

Legal Experts Flag Ga. High Court's Judicial Ethics Stance

Law360 (April 11, 2023, 3:59 PM EDT) — The Georgia Supreme Court could be out of step with widely accepted judicial ethics standards by limiting the conduct for which judges can be disciplined as part of a two-year case against a suspended Georgia Court of Appeals judge, some legal experts say.

The state's highest court **dealt a blow** to Georgia's Judicial Qualifications Commission in a scathing March 15 **opinion** about the commission's **recommendation** that Georgia Court of Appeals Judge Christian A. Coomer be removed from office for a range of alleged conduct. Both the commission and Judge Coomer, who is accused of taking advantage of an elderly client while a practicing attorney and of misusing campaign funds, have until Wednesday to respond.

In addition to rejecting the commission's theory that it could pursue formal charges against Judge Coomer for his conduct before he became a judicial candidate or judge, the court also held that the commission has limited power over Judge Coomer's actions while he's on the bench. The court found that judges can't be disciplined for conduct outside their judicial capacity unless it can be shown that they acted in bad faith.

"My reaction to it, totally untutored, is that the court was wrong about conduct that occurred while [Judge Coomer] was a judge though not in his judicial capacity," Claire Finkelstein, professor at the University of Pennsylvania Carey Law School, said of the opinion. "And potentially right about conduct that occurred before he was a judge."

Finkelstein, the founder and faculty director of the University of Pennsylvania-affiliated Center for Ethics and the Rule of Law, said the court's bad faith requirement is somewhat unclear. She said judges should be held to account for their behavior while in office, regardless of whether they act in their judicial capacity.

"It's a completely artificial line to say it's not in [the judge's] judicial capacity," Finkelstein told Law360. "That I don't accept at all. The professional ethics rules make clear that what lawyers and judges do in their private lives is still part of how we assess their fitness for office."

Under the American Bar Association's Model Rules of Professional Conduct, misconduct involves dishonesty, fraud, deceit or misrepresentation, Finkelstein noted. She said there is nothing in the rule limiting misconduct to acts undertaken in a judicial capacity.

"Judges are held to all the same rules that ordinary lawyers are, and there are plenty of rules that go beyond their official capacity." Finkelstein said.

But Richard W. Painter, a University of Minnesota Law School professor and former chief White House ethics lawyer, said the court's bad faith requirement for conduct outside a judge's official capacity isn't especially

limiting. He said it's "a fairly broad carve-out" that covers any dishonesty, deceit or concealment as well as willful negligence of duty.

"It works if you properly look at what bad faith means," Painter told Law360. "What it wouldn't get into is negligence on the part of a judge outside their judicial duties. Merely being negligent isn't enough."

Justices Reject Watchdog's Legal Interpretation

The ruling, which effectively stripped many of the **36 charges** against Judge Coomer, reflected a "close reading" of the Georgia Code of Judicial Conduct, said Jonathan R. Nash, professor at the Emory University School of Law. He said the court's textualist approach is no surprise.

Nash said the court appeared to admonish the commission for thinking it had the power to investigate and prosecute judges for conduct that occurred before they took the bench.

The court pointed out that it had rejected a request from the commission in 2018 to extend the code to apply to pre-judicial conduct, saying the commission's response was to "proceed as if it had never happened, which ultimately resulted in bringing charges against Judge Coomer based on actions he took before he became a judicial candidate."

"This ruling is sort of a slap on the wrist," Nash told Law360. The commission "could have taken the position, 'We didn't need the amendment; the existing language already gave us that authority.' And this is the court saying: 'No, you're wrong about that. You need that amendment. We told you no, or we didn't adopt that amendment, and so you're out of luck.'"

Chuck Boring, the commission's former director, who led the Judge Coomer case until joining Robbins Alloy Belinfante Littlefield LLC in January, said he respectfully disagrees with the justices' decision. The commission **contends** that its rules give it "jurisdiction over judges regarding allegations that misconduct occurred before or during service as a judge," which complements the relevant Georgia Constitution provision for "conduct prejudicial to the administration of justice which brings the judicial office into disrepute."

"Regardless of the position taken on the issue, the Supreme Court adopted this jurisdictional rule regarding pre-bench conduct in 2018 without comment or question, and the JQC's actions have been consistent with the plain reading of that rule, and its application in other states, since that time," Boring said.

The court said the commission can't rely on its rules that give it jurisdiction over judges regarding allegations of misconduct "before or during service as a judge." Those rules don't trump the judicial conduct code, the court held.

