. Part IV provides analysis of challenges and questions raised by recording judges and discusses on balance the potential advantages of such recordings to fill key gaps in the judicial discipline landscape.[15]

II. BACKGROUND ON THE JUDICIAL DISCIPLINE LANDSCAPE

A little background on relevant points in the landscape of judicial discipline will help to put these issues into context. Four points in particular are illuminated here to set the stage.

13. *See infra* notes 16–28 and accompanying text.
14. *See infra* notes 29–119 and accompanying text.
15. *See infra* notes 120–42 and accompanying text.

A. Judicial Misconduct Complaints Never Filed

Filing a complaint about a matter of judicial misconduct can be a difficult choice to make. The challenge is a matter not only of risk but of timing. If the alleged misconduct affects an ongoing case before the court, the first challenge is the matter of timing. In such a situation, it is dangerous to risk the ramifications of a failed effort to raise the misconduct, for fear of being stuck with an unhappy judge who will continue forward with the case. At the same time, continuing forward with a judge who has engaged, or is continuing to engage, in judicial misconduct leaves the party with a proceeding that is tainted, and by failing to raise the issue promptly the aggrieved party may waive it or allow it to become moot. Apart from any specific effect of the alleged misconduct on a particular pending case, for attorneys who are repeat players before a particular judge, the risk of raising allegations of judicial misconduct or seeking a recusal where it might be unwelcome by the judge is fraught with potential complications in later cases as well. Depending on the facts and circumstances, judges might perceive their integrity to be under personal attack, and as a result, future dealings with those judges could become quite challenging.[16]

16. The points raised here are by no means the *only* deterrents to bringing judicial misconduct complaints. In addition, some states make the process itself quite challenging in an effort to protect judges (and arguably to lessen the volume of frivolous complaints). Furthermore, all states provide confidentiality for the judge named in the initial complaint. Depending on the jurisdiction, the judge's identity is revealed at a point ranging from the certification of the complaint as presenting a legitimate issue for resolution up to the point when the state supreme court actually imposes a public sanction. Thus, in many places, the identities of judges who receive no sanction or a private sanction remain private. By contrast, the identity of the complainant is not protected from the judge, which is a significant deterrent from filing. See further discussion of such deterrents in, e.g., Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained on the Bench*, REUTERS INVESTIGATES: THE TEFLON ROBE PART I (June 30, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-judges-misconduct/ (discussing practical obstacles to filing misconduct complaints); Jeffrey M. Shaman & Yvette Begue, *Silence Isn't Always Golden: Reassessing Confidentiality in the Judicial Disciplinary Process*, 58 TEMP. L.Q. 755, 760–62

In some situations, there may be the potential to raise alleged misconduct in a later complaint or grievance process after a matter has concluded, in order to obviate risk to the client in an ongoing proceeding. Not all judicial misconduct results in (or belongs in) recusal motions, for example. Nonetheless, it can be an uphill battle for those experiencing legitimate concerns with the conduct of judges to bring official complaints. Judges often hold significant power in the legal system, and indeed in the legal community. The more closely involved an individual is—the higher their stakes either in an outcome of a particular proceeding or the more vested their role in the system, etc.,—the more precarious it can be for them to challenge a judge's use or abuse of authority in some way. These are consistent deterrents to bringing complaints about judicial conduct.

The absence of evidence to clearly demonstrate the misconduct that occurred only compounds these problems. Thus, the existence or absence of objective evidence of a judge's communication, interaction, or other conduct at issue can be of great significance in the balance of considerations that lead to this initial decision whether to bring forward a complaint in the first instance. Regularizing official recording of official judicial conduct has the potential to bring more misconduct into the light.[17]

B. Judicial Misconduct Complaints Dismissed at Outset

Having said that much judicial misconduct goes unreported, at the same time many complaints that are filed are quickly dismissed. According to annual and other reports filed in many jurisdictions around the world at all levels, the vast majority of complaints about judicial misconduct are dismissed at an early stage

(1985) (discussing participation problems stemming from confidentiality imbalance).

17. By the same token, this would permit responding judges to have clear evidence as well, by the light of which to raise a defense to any illegitimate complaints brought against them.

(effectively immediately) on the basis either that they fail to state any ground of judicial misconduct within the purview of the reviewing body,[18] or that there are simply no facts alleged in support of the complaint.[19] These

18. Commonly, for example, across jurisdictions not only within the United States but around the world, complaints are simply anchored in disagreement with the judge's decision or otherwise with the outcome of the case, and thus do not fall within the jurisdiction of the reviewing body, as the complainant should instead (if there are grounds) seek an appeal of the legal decision, instead of a review of the judge's conduct. For examples of the volume of complaints that fall away without substantive inquiry or investigation, see, e.g., *Statistics*, NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT, https://cjc.ny.gov/General.Information/Gen.Info.Pages/Statistics.html (last visited Aug. 12, 2023) (providing overall summary statistics of disposition of complaints before the commission since its inception in 1975 through end of 2021, indicating 85% dismissal rate upon initial/preliminary review); STATE OF CAL. COMM'N ON JUD. PERFORMANCE, 2022 ANNUAL REPORT, at 12–15 (2023), https://cjp.ca.gov/wp-content/uploads/sites/40/2023/03/2022-Annual-Report.pdf?trk=public_post_comment-text (providing detail of disposition of complaints before the commission in 2022, indicating a 91.5% dismissal rate "without staff inquiry or preliminary investigation"); *Selected Case Summaries of Dismissed Complaints*, DELAWARE COURTS: THE COURT ON THE JUDICIARY, https://courts.delaware.gov/coj/summaries.aspx (last visited Aug. 12, 2023) (providing descriptions and examples of three categories of complaints dismissed at different points in the process, and linking to case summaries, without data but with by far the largest number of case summaries falling into the initial category of those dismissed "after review," i.e., before any preliminary investigation). The examples from these states are representative of the norm. They are chosen to provide examples of both large and small states, statistics both for the long and the short term, and in a variety of formats.

The same trends show up in other jurisdictions around the world. *See, e.g.*, JUDICIAL CONDUCT INVESTIGATIONS OFFICE, JCIO ANNUAL REPORT 2021–2022, at 2, 13 (UK) (noting, "As in previous years, a substantial proportion of complaints (57%) could not be accepted because they were about issues outside the JCIO's remit such as judicial decisions, which can only be challenged on appeal to a higher court. A further 28% of complaints were dismissed for a range of reasons, including, for example, that they were found to be misconceived," and providing a detailed breakdown of reasons for non-acceptance and dismissal of complaints, many of which are facially applicable); JUD. CONDUCT COMM'R, *Report for the Year to 31 July 2022*, at 2–3, 7 (2022) (N.Z.), https://jcc.govt.nz/pdf/annual-report-21-22.pdf (indicating 88% dismissal rate for lack of jurisdiction in current year, and 79% average over past five years; noting in paragraphs 7 to 10 of "[t]ypes of complaints" discussion that complainants are often aware of the provision for dismissal but are simply willing to try any option that they might have for redress).

19. These complaints may be facially frivolous, lacking in good faith, or otherwise making conclusory statements of violations without even the suggestion of the factual scenarios that might lead to further investigation to support them. *See* STATE OF CAL. COMM'N ON JUD. PERFORMANCE, *supra* note

dismissals occur without any investigation—i.e., they are facially insufficient/improper.[20] In the latter category, there are simply no facts offered to support the claims made. If there were a plausible indication of judicial misconduct to spark an investigation to reach those facts, the reviewing bodies would pursue them in the investigative stage. Thus, these early dismissals (on either basis) are not a category likely to be much affected by the additional evidence that would be gained in the recording of judges. There are no proper arguments being articulated in these matters. It is not a problem of a lack of evidence to support them.

C. Dismissals After Investigation

By contrast to these early dismissals, there is another subset of dismissals that come after investigation of the complaint. These dismissals are quite often based on insufficiency of evidence, and there is great potential for recordings of judicial conduct to play a role in clarifying the facts of these claims so that more might survive past this stage. These are complaints that appeared to have enough heft to proceed at the outset, but ultimately the facts alleged were insufficient to support the claims made in the complaint, or those facts were not ultimately proven true, or else in the fuller context, the facts presented did not meet the required standard of proof.[21]

18, at 15 ("In other words, there was an absence of facts which, if true and not otherwise explained, might constitute misconduct."); *Selected Case Summaries of Dismissed Complaints*, *supra* note 18 (describing types of complaints dismissed after initial review).

20. Unfortunately, in most jurisdictions' reports, all these early dismissals are lumped in together, so it is not easy to discern clearly the proportion made up by each specific subcategory. In its reporting, by contrast, the Judicial Conduct Investigations Office (the judicial conduct office of the courts of England and Wales) uses 18 distinct categories for complaints that are either not accepted for investigation or are dismissed after having been accepted (though the bulk fall into just ten of those categories). JUDICIAL CONDUCT INVESTIGATIONS OFFICE, ANNUAL REPORT 2019–2020, at 10 (UK).

21. For example, in its 2022 Annual Report, after noting the 1,294 complaints that were dismissed "without staff inquiry or preliminary investigation" out of

Without an audio- or audio-visual recording of judicial conduct, the evidence typically available in such a matter consists of some combination of witness testimony from the responding judge, witness testimony from the complaining party, witness testimony from others with relevant knowledge (often court employees, sometimes other attorneys or parties who were present or otherwise involved in an incident), relevant written documents, and, if available, a written transcript of any relevant exchanges that were transcribed. This array of sources is certainly useful, but also potentially problematic on many levels.

As to written transcripts, not all of a judge's engagement or exchanges with others happen on the record in the first place. But even for those that do, for a record of those official "on the record" exchanges to exist, someone must undertake to *make* that record. This is not as universal as one might imagine. As indicated above, the rules vary as to when such a record is required, as well as to who bears the responsibility to making it, who has access to it, and who bears the cost for access.[22] The upshot of all of this, in addition to some other gap-creating factors discussed above,[23] is that transcripts simply do not cover all of a judge's conduct that is susceptible to disciplinary complaints. However, the issue goes well beyond availability of transcripts to the fact that written transcripts are simply inferior to audio or audio-visual recordings, not only in basic points of accuracy,[24] but in demonstrating a fuller communicative context. As will be discussed more fully through the examples in Part III, there are nuances of tone, volume, expression, physical and situational context, and more, that can be reviewed on a recording, but are lost, or at

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the initial 1,414 filed for the year, the Commission continues: "Following staff inquiry or preliminary investigation, the commission closed another 60 matters without discipline. In these cases, investigation showed that the allegations were unfounded or unprovable, or the judge gave an adequate explanation of the situation." STATE OF CAL. COMM'N ON JUD. PERFORMANCE, *supra* note 18, at 15.

22. *See* discussion *supra* note 1 and accompanying text.

23. *See supra* notes 5–10 and accompanying text.

24. *See supra* note 21.

best only provided as occasional and minimal stage directions in a written transcript.[25]

More worthy of note than these issues with written transcripts (where there is at least a concrete record of what transpired, potentially flawed though it may be) is reliance on evidence from witness testimony to reach a conclusion of insufficiency. It is commonplace in judicial misconduct cases for a reviewing body to seek self-assessing input during the investigation from the responding judge. Such bodies may, of course, as relevant and appropriate to the matter, also seek input from the complaining individual as well as other witnesses (often courthouse employees, other attorneys, etc.) who have witnessed the event. However, the testimony of all such witnesses is subject to the inherent human deficiencies of flawed perception and flawed memory, but there are more specific problems in the mix as well. On the side of the judge, the position itself tends by its nature to inculcate in many role-occupants an overconfidence in one's own position of authority. This skewed perspective and lack of humility is sometimes known colloquially as "black robe disease."[26] However, exactly because the judge is in a position of authority, the judge's testimony tends to carry weight and receive more deference.[27] Perhaps in many instances that is earned and deserved deference. Judges often reach their positions based on merit—experience and expertise in their field. However, this is not always the case, nor does merit immunize judges from mistakes or from the common susceptibility

25. *See* discussion *infra* Part III.A.1.

26. Wendy Davis, *Bullying from the Bench*, ABA J., Mar. 2019, at 46, 50–51.

27. This deference to the judge's perspective based on the judge's role can in some places develop into a sort of home court advantage mixed with being judged by one's own teammates, teammates who are sometimes overt in their preference for handling judicial conduct matters outside the public eye. *See, e.g.*, Michael Berens & John Shiffman, *With "Judges Judging Judges," Rogues on the Bench Have Little to Fear*, REUTERS INVESTIGATES: THE TEFLON ROBE PART II (July 9, 2020, 10:00AM), https://www.reuters.com/investigates/special-report/usa-judges-deals/ (providing examples of judges using their discretion to handle discipline of fellow judges privately or confidentially, judges being more sympathetic to situations of other judges, and states keeping overall data on private discipline of judges confidential).

to ordinary human faults in accuracy of perception or recollection. Furthermore, because the judge is in a position of authority, other witnesses, especially those who work closely with the judge or who can expect to appear before the judge again, have a vested interest in aligning their interests with the judge's when they provide their accounts.

In this category, where allegations of misconduct are currently dismissed for lack of sufficient evidence to support the claim, more consistent clarity based on objective evidence would have the potential to support more claims past the stage of these dismissals.[28]

D. Communicative Conduct as Major Topic Area of Complaints

As noted above, one of the main topics of the complaints that do get filed is, and survive at least to the stage of investigation is, broadly characterized, judicial communication, or communicative conduct. Uncivil tone, inappropriate demeanor and language (on and off the bench), ex parte communication, and more—all these are common fodder for misconduct complaints as the behavior is not only upsetting to the parties and lawyers involved, but also unbecoming of the judicial role. To be fair, there are also plenty of loud-mouthed litigants, defiant defendants, and counsel who need to cool it, right along with the bullies on the bench. And as the post-truth era has taken hold, the companion trend of uncivil discourse is perhaps only getting worse. Some of this might be attributable to social media algorithms that promote the circulation of uncivil episodes that are truly beyond the pale. When such episodes go viral, the bad behavior in places of power, including on the bench, is not only exemplified but solidified in the popular imagination of how the courts operate. This becomes the norm that people know, rather than the "boring" norm of

28. Or, if they did not—if all the clarity were on the side of no misconduct—that too would be an improvement, for both clarity and public confidence.

good judges who do not yell or mock or jump over the bench and tackle anyone. One might argue that this is an argument for *not* recording the bad judges, so that they could not go viral. (Hide the bad?!) But this is surely not the answer. The information is important. But perhaps there are means of providing context and control to avoid misuse or abuse.

III. EXAMPLES FROM CASES AND REPORTS

The following discussion first looks closely at a handful of examples from state courts around the United States and then pans back to look more generally—and internationally—at information and broader pattens found in reports from a handful of other common law countries. These examples illuminate some of the ways in which recordings, both official and unofficial, can make a significant difference in misconduct and discipline processes. Through examples of proceedings both with and without recordings, the discussion explores how the lack of recordings can create problematic gaps both with respect to bringing forward complaints in the first place, and with respect to more objective resolution of complaints. Examples in cases from the United States as well as those in reports from abroad reinforce the connection between the nature of communicative misconduct and the problems that recordings can help to minimize or avoid.

A. United States

1. Wells *(Texas)*

The example of a family court judge in Houston offers an in-depth look at how recordings matter, the information they yield, as well as some of their potential shortcomings (whether the recordings are official or

otherwise).[29] While the disciplinary opinion that resulted from this matter was not focused on anything related to the record or making of recordings, the facts of the case cast helpful light on the crucial role that the record and recordings can play in the conduct of judges and in the disciplinary process that may follow.

The judge in this case presided over a three-day bench trial in April 2019.[30] In February 2020, one of the lawyers in the matter filed a complaint with the Texas State Commission on Judicial Conduct.[31] In April 2022, three years after the original incident and nearly two years after the complaint was filed—a reminder that the wheels of discipline, just like the wheels of any other type of justice, can turn slowly—the commission issued an admonition and order.[32] In the meantime, the judge remained on the bench. The Texas Commission sets some of the scene in its brief admonition and order:

> During April 2019, [the judge] presided over an acrimonious divorce case which involved allegations of domestic violence. Throughout the trial, [the judge] expressed irritation at both lawyers, slamming his fists or books on the bench, erupting in anger at counsel, using a harsh and sarcastic tone of voice, abruptly announcing recesses, or walking off the bench in frustration and anger.
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> On April 17, 2019, at or near the end of proceedings, [the judge] ordered the attorney representing the wife . . . to his chambers for a "discussion" while the

29. Public Admonition and Order of Additional Education, CJC No. 20-0873, (Tex. Comm'n on Jud. Conduct, Apr. 20, 2022) [hereinafter *Wells Order*], https://www.scjc.texas.gov/media/46884/wells20-0873pub-adm-oae-42022.pdf.

30. *Id.* at 2.

31. Teresa Waldrop, *He Says We Can't Sue Him but We Should File Judicial Complaint. Done.*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-8d3xr-htmgl-hk4cy-jtn2y-hhybx-r4lsk [https://web.archive.org/web/20221110231546/https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-8d3xr-htmgl-hk4cy-jtn2y-hhybx-r4lsk] (last visited Aug. 15, 2023).

32. *Wells Order*, *supra* note 29.

> parties and other counsel remained in the courtroom.[33]

What is not explicitly stated in the commission's findings is that there was of course no official court reporting of what happened in that in-chambers "discussion." Yet the commission went on to make many specific findings of fact, including some that quote the judge's verbatim statements in this in-chambers meeting. But only the attorney and the judge were present. The order states that "[o]n entering his chambers, [the judge] cursed and then continued to use profanity to express his anger to [the attorney] about the presentation of the case," that the judge "confessed that he had lost his temper and created an irreparable mess of the trial, conceding he was known to 'have a bad temper' and stating, 'the reality has—has come to me that I may not be suitable for this.'"[34] The commission further found that the attorney was frightened and intimidated, but notwithstanding her repeated requests to leave or to have witnesses present, the judge continued the meeting for over an hour.[35] It found that the judge expressed in the meeting that he was "horrified" and that he wondered if he should "fling himself out the window" or "crawl under [his] desk."[36] The judge ultimately invited the other parties and counsel into chambers, apologized, and later the next day recused himself from the case.[37]

But what can be made of the fact that there was no official recording of what happened in chambers, and yet there are such specific findings of fact as to what transpired? Did the judge and the lawyer simply agree on what was said? One might think so, given some of the sentiments of self-doubt expressed (as presented in the judicial commission rendering) and the fact that the judge later recused himself. However, it is not nearly so

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33. *Id.* at 1.
34. *Id.* at 2.
35. *Id.*
36. *Id.* (internal quotation marks omitted).
37. *Id.*

simple. In fact, what transpired was far more complicated. The attorney who was summoned into chambers (and who ultimately filed the complaint against the judge) also filed to run against him for his seat on the family court bench, and in the campaign process published a blog which provided further facts and circumstances.[38]

As suggested to some extent by the Commission's description, the tone of the trial had already been contentious on the judge's part. He had erupted at the parties on several occasions, though notably had gone off the record to do so in some instances, so not all occasions are reflected in the official trial transcript.[39] The trial itself was officially recorded and transcribed by the court reporter for the family court, [40] and as one would expect, the judge directed that certain portions were "on" and "off" the official record. In one such instance, when the judge had started an off-the-record outburst at counsel, the attorney in question had the presence of mind to hit

38. *See* Teresa Waldrop, *I'd Rather Be Running for Something Than Against It*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-one-7h2rr [http://web.archive.org/web/20221110231546/https://www.teresawaldropforjudge.com/quest-blog/project-one-7h2rr] (last visited Aug. 30, 2023) (on file with author).

39. *See, e.g.*, Teresa Waldrop, *It Comes Back to Me in Fits & Starts*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x [https://web.archive.org/web/20221110231546/https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x] (last visited Aug. 15, 2023) (on file with author); *see also* Teresa Waldrop, *Tirade Not in Transcript*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p (last visited Aug. 15, 2023) (on file with author) [hereinafter Waldrop, *Tirade*]; Teresa Waldrop, *Feeling a Little Shy*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/g4ebr4z4akbem3a-ygna4-lxdg4-edd5t-sdjmh-e2j2w-r9mxy-jycs6-8g4eb (last visited Jul. 21, 2022) (on file with author); Teresa Waldrop, *What's Really Pushing Through at Me Today*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-8d3xr-htmgl-hk4cy-jtn2y-hhybx-r4lsk-8tycp-f3smz-tmx5f-m22tl-mby68-56cr3-9eb9h-3r889-gdwyy-3nb8t (last visited Jul. 21, 2022) (on file with author).