Boring, who is still assisting the commission on the Judge Coomer case, said in reference to the agency generally that the lack of relevant Georgia case law on judicial ethics has prompted "testing of the boundaries from all different sides" of the applicable rules.

"Every day in that [commission director] job was like my first day on the job as a new attorney or in law school because there were no answers," Boring said. "Because of the newness of the agency, it's taken a lot of tweaking."

Though the commission was established in 1972, it was overhauled by the state Legislature at the end of 2016, when new rules were set. Boring, a former prosecutor, became director three years later.

"Everybody involved is working toward making it work, but it's a lot of trial and error," Boring said. "A lot of times we may stub our toe when we're trying to do the right thing and find out not all the parties agree."

Hurdles Limit Oversight of Pre-Judicial Conduct

Finkelstein says it makes sense for the court to rule that a judge's pre-judicial conduct can't be used against them by the commission. The court clarified it was not making the determination about situations in which a judge is indicted or convicted for pre-judicial conduct.

"Where the conduct takes place prior to their time in office, I don't think you can reach back there," Finkelstein said. "Imagine deciding to impeach a president based on something that he did prior to becoming president. That would make no sense."

Finkelstein said judicial elections could be invalidated if an ethics board were able to remove an elected judge from the bench for pre-judicial conduct.

"That seems to cancel the voters' will," she said. "Candidates do sometimes manage to cover things up, and we don't go back and redo elections, and we don't want our nonelected officials having the power to go back and redo elections."

Painter said judicial ethics agencies in most states focus on a judge's conduct while the judge on the bench, and not before. He said pre-judicial conduct could be considered when a judge lied about or concealed past behavior in order to assume office.

Nash said the court alluded to due process problems associated with pursuing cases against judges for their pre-bench behavior. He said that could be a hurdle even if the Georgia Code of Judicial Conduct is amended to apply to pre-judicial conduct.

The court didn't decide the due process issue, finding it didn't have to. But the justices mentioned the possibility that due process protections under the U.S. Constitution and the Georgia Constitution could apply, Nash said.

"There seems to be some obstacles, I'll just put it that way, to considering pre-judicial conduct," he said.

Nash said the ruling doesn't fully protect Judge Coomer from the commission's case. The court rejected the suspended judge's argument that the commission's oversight of judicial candidates only applies to 'campaigning and politics relating to judicial positions.'

The court also rejected Judge Coomer's theory that he couldn't be investigated by the commission for conduct that occurred while he was a judicial candidate and a member of the state House. The court similarly dismissed as without merit the judge's argument that the commission lacked authority to discipline him while another government agency had concurrent authority to consider alleged misconduct.

"We would not go as far as Judge Coomer urges in drawing the limits of the JQC's reach," the court said.

"It sounds like there could be some basis here to move forward," Nash said of the case.

Many of the charges against Judge Coomer relate to his work as an attorney, before he sought to be a judge and was appointed to the Georgia Court of Appeals in 2018. Judge Coomer **acknowledged** during a commission trial that it was wrong for him to make himself and family members beneficiaries of a series of wills he drafted for an elderly client, James Filhart.

Some of the charges against Judge Coomer relate to his dealings with Filhart after his appointment to the bench, including a legal malpractice suit Filhart brought against the judge in early 2020, which was settled within a couple of months for \$50,000.

Judge Coomer was also accused of misusing campaign funds for family trips to Israel and Hawaii, and of moving money between his campaign and law firm accounts without disclosing the transactions, while a state lawmaker and a judge. He has maintained that he did what Filhart asked him to and that his alleged campaign finance violations boil down to some sloppiness on his part.

Judge Coomer was investigated by the State Bar of Georgia as well as Georgia's Adult Protective Services and the Georgia Government Transparency and Campaign Finance Commission. Judge Coomer **ended** the campaign finance commission's case by paying a \$25,000 fine in December 2021.

The state bar's investigation into Judge Coomer is pending. Judge Coomer, whose elected term expires at the end of 2026, has been suspended with pay since January 2021.

The court remanded the judicial commission's case for reconsideration of its recommendation that Judge Coomer be removed from office "in the light of the law as it actually exists." Judge Coomer and the commission's investigative panel were then **ordered** to identify which charges survive the court's pre-judicial conduct holding, and what evidence there is of bad faith for those remaining charges.

The case is Inquiry Concerning Judge Christian Coomer, case number S21Z0595, in the Supreme Court of Georgia