40. For an example of the expense indicated above, the attorney notes in passing that the cost of this trial transcript was $4,550. Waldrop, *Tirade*, *supra* note 39.

an audio recording application on her cell phone, which was sitting on the counsel table.[41] A few minutes later, when she was summarily ordered by the judge into the ex parte meeting in chambers, she had the cell phone with her in her purse, and it was already recording—the quality of the recording is therefore in some cases muffled, but it does capture most of what occurred (albeit in audio form only) during the nearly two-hour discussion alone in chambers, and then afterwards in chambers when others were at last invited to join them.[42] It was on the basis of this recording that the attorney was able to move forward with her complaint.[43]

Given the judge's remarks preserved on the recordings of the in-chambers meeting, perhaps the recording itself should not have been necessary. After all, the judge himself suggested his unsuitability for the role.[44] He confessed his horror at his own behavior and noted that he could not think of any more ways in which he could have messed things up (though he used more colorful language to express that).[45] And afterwards he recused himself.[46] However, there are other indications that the recording was essential. Despite any statements

41. Teresa Waldrop, *This is Not a One Off*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-k5h27 [https://web.archive.org/web/20221110231546/https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-k5h27] (last visited Aug. 15, 2023) (on file with author) [hereinafter Waldrop, *Not a One Off*].

42. *See id.*; Teresa Waldrop, *He Said He Would Hug Me if He Could*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-8d3xr-htmgl-hk4cy [https://web.archive.org/web/20221110231546/https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-8d3xr-htmgl-hk4cy] (last visited Aug. 15, 2023) (on file with author) [hereinafter Waldrop, *Hug*].

43. *See* Teresa Waldrop, *He's Wildly Familiar With the Parol Evidence Rule*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-tc3wn [https://web.archive.org/web/20221110231546/https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-tc3wn] (last visited Aug. 15, 2023) (on file with author).

44. *Wells Order*, *supra* note 29, at 2.

45. *See infra* note 61 and accompanying text.

46. *Wells Order*, *supra* note 29, at 2.

at the time about his unsuitability for the role, the judge not only ran to retain his seat, but campaigned actively in a three-way primary, arguing that he was better suited than the others for the seat.[47] Contrary to his statements on the recording, he said in campaign events that the only person objecting to his conduct was this one attorney.[48]

The judge was aware of the attorney's independent recording during the pendency of the misconduct complaint with the conduct commission, because he commented negatively about it during a primary election event (still before the commission's decision was released).[49] His reaction to the recording was not conciliatory but combative.[50] That is, even with a clear record of what transpired, with his own voice placing him in a compromised position, he was not willing to concede any ground.

The only reason objective evidence exists regarding what occurred in chambers is because the attorney had a device available with which to record it and happened to be able to do so. She noted that she would not likely

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47. Attorney Waldrop has since won the seat that was previously occupied by Judge Wells.

48. In fact, in their primary contest and in contrast to his prior statements about having to apologize to people all the time, the judge took the position that this attorney was the only one who had any problem with him. Teresa Waldrop, *I Made Him a Better Judge–Um, You're Welcome, I Guess*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/g4ebr4z4akbem3a-ygna4-lxdg4-edd5t-sdjmh-e2j2w-r9mxy-jycs6-8g4eb-gn79h-mxtwm-zxd6t-bfkj2 (last visited Jul. 21, 2022) (on file with author) [hereinafter Waldrop, *Better Judge*]; *see also* Teresa Waldrop, *Redux Series to Discuss Public Sanction of Incumbent: He's Wildly Familiar with Parol Evidence Rule*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/redux-series-to-discuss-public-sanction-of-incumbent-hes-wildly-familiar-with-parol-evidence-rule [https://web.archive.org/web/20220506013744/https://www.teresawaldropforjudge.com/quest-blog/redux-series-to-discuss-public-sanction-of-incumbent-hes-wildly-familiar-with-parol-evidence-rule] (last visited Aug. 15, 2023) (on file with author).

49. *See, e.g.*, Waldrop, *Better Judge*, *supra* note 48.

50. At a campaign event during their contested primary in early 2022 and before the commission had released its disciplinary order, the judge suggested impropriety on the attorney's part both for making and for posting the recording (without citing any basis in Texas law or ethics rules for that). *See id.*

have had the courage to make her complaint or share her story had it not been for the recording. Even with it, and even in the face of the disciplinary order regarding the judge, others have doubted her story.[51] On the other hand, she notes that others have told her that similar things have happened before and since,[52] but without being brought forward. As the attorney states: "This is also why I think it's imperative we find the funds to record all proceedings on and off the record in our courtrooms. Much of what happened to me occurred in chambers. I'm not sure yet how to fix that. And, frankly, there are already rules against ex parte communications with lawyers on the books."[53] The rule alone was not sufficient. Her independent recording was the only record other than her word and the judge's. Even with that, it was an uphill battle.

The attorney used her blog to demonstrate several things, among them the difference an audio recording can make in conveying the reality of what happened. It can convey the simple fact that the conduct (particularly the communicative conduct) occurred, certainly; but

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51. *See, e.g.*, Teresa Waldrop, *Who Has Guts to Stand and Object*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/g4ebr4z4akbem3a-ygna4-lxdg4-edd5t-sdjmh-e2j2w-r9mxy-jycs6 (last visited Jul. 21, 2022) (on file with author) [hereinafter Waldrop, *Guts*]; Waldrop, *Not a One Off*, *supra* note 41; *see also* Teresa Waldrop, *Redux: This is Not a One Off*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/redux-this-is-not-a-one-off [https://web.archive.org/web/20220505221142/https://www.teresawaldropforjudge.com/quest-blog/redux-this-is-not-a-one-off] (last visited Aug. 15, 2023).

52. Teresa Waldrop, *Off the Kuff Reports on Public Sanctions*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/off-the-kuff-reports-on-public-sanctions [https://web.archive.org/web/20220516001023/https://www.teresawaldropforjudge.com/quest-blog/off-the-kuff-reports-on-public-sanctions] (last visited Aug. 30, 2023) (on file with author). *See also* Teresa Waldrop, *Goddamn It. Get Out of Here*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-8d3xr-htmgl [https://web.archive.org/web/20221110231546/https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-8d3xr-htmgl] (last visited Aug. 15, 2023) [hereinafter Waldrop, *Out of Here*].

53. Waldrop, *Not a One Off*, *supra* note 41.

beyond that, even an audio clip alone can convey tone, volume, pacing, and demeanor in the delivery of speech better than a paper transcript alone.[54] Indications like banging on a table or kicking a door closed might be stated in a transcript if they are remarked upon for the record, but hearing what it sounds like in an audio recording—or better still, seeing what it looked like with fuller context in a video, putting the visual together with timing and tone of what was spoken, seeing where others were in the room, and so on—is far more effective for understanding what transpired.[55] For example, being able to listen to tone of voice and hear a derisive chuckle here, a long pause there, a stark contrast in volume between two speakers often tells the attentive listener much more than the actual words being spoken.

Without the attorney's recordings, it would have been the judge's word against hers. But in many courts, cell phones are not permitted at counsel tables and independent recordings are explicitly prohibited,[56] so

54. *See, e.g.*, Waldrop, *Out of Here*, *supra* note 52; *see also* Waldrop, *Not a One Off*, *supra* note 41; Waldrop, *Guts*, *supra* note 51. To some extent, of course, the fact of the recording—from which a transcript can be made—is then very useful in creating exhibits to convey other information about what has transpired. For example, it can be used to convey the volume of profanity used, or the number of objections made. *See* Teresa Waldrop, *Summary of Profanity–Yes, There's an Exhibit*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-8d3xr [https://web.archive.org/web/20221110231546/https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-8d3xr] (last visited Aug. 15, 2023); *see also* Teresa Waldrop, *Daily Objection Tally*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy [https://web.archive.org/web/20221110231546/https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy] (last visited Aug. 15, 2023). The volume of profanity and number of objections are shown in concrete terms, which would not be possible without the recordings and transcripts.

55. *See, e.g.*, Waldrop, *Out of Here*, *supra* note 52.

56. There is considerable variety in state laws and court rules governing recordings. Only about a dozen states allow fully unrestricted recording in courtrooms. *See* Mitchell T. Galloway, *The States Have Spoken: Allow Expanded Media Coverage of the Federal Courts*, 21 VAND. J. ENT. & TECH. L. 777, 818–20 (2019). Otherwise, restrictions relate to matters of broadcasting or to subject matter (such as prohibitions on recording of criminal or juvenile matters). Only a handful of states completely ban all recordings across the board. *Id.* Others

when summoned to chambers or otherwise "off the record," an attorney might not have any means available to act as this attorney did. Even so, she took a risk in reaching to record the conversation—that the judge might see her and stop her. Or become yet further upset. (Indeed, as noted above, the judge later vaguely asserted some impropriety about the recording, albeit without stating any basis.[57]) The recording might have been too muffled, the recording application might have stopped, or her phone battery might have died. As it stands, as she notes in her blog, there were, in fact, things that were said and done in chambers that were not picked up sufficiently clearly on the recording for her to feel comfortable discussing or relying on them afterwards.[58] In any of these scenarios, she might never have filed her complaint or made her run in the election to pursue a change in the situation.

The power differential between judges and those before them is obvious,[59] but judges are not always sufficiently mindful of it.[60] Unfortunately, in this situation, the judge was well aware of it, but brazenly

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make it a matter of a judicial conduct rule and prohibit it across the board unless expressly approved by the presiding judge. *See, e.g.*, LA ST CJC Canon 3(A)(9)(a)–(d).

57. *See* Waldrop, *Better Judge*, *supra* note 48. In a similar instance, an Alabama judge made a vague complaint about an independent recording that captured his remarks that were found to be inappropriately racially charged. *In re* Jinks, Case No. 57, at 5 n.3 (Ala. Ct. Judiciary, Oct. 29, 2021), https://judicial.alabama.gov/docs/judiciary/COJ57_JINKSFinalJudgment.pdf. There was no basis in state law or court rules to prohibit making a recording or to exclude such a recording as evidence in the judicial discipline process. *Id.*

58. Waldrop, *Hug*, *supra* note 42. Furthermore, on a mundane practical note, it was a costly effort to use those portions she did use. She had to pay approximately $800 to have the audio file transcribed for use in her complaint. Waldrop, *Not a One Off*, *supra* note 41.

59. Teresa Waldrop, *I'm Not Rotfl*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-8d3xr-htmgl-hk4cy-jtn2y-hhybx-r4lsk-8tycp-f3smz-tmx5f-m22tl-mby68-56cr3 [https://web.archive.org/web/20220519002055/https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-8d3xr-htmgl-hk4cy-jtn2y-hhybx-r4lsk-8tycp-f3smz-tmx5f-m22tl-mby68-56cr3] (last visited Aug. 15, 2023).

60. *See generally* Abbe Smith, *Judges as Bullies*, 46 HOFSTRA L. REV. 253 (2017) (discussing personal experiences of bullying behavior in judges).

indicated his perspective that the differential ran to his benefit. After the ex parte discussion with the attorney, the judge brought the rest of the parties and counsel into chambers and said the following:

> Which one of y'all would have the guts to stand up and object, uh [judge laughs] [pause] I mean I just couldn't have f—ed this up any more. 'Scuse me. I had to just say it. I just couldn't. [pause] I don't drink by the way, you know. Maybe if I was drunk I'd have some kind of an excuse. I-I-I mean I am just horrified.[61]

Note, however, that the judge was *not* recusing himself at that point. (He did so the next day.) Lawyers in such a situation will, of course, have many considerations to balance. The interest of their client; their own professional reputation (with this judge, with other judges, among other lawyers, and with prospective clients) and, in turn, their livelihoods; the ethical obligation to report misconduct of the judge under Rule of Professional Conduct 8.3(b); and so on. The fact is that the judge in this case was exactly right that it takes guts to stand up to judicial power. And he was right as well that few choose to do so. In many cases, in the moment that choice is about protecting the position of a client.[62] In others, whether in the moment or later, it is because of fear that the power differential is simply too great—that it just will not come out well in the end. And lack of evidence to clearly back up the attorney's position makes this all the more difficult.

2. O'Diam *(Ohio)*

An incident involving an Ohio probate judge, disciplined by the Ohio Supreme Court, provides a useful example of how necessary a recording may be to reach an accurate determination, given the ability of a judge to persist in a skewed perception of his own conduct.[63] This

61. Waldrop, *Guts*, *supra* note 51 (quotation transcribed from audio link).
62. *See* Smith, *supra* note 60, at 272.
63. Disciplinary Couns. v. O'Diam, 196 N.E.3d 812, 813–14 (Ohio 2022).

type of objective evidence of communicative conduct is a crucial help to decisionmakers, and ultimately protects both judges and those who appear before them by preserving an accurate record of what transpired. The court here was reviewing panel and board recommendations on allegations that the judge had violated the Code of Judicial Conduct by "engaging in the undignified and discourteous treatment of a beneficiary" in an estate case pending in his court.[64] The beneficiary had commented publicly before the County Commissioners regarding the judge's practice of using waivers of disqualification in order to permit his daughter (also the beneficiary's counsel) to practice law in his court.[65] Upon learning of this through his clerk and having obtained a videotape of the incident, the judge spoke about the matter with his daughter and scheduled a status conference in the case, which he ordered the beneficiary and others to attend, without giving any notice as to the subject or any notice as to his intention to require the beneficiary to testify under oath.[66] At the status conference, the judge played the videotape, called the beneficiary to the stand, put him under oath, and then cross-examined him vigorously for nearly an hour, also allowing his daughter to do the same for over 15 minutes.[67] The beneficiary became very emotional under this pressure from the judge and his daughter, requested water (which was not provided), and so on.[68]

While the judge asserted that his purpose for the status conference was "to determine why [the beneficiary] had an issue with the waiver of disqualification and whether there was any way to fix it,"[69] the court agreed on review with the panel's finding that the judge never, in fact, addressed those topics, but focused instead on his own reputation and that of his

64. *Id.* at 813.
65. *Id.* at 814–15.
66. *Id.* at 815.
67. *Id.* at 815–17.
68. *Id.* at 815, 817.
69. *Id.* at 819.

daughter, and the personal offense he experienced.[70] Most significantly, though, the judge described the beneficiary's testimony as "a lot of overdramatization and . . . overreaching remarks that just never occurred" and stated that the beneficiary testified to his perception of events while his own testimony was "the opposite of that."[71] He suggested that the court could find the answers (i.e., his appropriate behavior) in the recording.[72] However, the panel (along with the board and the court) found a sharp contrast between the judge's characterization of his own behavior, and the behavior reflected on the recordings, which was "strident and confrontational" both with the beneficiary and when he went to confront the county commissioners in person as well.[73] The panel concluded that he "fail[ed] to recognize that he verbally assaulted a party and a citizen who was properly utilizing the court system."[74]

A situation like this one may work out in the end (in terms of appropriate discipline imposed) when an audio recording exists. However, when a recording does not exist—especially when an *official* recording does not exist—the party or attorney, already in a position subordinate to the judge, is put at unnecessary risk. If it were standard operating procedure to record all official business conducted before a judge—where parties and/or attorneys engage with judges in their official capacities, all involved would be able to rest assured that they would have the evidence to back up their concerns. (Judges, equally, would have that objective record to quash any misperceptions, if they believed that concerns about their conduct were misplaced.) Without this enhancement in operating procedure, however, there remains an imbalance, because of the imbalance of power and influence leaning in favor of the judge.

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70. *Id.* at 819, 822.
71. *Id.* at 820.
72. *Id.*
73. *Id.* at 820, 823.
74. *Id.* at 820.

3. Blum *(Iowa)*

An Iowa appellate opinion, *Blum v. State*,[75] illuminates several problems that arose out of an unrecorded jury selection process. While the lack of a recording of that procedure was not itself the focus of the court's analysis on appeal, nor was any party or the judge pointing a finger regarding any fault for a lack of recording of that proceeding, still a review of the developments makes clear the potential difference that a recording of that original proceeding would have made.

In *Blum*, the defendant was charged with first-degree murder, and jury selection began in the case roughly 18 months later.[76] The defendant pled guilty to second-degree murder on the evening of the same day jury selection began, but eight days later moved to withdraw that plea, claiming that he was intimidated by the court's statements and felt that the jury would not treat him fairly.[77] Without any transcript or audio or video recording of what occurred at jury selection, the defendant and the judge simply disagreed as to their recollections of what transpired. The defendant moved to withdraw his plea (before the same judge), based on the statements the defendant alleged that the court and a prospective juror made, but the court did not believe these statements had occurred. During the motion hearing, in light of the dispute, the judge requested that the defendant's lawyer make a professional statement as to what had transpired on the earlier occasion.[78] The lawyer complied and duly made such a professional statement, which was largely against the interest of his own client, agreeing with the judge's account as to what had occurred in the courtroom.[79]

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75. 510 N.W.2d 175, 176–77 (Iowa Ct. App. 1993).

76. *Id.* at 176.

77. *Id.*

78. *Id.* at 177. A professional statement is effectively equivalent to an affidavit.

79. *Id.*

The defendant client, Blum, claimed that by complying with the judge's request for professional statements, the attorney became a witness against his client and left his client without any representation to cross-examine or object, thus prejudicing him.[80] This would be problematic standing on its own. Certainly, the attorney should not have put his client in such a position. He should have indicated to the judge that he could not (and would not) do so. But it is the judge who should never have started things down this road in the first place. As the appellate court in *Blum* stated, "We disapprove of this type of demand or request by a judge under such circumstances."[81] But, as the court also noted, it was far worse under the particular circumstances of this case, given that the judge had already stated quite specifically to the defendant his distaste for and even hostility towards him.[82] It is crucial to note that none of this would have come up in the first place if there had been an objective record of what happened at jury selection.

Here, a party before a judge raised concerns about an alleged hostile environment created by remarks by the judge and a juror, and no objective contemporaneous record was available on which to review those remarks. The judge then sought to enlist the party's counsel to shore up the judge's own side in the debate over what was said. Even if truth were entirely on the judge's side in such a scenario, this approach puts too much pressure on the party's counsel and puts the party (as well as counsel) in a radically unfair position. To avoid situations of this nature, recordings ought to be available, to simply allow all parties to refer back

80. *Id.* at 178–79.

81. *Id.* at 179.

82. The judge said:

> Having had a chance to observe your traits and character I feel safe in telling you that you're easily one of the most manipulative and downright deceitful people I've ever had the misfortune to encounter. . . . My only regret is I can't give you more time that [*sic*] I am going to give you.

Id.

quickly, clarify and confirm their recollections and move forward, with everyone maintaining their appropriate roles. Furthermore, for these purposes,[83] recordings present a preferable alternative to written transcripts rendered by individuals subject to either error or influence.

4. Coakley *(California)*

In this unreported appellate case from California, one might readily say that nothing actually went wrong as a result of the lack of a recording. However, the case provides a useful example of what so easily *could* go very wrong in a case without a recording. In *People v. Coakley*,[84] one of the codefendants in a robbery case was assigned to a judge for trial.[85] In the courtroom, there was an unrecorded pretrial discussion with counsel about a plea agreement.[86] During that discussion, when the judge perceived that the attorneys desired his intervention, the judge explained the benefits of the plea offer to the defendant, but to no avail.[87] When it became clear that a plea deal would not be reached, the judge said something (unclear exactly what because it was not

83. There are other purposes for which written transcripts are certainly preferable (e.g., for attorneys working on appeals, reading and searching the record is unquestionably easier in written form). The proposal is limited to its specific purpose, i.e., improvement of both procedural and substantive aspects of judicial misconduct. (Even so, presumably one who would prefer to work with a written transcript should appreciate the resource of enhanced accuracy available in an audio-visual recording as an additional record of a proceeding.) In fact, a national study in the 1990s found that cases with video records were more likely to be affirmed on appeal than those with only written transcripts. *See, e.g.*, Fredric I. Lederer, *An Environment of Change: The Effect of Courtroom Technologies on and in Appellate Proceedings and Courtrooms*, 2 J. APP. PRAC. & PROCESS 251, 259 (2000) (specifically examining study results on the effect of video records on Kentucky appeals); *see also* Robert C. Owen & Melissa Mather, *Thawing out the "Cold Record": Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, 2 J. APP. PRAC. & PROCESS 411, 417 (2000) (discussing the higher affirmance rate of Kentucky cases decided by videotape records).

84. No. B231522, 2012 WL 5207488 (Cal. Ct. App. Oct. 23, 2012).

85. *Id.* at *2.

86. *Id.*

87. *Id.*

recorded) to counsel "to the effect that the only thing that would make the defendants [*sic*] plead was for the judge to come out in a white sheet and pointy hat."[88] The judge then declared a mistrial and recused himself.[89] (The judge was separately admonished for the remark.[90])

The case proceeded with a new judge after the mistrial, and the defendant later appealed, arguing among other things that the original judge's racist remarks set a problematic tone for the proceedings, even though the case went forward under a different judge.[91] The appeal on this ground was dismissed both because the argument was not raised below and because no evidence was brought forward to support any suggestion that the original remark tainted the trial. [92] Indeed, in this instance, the first judge appears to have corrected for his error as best he could in the circumstances, and there is no evidence of a problem with what occurred in relation to the second judge. However, it takes little effort to imagine a scenario in which these same circumstances would lead to a different outcome. Here, the original judge recognized the problem immediately and recused. But imagine a judge who did not recuse right away. Without a recording, what if the attorney for the defendant had to make a choice about whether to risk a recusal motion? What if the attorney had to worry about whether the judge might, like the one in *Blum*, have a different recollection of what happened? Without an independent recording like the one in *Wells* for backup, there would only be witness testimony to rely on. In fact, in *Coakley*, there were varied recollections of the salient remark. Those variations could have run even further afield, especially when influenced by stakes in the proceeding and long-term reputational and career

88. *Id.* To be clear, because the proceedings were not recorded, the remark itself cannot be quoted verbatim. The quotation here is from the opinion discussing what is reported to have been said.

89. *Id.*

90. *Id.* at *2 n.5.

91. *Id.* at *3.

92. *Id.*

interests. The existence of an official recording of an official proceeding to capture the judge's interactions with all those involved can eliminate or at the very least minimize such uncertainties.

5. Hawkins *(Florida)*

Finally, the example of a judge from Florida demonstrates one more helpful context to explore—where video (even without audio) may assist in the face of a judge's refusal to acknowledge the occurrence of misconduct. Reportedly frustrated with an employee regarding preparation of her afternoon docket, the judge was caught on video (without audio) in an interior courthouse hallway very briefly placing both of her hands around the employee's neck and then gesturing dramatically at him while speaking to him.[93] No one else was present in the hallway, so this video was the only source of evidence other than the judge and the employee themselves. The judge was charged by the Florida Judicial Qualifications Commission and suspended while the matter was pending.[94] The matter was pursued for some time, but while it was pending, the judge lost the primary race for her seat and decided to resign, so the Commission dropped the charges.[95] However, in the meantime, even in the face of the video evidence, the judge had maintained her denial of the misconduct.[96]

Situations in which judges deny basic facts or fail to acknowledge problematic aspects of their behavior are perhaps the most readily addressed by availability of more recordings. The existence of recordings may not (however surprisingly) stop a judge from denying that

93. Jim Rosica, *Broward Judge Denies Misconduct After Video of Her Briefly Choking Employee*, FLORIDA POLITICS (Aug. 2, 2019), https://floridapolitics.com/archives/302411-broward-judge-denies-misconduct/.

94. *Suspended Judge Resigns*, THE FLORIDA BAR: FLORIDA BAR NEWS (Nov. 25, 2020), https://www.floridabar.org/the-florida-bar-news/suspended-judge-resigns/.

95. *In re* No. 19-351 Hawkins, No. SC19-1193, 2020 WL 7391139, at *1 (Fla. Dec. 16, 2020).

96. Rosica, *supra* note 93.

the conduct took place or that it was improper. But at least a recording provides greater clarity about the facts or circumstances of the judge's communicative conduct so that a complaint or charge may be more effectively pursued and/or defended. The more "objectively observable" the evidence in support of the facts, the more potential there will be to move forward constructively—on something better than conjecture—even in the face of potential hurdles to persuasion in a post-truth society.[97]

Examples like those from Texas, Ohio, and Florida, in which recordings actually existed (official or unofficial; audio or video) may be the most surprising in the mix—where even in the face of recordings of audio, video, or both, judges denied their own misconduct to some

97.The Cambridge Dictionary defines the term post-truth as "relating to a situation in which people are more likely to accept an argument based on their emotions and beliefs, rather than one based on facts." *Meaning of Post-Truth in English*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/post-truth (last visited Aug. 18, 2023). Commentators, especially on politics, have noted that we live in a "post-truth world," or a post-truth or "post-fact" age or era increasingly over the past 20 to 30 years. Matthew O'Brien, *The Age of Niallism: Ferguson and the Post-Fact World*, THE ATLANTIC (Aug. 24, 2012), https://www.theatlantic.com/business/archive/2012/08/the-age-of-niallism-ferguson-and-the-post-fact-world/261395/; Brandon Harris, *Adam Curtis's Essential Counterhistories*, THE NEW YORKER (Nov. 3, 2016), https://www.newyorker.com/culture/culture-desk/adam-curtiss-essential-counterhistories. Though another writer in *Slate Magazine* argues that really, we have always been there. Sam Kriss, *The Biggest Political Lie of 2016*, SLATE (Aug. 31, 2016, 2:04 PM), https://slate.com/news-and-politics/2016/08/the-biggest-political-lie-of-2016.html. And indeed, it may be true that this bent has always existed at some level in human nature, but this term as such was first used in the early 1990s, and it experienced a sharp rise in popularity in association with the 2016 U.S. presidential election. "Post-truth" made a sufficient impact on the vernacular that it was named the Oxford Dictionaries' 2016 Word of the Year. Alex Johnson, *"Post-Truth" Is Oxford Dictionaries' Word of the Year for 2016*, NBC NEWS (Nov. 16, 2016, 9:15 PM), https://www.nbcnews.com/news/us-news/post-truth-oxford-dictionaries-word-year-2016-n685081. However, judges—like others—live in a society of increasing breakdown and distrust when it comes to confidence in the reliability of sources. When it comes to trust in proven or provable facts, unfortunately, for some, more and better information is not the solution that garners trust or hope. Even so, ultimately, a recording can be helpful—not so much because it will necessarily persuade a person who holds an entrenched view, but because it offers an objective record amid conflicting views, and thus has the potential to assist in shedding light not only on the facts, but on the credibility of one who continues to deny its contents.

degree. Judges, after all (depending on the exact roles they play) are arbiters of evidence, finders of fact, and so on. It is their role to determine whether standards have been met. Their ability to discern and to judge accurately is important. However, in these instances, presented with evidence of their own conduct, they were either unable to discern accurately or unwilling to acknowledge openly the problematic behavior at issue when confronted with it. Recordings thus played a crucial role. They relieved the need to rely solely on judges as witnesses of their own conduct. They filled a gap in judicial capacity for objective self-awareness. Furthermore, they alleviated some of the gravitational pull to defer to judges' own perceptions, even in light of judges' generally greater knowledge about norms and expectations where courtroom proceedings and judicial behavior are concerned. For these reasons, among others, it is very unlikely that any of these matters would have been brought forward in the first place if the recordings had not been available.

B. Brief Comparison with Other Common Law Countries

This is not just a matter of importance in the United States. Annual reports of judicial disciplinary bodies as well as judicial disciplinary decisions in other countries reveal the importance of audio or video recordings, and the problems arising from the lack of such recordings, particularly in cases involving judicial communications and other demeanor-related matters.

1. New Zealand

Judicial misconduct in New Zealand is handled by a central system overseen by a single Judicial Conduct Commissioner. Each year the office of the Commissioner produces an Annual Report offering an overview of trends and compiling basic statistics on the state of the judiciary as it relates to complaints, resolutions, and

related issues.[98] Reporting from New Zealand (and indeed activity on the whole in this arena) remains minimal, but what there is aligns with the general points of discussion here. The 2020–21 report notes a growing focus on issues related to demeanor in recent years, and continuing problems in this area,[99] and specifically notes the significant assistance gained from use of audio recordings of underlying matters when making determinations regarding the substance of complaints.[100]

2. Canada (British Columbia as an example)

As in other jurisdictions, the provincial courts of Canada produce annual reports providing a combination of statistics regarding the state of the judiciary and relevant outcomes on various points regarding disciplinary complaints and decisions. (These reports vary greatly across jurisdictions as to scope, style, format, and content.) In the provincial court of British Columbia, the 2019–20 Annual Report includes, among other things, summaries of those complaints made against judges that had sufficient grounding to proceed to an investigation and disposition.[101] Thirteen such complaints are each briefly summarized in the report.

98. For scope and context, the Annual Report for 2020–21 indicated 214 complaints received about 363 judges (both marked increases over the prior year at 136 and 162 respectively—the increase being attributed to an uptick in complaints in appellate matters, where there are more judges on each case, and thus each is counted separately). JUD. CONDUCT COMM'R, *Report for the Year to 31 July 2021*, at 2, 5 (2021) (N.Z.) [hereinafter *JCC 2021 Report*], https://jcc.govt.nz/pdf/annual-report-20-21.pdf. In line with the increase in the number of complaints received, there were twice as many (16, up from eight) referrals to Heads of Bench, but there was still only one recommendation for an appointment of a Judicial Conduct Panel. *Id.* at 2. Such referrals are rare. *Id.* at 6.

99. *Id.* at 6; *see also, e.g.*, JUD. CONDUCT COMM'R, *Report for the Year to 31 July 2016*, at 5–6 (2016) (N.Z.), https://jcc.govt.nz/pdf/annual-report-15-16.pdf (providing the nature of complaints and reasons for referrals to Heads of Bench, including those focused on communication and related behavioral issues).

100. *JCC 2021 Report*, *supra* note 98, at 6.

101. PROVINCIAL CT. B.C., *Annual Report 2019/20*, at 60–65 (2020) (Can.) [hereinafter *BC Annual Report*], https://www.provincialcourt.bc.ca/downloads/pdf/AnnualReport2019-2020.pdf (providing an appendix of complaint summaries against judges).

Twelve are relevant to this discussion, as they dealt in one way or another with judicial behavior or demeanor that falls into this broad category of communicative conduct. Notably, these summaries are all relatively succinct (at or under half a page each). Nonetheless, each summary mentions something about the existence and the relevance of any audio recording of the matter (even and sometimes especially where there was not one). These comments indicate whether and how such recordings had, or would have had, relevance to the investigation and determination of the misconduct alleged.

In seven of the 12 relevant complaints, no audio recording was available.[102] In five, audio was available and was reviewed.[103] In several instances, the summary noted that audio would not ordinarily have been recorded in the type of proceeding that had occurred (and thus the reviewing body looked to the judge for a response),[104] but in such a matter, where a recording did exist, it would not be ignored.[105] Thus, recording appears to be a relatively rare, or at least unexpected practice, particularly in comparison to its relatively high value as a tool on review.

In all cases, regardless of whether audio was available for review, the judge whose conduct was in question was also asked to respond to the matters in question. The judge was asked to comment on the characterization of the alleged misconduct (to explain or give context for actions or comments made, or alleged to have been made, during a proceeding).

Misconduct was found in only two of the 12 cases investigated.[106] Additionally, in one of the cases in which technically no violation or official misconduct was found,

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102. *Id.* It was made clear, however, that if such recordings had been available, they would have been reviewed.

103. *Id.* at 61–65.

104. *Id.* at 60–63.

105. *See id.* at 62.

106. A third case yielded a decision that a determination could not be reached either way on the facts available. PROVINCIAL CT. B.C., *supra* note 101, at 64 (Complaint #10).

the reviewing body nevertheless determined that it was best to provide advice to the respondent in order to avoid problems in the future.[107] Notably, this was a case in which there *was* a recording—a fact that played into the reviewing body's ability to make such a fine-grained determination and provide such advice to the judge.

In nine of the cases, no misconduct was ultimately found, and in more than half of those nine, no recording was available for review in making the determination.[108] Where recordings were *not* available, determinations were made based on the account of the judge, the statement of the complainant, and any other evidence available as to the relevant circumstances. However, in many instances, there was little such evidence because the allegations at issue were about the judge's demeanor, tone, or other types of disrespectful treatment indicative of bias.[109] These are matters of subjective interpretation both when perceived and when recounted. In the absence of a recording, the reviewing body appears to have been deferential not only to the judge's factual account of what transpired, but to the judge's assessment of what is appropriate or standard conduct in a court context.[110]

This discrete example from one provincial court's annual round-up of misconduct cases provides an illuminating view of the importance of recorded evidence of judicial conduct, not only as a matter of fact, but as a matter of the perception of those reviewing the issues. Such evidence offers an objective view where a judge's self-perception may be biased, or where the accounts of others may lack necessary perspective or understanding. Having recorded evidence does not mean the judge will be on or off the hook for misconduct; it simply enables a more thorough, consistent, and reliable review—one that can inspire greater confidence in the outcome.

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107. *Id.* (complaint summary #9).
108. *Id.* at 60–65.
109. *See, e.g.*, *id.* at 60 (Complaint #1), 63 (Complaint #8), 65 (Complaint #11).
110. *See id.* at 60–65.

3. England and Wales

In the courts of England and Wales, the Judicial Conduct Investigations Office produces an annual report on statistics, goals, achievements, areas for improvement, and so on.[111] Roughly 25% (325) of the *complaints* received for the Annual Report year 2019–20 fell into the general category of "inappropriate behavior and comments," a figure within the normal range not only for England and Wales, for judicial systems of any size. The annual report did not indicate how many of the 42 actual findings of *misconduct* for that reporting year fell into this category. Individual reported discipline cases are only posted publicly by the Investigations Office in a temporary format, so except for currently posted matters, it is challenging to research past incidents or indeed trends, unless one builds up a store of information over time by preserving it independently. However, more recent (and thus currently available) data for comparison, suggests that a substantial portion of the cases resulting in findings of misconduct in the 2019–20 year would relate to this category of inappropriate behavior and comments—at least equivalent to the 25% proportion of complaints made, if not a higher proportion.

Most of the discipline meted out in the year 2021 was in the form of formal warnings and formal advice. Discipline addressed both on and off the bench conduct. Full opinions and explanations were not provided—just a very brief summary statement. These summary statements were more minimal than those provided by the Provincial Court of British Columbia. They did not reach details such as the specific evidence available, so it is unclear whether audio or video recordings of conduct were relied upon or not. However, the behavior at issue did indicate how useful such evidence would be for purposes of making determinations and offering the warnings and advice that are the sanctions in these

111. JUDICIAL CONDUCT INVESTIGATIONS OFFICE, ANNUAL REPORT 2019–20 (UK).

cases. For example, in 2021, five statements issued by the Investigations Office indicated formal warnings or formal advice given to judges for the following behavior: (1) speaking with a raised voice and inappropriately to two members of staff;[112] (2) "showing anger and sarcasm during a court hearing";[113] (3) being rude to a legal adviser in a retiring-room conversation;[114] (4) "making a sexist comment to counsel";[115] and (5) berating officials and misusing judicial status to gain influence following cancellation of son's driving test.[116]

As even just these bare descriptions indicate, not all of the incidents giving rise to complaints occur when judicial officeholders are on the bench in a courtroom, or even necessarily in other parts of the workplace. Therefore, they also indicate that audio or video recordings of official proceedings would not be a perfect solution to capture everything that is at issue. However, recordings in official proceedings or engagements would reduce speculation or debate among differing recollections or perspectives that might exist. Not those that happen fully outside of the judge's official capacity, and perhaps not some that occur in a more personnel-oriented capacity,[117] but many of them. Practice rules in the courts of England and Wales are generally fairly restrictive about access to recordings of court

112. *Statement0521*, JUDICIAL CONDUCT INVESTIGATIONS OFFICE (Mar. 3, 2021), https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/Statement0521/ (on file with author).

113. *Statement1021*, JUDICIAL CONDUCT INVESTIGATIONS OFFICE (Apr. 27, 2021), https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/Statement1021/ (on file with author).

114. *Statement1421*, JUDICIAL CONDUCT INVESTIGATIONS OFFICE (Jun. 16, 2021), https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/Statement1421/ (on file with author).

115. *Statement-2621*, JUDICIAL CONDUCT INVESTIGATIONS OFFICE (Aug. 17, 2021), https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/Statement-2621/ (on file with author).

116. *Statement3422*, JUDICIAL CONDUCT INVESTIGATIONS OFFICE (Jan. 13, 2022), https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/Statement3422/ (on file with author).

117. *See* further discussion *infra* Section IV.A.1.

proceedings.[118] That said, the Investigations Office's standard practice is described in one publication as follows:

> For complaints that [the Office] is not plainly obliged to reject or dismiss straightaway, the steps taken may include *listening to the audio recording of a hearing,* obtaining comments from third parties such as court staff or legal professionals, and obtaining comments from the office-holder against whom the complaint has been made.[119]

This practice certainly makes sense. If recordings were made, they could be heard and incorporated into the decision-making process. Therefore, like the gaps to be filled in other systems, it would be even more helpful to extend regular practices of making such recordings in order to even better achieve the purposes discussed here and in the examples of other jurisdictions above.

IV. DISCUSSION AND ANALYSIS

Audio-visual recordings—increasingly conventional and manageable technology—present a many-faceted opportunity for illumination and clarification of matters of judicial conduct. Fixed cameras and microphones may typically be placed easily to capture the bench in a courtroom, as well as counsel tables and the gallery as a whole. Similarly, in a conference room, depending on the size of the room, a camera may be placed to capture all or most of a table, and guidance about optimal seating may be provided for those times when recording is critical. Indeed, some states have already made a move to video as the standard for capturing the official record for proceedings. Arizona courts, for example, have been

118. *See* The Remote Observation and Recording (Courts and Tribunals) Regulations 2022, Explanatory Memorandum ¶ 14.1 (UK), https://www.legislation.gov.uk/uksi/2022/705/pdfs/uksiem_20220705_en.pdf.

119. MINISTRY OF JUSTICE: COURTS AND TRIBUNALS JUDICIARY, JUDICIAL DISCIPLINE CONSULTATION ON PROPOSALS ABOUT THE JUDICIAL DISCIPLINARY SYSTEM IN ENGLAND AND WALES, 2021, at 65 (emphasis added), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1033392/judicial-discipline-consultation.pdf.

at the forefront of using video in courtrooms, not only being early adopters of video records,[120] but also progressing to the point of livestreaming their video feeds for many, if not most, daily court proceedings.[121]

For purposes of achieving the conduct- and discipline-related objectives that are the focus here, additional cameras might be stationed similarly easily even in chambers. But perhaps better, a judge might simply determine that all official judicial communications and interactions with attorneys and parties will be conducted exclusively in either courtrooms or conference rooms in order to keep chambers as a place solely for work by the judge and chambers employees, judicial peers, and so on. A negative inference might therefore follow if the judge were later to be the subject of a complaint about official on-the-record matters discussed in chambers with others but not recorded.

There is much to say in favor of more prevalent and accessible recording of what occurs before judges in their official capacities, but before turning to those points, there are genuine concerns and questions that must be given due consideration as well. Many of the reasons given in the past for prohibiting audio and video in courtrooms, such as distraction and disruption, or undermining the mystique of the court, simply will not hold up anymore, but other questions and challenges are deserving of serious engagement. The following discussion explores various arguments worthy of note on both sides of this debate.

120. *See generally* Briana E. Chua, Comment, *Arizona's Digital Record and Its Use on Appeal*, 35 ARIZ. ST. L.J. 605 (2003) (detailing Arizona's official use of video and other state courts' optional and pilot programs as well).

121. *See, e.g.*, *Calender*, THE JUDICIAL BRANCH OF ARIZONA MARICOPA COUNTY, https://www.superiorcourt.maricopa.gov/calendar/today/ (last visited Aug. 15, 2023).

A. Questions and Challenges to Consider

1. Line-drawing: When and Where

Perhaps among the most obvious challenges are some basic line-drawing questions, many of which are interconnected with other questions that arise. As noted earlier, judges engage with attorneys and the public in all manner of ways, not just on robes on the bench in courtrooms, so when and where would the cameras and microphones not be on them? Many judges engage in official proceedings with lawyers and even sometimes parties in their chambers and in their conference rooms, but they also use those rooms for many matters that should not be recorded or should not be made accessible for a variety of reasons (e.g., protection of minor children, protecting safety of victims of certain crimes, etc.). Even if judges determine to engage on official matters with attorneys and parties exclusively in their courtrooms or conference rooms (rather than in chambers, for example), they will still necessarily engage in their official capacities with staff, peer judges, and others in other parts of the courtroom/courthouse space and elsewhere.

Some of these interactions might well be captured on courthouse security cameras (particularly those in public spaces). However, many interactions, notably those involving peer judges and staff working on confidential court matters, will not and arguably should not be recorded. For example, I would not propose that judges be recorded in all of their official in-role, in-chambers, interactions with their judicial staff (law clerks, judicial attorneys, assistants, bailiffs, etc.), or indeed in their interactions with other judges. While there is unquestionably potential for judicial misconduct in all of these interactions, and some of the same concerns about imbalance of power between the judge and a potential complainant exist in many of these circumstances, the need to preserve a functioning work environment for the court without everything being done on camera—and the

need to do so without the risk of a breach—outweighs the interest in preserving a record for purposes of dealing with judicial misconduct. Should an incident occur, the potential complainants in these situations will be better equipped than most to bring the matter forward in a credible manner, and if the behavior is part of a pattern, may also be able to take the opportunity to make independent recordings, depending on their circumstances.

Furthermore, some judges are required to engage in official conduct in all manner of other places (signing off on search warrants, for example, after hours), and improper conduct or communication could occur in such a setting just as easily at such a moment wherever it occurred as in a courtroom. At the outset of the discussion of line-drawing, it is important to emphasize that the proposal here is not meant as an attempt to be exhaustive in capturing all judicial misconduct. Such an attempt would be doomed to failure. It is instead an effort to suggest some reasonable and rational improvement toward providing more information and evidence than is currently available regarding judicial misconduct. It is about making efforts towards filling the gaps, but not to attempt to hermetically seal them. Reasonable minds may differ as to where and how to draw the lines in attempting to fill those gaps, both in terms of priorities in precise objectives and in light of existing rules and infrastructure to work with in any given jurisdiction.

Judicial body cameras are certainly not the idea here. There is a countervailing need for confidentiality in much of what judges do, and at a certain point a diminishing return on the value of what would be obtained by capturing the additional content in other settings beyond what occurs in the courtroom and conference rooms (and potentially in chambers) when judges are conducting official business with attorneys.[122]

122. Again, as noted above, the personnel example is a large component of this. Peer-to-peer discussions with other judges is another substantial factor. Another difficult point arises with judges' use of the telephone (official or personal) to

Given that a substantial portion of the complaints about judicial misconduct involve judicial speech, demeanor, and other observable behavior undertaken from a relatively few relatively fixed official physical positions in the judge's work space, there is a fairly straightforward way to reasonably address the issue of gaps in objective evidence of what occurs in many official proceedings.

Despite the differences, there are some useful points to be learned from the experience thus far with police body-worn cameras (though again, body cams are far from the proposal for judges here). Policing and judging are obviously distinct from one another in many ways, but at their core both roles put public servants in powerful roles, where a transparent and objective record of official interactions and communications can be of great value in maintaining public trust. Use of body-worn cameras by police has increased in the past decade,[123] as has empirical research on the same.[124] Generally speaking, studies show that the use of these cameras and their recordings can exert positive effects on police behavior,[125] so this may be an indicator of the potential for the recordings proposed here for judges—even though cameras in the courts would be stationary and the nature of their capture would be somewhat more limited.

Studies of police body cams also showed (in experimental settings) that officers wearing cameras received fewer reported complaints than those not wearing cameras.[126] Officers may change their behavior due to knowledge of being recorded; citizens may file fewer unfounded complaints (perhaps due to knowledge of officers being recorded); and/or the existence of

communicate on official business with attorneys, but for a variety of reasons, I would not try to encompass all these recordings within the proposal for recordings.

123. Cynthia Lum et al., *Research on Body-Worn Cameras: What We Know, What We Need to Know*, 18 CRIMINOLOGY & PUB. POL'Y 93, 94 (2019).

124. *Id.* at 95–97.

125. *Id.* at 96.

126. *Id.* at 99.

recordings may result in potential complaints being resolved quietly to avoid exposure of footage.[127] In any event, this suggests some possibility for similar effects with more video involving judicial interactions.

Another positive effect on police officers, which might translate to the judiciary, was one of attitude. Officers began to feel positive (or at least neutral) about the use of cameras once they began to use them and share that experience with their colleagues, and once they saw the potential for recording to protect them against overreaching by someone who would complain about them.[128] This aligns with a general trend in the courts that shows judicial attitudes about audio-visual coverage of courts generally is becoming more favorable over time.[129] This is an incremental change, but a positive one nonetheless.

So, judges may come to feel positive about being regularly recorded in their official interactions, and it may well be feasible to draw some clear boundaries as to where cameras will be used to capture what can be defined as "official" interactions in certain designated spaces at certain times. Cameras will inevitably fail to capture all relevant exchanges and will just as inevitably capture some exchanges that require confidentiality. Fixes will be feasible for these challenges as for so many others that surround the delicate and many-faceted roles that judges play.[130]

Any given jurisdiction must make its own choices properly tailored to the work of the judges on that bench, the existing law of the jurisdiction, and the infrastructure and local rules of the relevant courts.

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127. *Id.* at 100.

128. *Id.* at 103.

129. *See* Daniel Stepniak, *Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions*, 12 WM. & MARY BILL RTS. J. 791, 822–23 (2004).

130. Functionally, this might be a matter of a request or motion (made by a party, or by the judge *sua sponte*) to transition from video to written record, or to eliminate a record entirely, for a given matter; or after the fact a matter of a request or motion to seal or destroy recorded evidence immediately rather than awaiting a records retention period to lapse.

Rational bounds that may be set as to the when and the where. Generally speaking, "when" should be bounded by when the judge is engaging officially on a matter with an attorney or party. "Where," by default, at least should be in the judge's court or in any other space in which the judge chooses to undertake such official in-role interactions. If such an interaction begins elsewhere, the judge should prompt a move to "official" territory, or else, if the interaction is, for example, improperly ex parte, such that it should not be happening anyway, the fact that it is happening where it is not being recorded to should be a reminder to the judge that something is not right. If the judge is not mindful of that, at least an aggrieved party should be able to rely on the fact of the location to indicate the impropriety.

Other choices could be made about the exact parameters of the when and the where, so long as they align with the purposes to be achieved. However, there remain other line-drawing questions that must be addressed.

2. Line-Drawing: Purpose and Scope of Use

Closely connected with the questions of when and where are two other line-drawing questions: those of purpose and scope of usage. Unless the purposes of recordings of judges are well-defined by a given jurisdiction implementing them, it will be easy for questions and potential problems to multiply quickly. The core purpose articulated here is to capture judicial behavior and interactions (particularly communicative conduct) in order to illuminate and clarify, and thus enhance and improve, the judicial discipline process and the decisions made in that process. Recordings could of course be used for many other purposes well beyond this scope, such as preserving the record for appellate proceedings and enhancing the record evidence for attorney discipline. The infrastructure improvements required for ensuring the capacity to make the recordings might well justify a multiplicity of purposes. However, the focus of this discussion is on the

implications for purposes of filling gaps in the discipline process, rather than on the fuller array of other potential purposes.

If courts are concerned about the security of the recordings in general (not just particularly sensitive matters, but all recordings across the board), one possibility would be to make video reviewable only onsite, rather than posting or distributing it. There would likely be more expense involved in this, in terms of personnel, equipment, and space, but it would dramatically reduce security concerns while maintaining broad accessibility (assuming that the space for review is itself accessible). Furthermore, in addressing issues of maintenance and storage, etc., if the primary purpose is to preserve recordings for purposes of reviewing judicial conduct, there is a limit to the length of time for which recordings would need to be preserved.[131] If the reviewing party chose to pursue a matter using the recording as evidence of a concern about judicial misconduct, the recording would be preserved for review by the relevant reviewing bodies, as well as the respondent and any other relevant parties who might need access to view it. Again, should a jurisdiction choose to expand the scope of use beyond this, certainly the recordings could be useful for broader purposes, but this proposal addresses only this narrow scope.

One of the concerns that could be minimized by a more curtailed purpose and more restrictions on access and usage would be that of invasion of privacy and attendant concerns about psychological impact of extensive media coverage that might arise from potentially broader use—and more particularly, from potential broadcast or other release—of such recordings.[132] If court proceedings are all officially

131. If others of the above-listed potential purposes are in play, then this time might be extended, or might be indefinite. However, to limit storage, security, and maintenance concerns, it would be sensible, as a general matter, to time-limit access to video unless there is a countervailing purpose to be served by making all recordings available indefinitely.

132. There is, for example, undoubtedly public interest in access to court records as public records, but the question is one of the scope of that access.

recorded and maintained only by the court strictly for official purposes, if those recordings are kept secure, and if records retention and destruction policies are properly followed, then there is also better potential for workable limitations.[133] This would require vigilant security efforts, but is at least conceivable. All this said, it is also noteworthy that one of the general findings from the studies of police body cameras, where the same worries were raised about invasion of privacy for those being recorded, has been that society has simply adapted to the fact of being recorded. [134] People have generally become much more accustomed not only to being recorded, but to those recordings being posted and shared, so that this privacy concern appears to have diminished over time.

Wherever the lines are drawn, it is important, once the lines are drawn, to keep focus on the designated purpose. One of the major purposes intended for police body cameras was related to enhancing the accountability of the officers being recorded—like what is envisioned here. However, results are revealing, in that few cases are brought against the police based on these recordings. The recordings from police body cameras are used by prosecutors primarily against citizens.[135] Given the purpose of improving judicial

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Should recordings be made remotely accessible? Should it be possible for the public to in turn disseminate or freely broadcast the recordings themselves? This comes with the attendant dangers of distortions of the videos, of development of deepfakes, or even simply the problem of viral videos of judicial misconduct unbalanced by the run-of-the-mill good conduct that is too dull to find the "sticky eyeballs" that are lucrative on the internet. Thus, it is—again—a matter for any given jurisdiction or court to set its purposes and priorities in determining the parameters for access in order to properly balance these concerns. Providing in-person on-site access to view the recordings so that reporting is possible, but not allowing access that would make possible any alteration or direct broadcast of the video itself, seems to me a wise middle path. Raising the issue to the attention of those whose function it is to protect the public by disciplining the judge, making the public aware of the issue, is sufficient without sensationalizing it and certainly without potential for distortion.

133. Furthermore, confidence in a workable system of official recordings may limit the extent of independent recordings that might go "viral" and result in potential invasions of privacy as well.

134. *See* Lum et al., *supra* note 124, at 107–08.

135. *Id.* at 108.

discipline, it is important to establish guidelines that will prevent the same from occurring in the judicial context. For purposes of this project, at any rate, to maintain public confidence in the judiciary, the focus should ideally remain on *judicial* conduct, rather than on the conduct of those before the court. Setting boundaries about what is recorded and how it will be accessed and used should take that into account.[136]

3. Effectiveness in Changing Behavior

What about the potential that judges will change their behavior when they know they are being recorded? Will this work as a preventive measure to eliminate some problematic behavior at the source?[137] For some, being on camera may be an incentive to "perform" in some way, but this may not always be positive. Experience in courtrooms already equipped with video cameras demonstrates the reality that all across the country there are judges who are knowingly captured on courtroom cameras (and/or webcams for online hearings) everyday, and who still engage in blatant misconduct in front of those cameras.[138] So, there is no guarantee that this

136. Here again, the studies in the police body-worn camera context provide examples that reveal other purposes that could emerge and pull focus or derail efforts in the judicial context. For example, one might be concerned that the presence of cameras would affect substantive judicial decisionmaking (or indeed that this might be the very purpose of the use of these cameras). However, the studies in the police context showed no discernible effect on the officers' substantive decisionmaking regarding their work—e.g., tickets issued, arrests made, etc. *See id.* at 101. Hopefully, the same would remain true in the judicial context. No improper political or other influence would be felt, other than the need to follow the law, rules, and so on.

137. This has not only been a driver for the police body-camera movement (to incentivize positive changes in officer behavior), but some studies show it has been one of the positive outcomes so far. *See id.* at 100.

138. *See, e.g.*, Amber Ainsworth, *Michigan Judge Violated Conduct Code for Berating Cancer Patient Over Weeds, Judicial Tenure Commission Says*, FOX 2 DETROIT (Aug. 1, 2022), https://www.fox2detroit.com/news/michigan-judge-violated-conduct-code-for-berating-cancer-patient-over-weeds-judicial-tenure-commission-says (covering Michigan judge berating cancer patient for unkempt yard, threatening jail); *see also Cleveland Judge Pinkey Carr Acted Like "Game Show Host Rather Than a Judge," Should Get 2-Year Suspension, State Board Recommends*, CLEVELAND: COURTS AND JUSTICE (Dec. 13, 2020, 12:55 AM),

enhancement will work to modify the behavior of all judges for the better. It may do so for some. What it will certainly do is capture a judge's conduct, good or bad, so that it can be observed and then dealt with. That is the primary purpose.

4. Moving Bad Behavior

If a judge is aware that what they are doing is improper and they are intent on it, then they may well wield their authority to remove themselves and any relevant parties to another location out of the sphere of the recording device. That is, interjecting a practice of recording may simply prompt a judge to relocate their bad behavior out of view of reach of the recording devices in key moments. In such instances, a complaining party would have to fall back on the same resources and strategies that exist now (relying on witness testimony, creating their own recordings, etc.), with the distinction that could be some recorded evidence of the effort to relocate the proceedings, which would be useful in itself.

5. Maintenance, Security, Expense, Etc.

Other concerns might be raised as well regarding the management, maintenance, and security involved in making and keeping up with so many recordings. Some of these concerns, as to volume, for example, may be addressed by the records retention/destruction policy to be adopted, as noted above. There are certainly expenses associated not only with the initial set-up of the necessary equipment, but also the management and maintenance of the equipment and the data. The

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https://www.cleveland.com/court-justice/2021/12/cleveland-judge-pinkey-carr-acted-like-game-show-host-rather-than-a-judge-should-get-2-year-suspension-state-board-recommends.html (covering municipal judge engaging in unprecedented amount of misconduct on video conference proceedings); *Court Removes Brevard County Judge Murphy*, THE FLORIDA BAR: FLORIDA BAR NEWS (Jan. 15, 2016), https://www.floridabar.org/the-florida-bar-news/court-removes-brevard-county-judge-murphy/ (describing judge removed for threatening violence against public defender in court and engaging in physical altercation).

pandemic already prompted enhancement of both video and audio resources across many courthouses in the country as adaptation to remote proceedings became a necessity. These were not in every case the same video and audio equipment that would be used for the kind of recordings envisioned here, but the infrastructure is certainly further along than it was prior to the pandemic. There is considerable variation in the technological resources, personnel, expertise, and so on, not only from state to state, but from county to county and even from courtroom to courtroom within a building. Additional equipment would likely be required for many courts. Additional personnel might also be necessary, depending on staffing and skill sets in any given court.

Courts have traditionally been problematically underfunded in many areas and this will admittedly only add to that burden. However, that alone is not a reason to refrain from suggesting an improvement. It is a matter of determining priorities. Is it sufficiently important to get these matters right? Is it sufficiently important to send that message to the public? It is certainly important to take steps to try.

B. Advantages of Recording to Fill the Gaps

Having explored some of the questions and challenges of recording judges, we turn now to the advantages of overcoming these. Why is it worth it? What is to be gained?

1. Confidence to Pursue/Defend

Creating and preserving an objective audio-visual recording of what occurred in a given situation involving a judge acting in an official capacity has many potential benefits. Recordings assist those who need the evidence of misconduct in order to bring forward a viable complaint, and by the same token they also help those judges who need clear evidence of their conduct to defend against complaints.

As discussed in Section III, many individuals would not have the confidence to pursue their cases without the strength of evidence from recordings because their positions would be too precarious. Their word against the judge's might not feel strong enough. The risks to their cases or to their careers might be too great. They might not be able to find witnesses willing to speak up against a judge. Perhaps they did not have the opportunity to create an independent recording. Perhaps they were in a jurisdiction that prohibited such a recording, or they had no warning such a recording would be needed. Perhaps they do not even have a written record to rely on.

Recordings are unlikely to prompt an increase in complaints that lack merit, as the evidence they offer is only likely to clarify for all involved what actually occurred. A frivolous complaint will be even more obviously a waste of time. But they are likely to prompt more meritorious complaints. Because a recording provides a clear basis to proceed, it will offer an aggrieved individual the confidence needed to move forward where misconduct might otherwise go unchecked and therefore might be repeated. By the same token, it will offer an aggrieved respondent something to rely on to show that nothing was amiss. An uptick in complaints need not be viewed as problematic. On the contrary, it may be viewed as potentially useful on several levels. As discussed in more detail below, it will mean reassurance for those who previously felt they had no recourse. It will mean more conduct will come to light and thus be clarified for the benefit of judges themselves. And it will reassure the public that the system is functioning properly.

2. Confidence to Handle Misconduct in the Moment

While certainly one of the advantages of recordings in a post-truth era is that they can help to provide confidence to proceed with a complaint, or to pursue a matter with a disciplinary authority when it might otherwise seem too risky, recordings can also provide necessary assistance well before that point. It is hard

enough for an individual experiencing judicial misconduct during the moments when the misconduct is actually occurring. But if they had the assurance that the conduct was being recorded, it would have the potential to stiffen their resolve in how they respond. For example, the attorney in the *Wells* matter, even knowing she had started her own recording, could not be sure of what her phone would pick up from inside her purse, and knew that it was not an official recording, so there was little reassurance in it. She wrote about her attempt to think through her alternatives later—about how she did not walk out or pull someone else in against the judge's orders both because she respected the judicial role and because he had threatened contempt.[139] She went on:

> I'd like to think [if this happened again] I'd remind myself that women do not need to be polite to someone who is making them uncomfortable. My advice is to have a plan for what you'd do should you find yourself in this similar situation. I'd like to think I'd refuse to go into chambers alone with a judge mid-trial or hearing. I think I'd insist that opposing counsel be brought in with me. And maybe the court reporter too, with a request that a record be made of the in chambers conference. Maybe request the Family Law Administrative Judge be present and have that court's number or the Regional Administrative Judge's number on the ready in case you need it. I'm shaking my head as I type that . . . I've been into chambers with judges countless times over my 30 year career. Never once with a fear, or thought I'd need to be prepared for anything like what happened on April 17, 2019. . . . I cannot believe I'm having to recommend that female lawyers in the year 2021 have a plan since

139. Teresa Waldrop, *Why Didn't You Just Get Up and Walk Out?*, TERESA WALDROP FOR JUDGE: BLOG–MY QUEST FOR THE 312TH, https://www.teresawaldropforjudge.com/quest-blog/project-three-zfg6x-k4f9p-783sy-mewps-8d3xr-htmgl-hk4cy-jtn2y-hhybx-r4lsk-8tycp-f3smz-tmx5f-m22tl-mby68-56cr3-9eb9h-3r889-gdwyy-3nb8t-g4taw-en89d-kx5sm-4ljhd-ygp8p (last visited Jul. 21, 2022) (on file with author).

> this conduct is being permitted by others, including other jurists, to continue.[140]

But if all interactions with the judge, whether in the courtroom or in conference rooms or even in chambers were recorded by default, an attorney in her shoes would not have had to worry quite so much. She would at least have known that her record was being made, and that it was official. In a way, that is the functional equivalent of pulling someone in with you—the opposing counsel or administrative judge that she imagined requesting. The recording can be played back as necessary to indicate all that transpired, more reliably in fact than a witness could recount. And if there were some legitimate reason for an ex parte meeting, a recording device has the further advantage of preserving confidentiality in such a meeting while still producing a record that can be sealed as necessary (i.e., one fewer person will be present, but the information can still be preserved in case of later dispute).

3. Minimize Reliance on Witnesses in Precarious Positions

As noted above, audio-visual recordings present an opportunity to clarify facts and reveal a fuller courtroom context, and they do so with less reliance on witness testimony. They minimize speculation and bias, and inject enhanced objectivity and credibility, as there is less reliance in the investigative phase on witness testimony of judges themselves (who may have bias in their self-perception) as well as those witnesses who may be beholden, for any number of reasons, to those judges. This presents a practical advantage not only for the decisionmakers and for those who want them to make reliable decisions, but also for those who would be placed in awkward positions by being witnesses.

All of this assists decisionmakers in determining whether any misconduct occurred, as they will not have

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140. *See id.*

to rely solely on the accounts of those whose perspectives and incentives may be skewed for any number of reasons. And, in turn, this enhances reliability and credibility for the benefit of other stakeholders looking on.

4. Greater Clarity

Having recordings that are available for review not only provides greater clarity as to the facts of what happened in a given situation (already much discussed), but it also provides greater clarity on where there are genuine disconnects in perceptions of behavior, or in application or interpretation of rules, and so on. As more matters are brought forward and can be reviewed objectively in audio-visual form, there will be more examples, potentially more patterns, and most importantly, less guesswork. Some of these will inevitably reveal grey areas and new opportunities to clarify rules.

5. Potential Training Tool

Along similar lines, having recordings that are available for review can be useful as an opportunity for greater judicial self-awareness and even as a potential training tool for judges, both specifically and generally. That is, judges may benefit simply from seeing themselves on a recording. The behavior itself need not be particularly noteworthy—simply being aware of how one appears in the course of an ordinary proceeding—seeing one's own body language, hearing one's own tone of voice and choice of language, at a distance from when one engaged in that conduct, can be instructive. But when there is an ethical violation, that certainly has the potential to be even more instructive when viewed by the judge, and, in an appropriate context when viewed by others, to learn from it where things went wrong.[141]

141. Perhaps the judiciary can learn from the police context here, as this is one area in which outcomes appear to have been mixed at best. This appears to have been one of the goals for the use of police body cams as well, but implementation

6. Enhanced Public Confidence

Meaningful public confidence is essential for access to justice and buy-in to the courts. Public confidence will be enhanced by the knowledge that disciplinary processes are founded on solid evidence rather than speculation or potentially skewed testimony, from the bringing of a complaint to the determination by a governing body. Any given jurisdiction might tailor its decisions about publication of information about recordings, or even the recordings themselves, to more fully inform the public as they make decisions about selection or retention of judges for particular offices or wrap that information into any evaluation processes that might exist in their jurisdictions. The variations across jurisdictions are, of course, extensive. However, there are common goals at the core—a competent and ethical judiciary presiding over functional legal system. It is easier to trust in that when there is an official record of how those in authority are presiding, and it is clear that there is an opportunity to hold them to account for it.

V. CONCLUSION

Some aspects of the proposal here may require further definition in the implementation, as it is not a one-size-fits-all proposal across jurisdictions and courts. The gist is consistent, however. Judges should not, in their official capacities in matters before them, interact with parties or attorneys without those interactions being captured (ideally by audio-visual recording) and securely preserved for a set period for potential review in case of any judicial misconduct. To the extent that this may not be practically feasible in a given court, independent recordings of judges who are engaging in misconduct may need to fill any relevant gaps and thus should be permitted where official recordings are not

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of teaching and training goals appears to be slower going thus far in some places. *See* Lum et al., *supra* note 124, at 109.

being made. Competent and ethical judges will ultimately be as much protected by this practice as those coming before the courts and the general public. Over time it will serve to strengthen the system as a whole, and enhance confidence in it, including confidence in those judges who do their work with integrity.