Ethics Watch

The Segars-Andrews *Case—Looking to the Future*

By Nathan M. Crystal

During the last several months lawyers, judges, legislators, and members of the public have been engulfed in discussion over the *Segars-Andrews* case. On December 18, the Judicial Merit Selection Commission issued its report in which it found by a vote of 7-3 that Judge Segars-Andrews was unqualified for reelection to the Family Court of the Ninth Judicial Circuit, seat 1.

The Commission's decision to find her unqualified was based solely on her conduct in dealing with a disqualification motion in a divorce case. Judge Segars-Andrews had conducted the hearing and had issued her Instructions for Order in the case to be prepared by the wife's counsel when she mentioned the case to her husband, who reminded her that his partner had been cocounsel with one of the wife's lawyers in a personal injury case that had been concluded about a year earlier. The case resulted in a large fee to her husband's firm; his share was about $300,000. Judge Segars-Andrews disclosed these facts to the parties and initially indicated on the record that she felt that she had to disqualify herself. She said that her failure to disclose the situation earlier (even though she had forgotten about it) deprived the husband of an opportunity to ask for her recusal. However, she gave the wife's lawyers an opportunity to submit a brief and other material on the issue. The wife's counsel did so, accompanied by an expert affidavit. In the interest of full disclosure, I prepared the expert affidavit expressing the opinion that Judge Segars-Andrews was not disqualified from deciding the case. I reaffirmed and expanded this affidavit at the judge's hearing before the Judicial Merit Selection Commission. Based on this material Judge Segars-Andrews concluded that she was not disqualified and in fact had a duty to sit in the case. The Court of Appeals subsequently affirmed all her decisions in the case, both on disqualification and substantive matters. The husband then filed a grievance with the Commission on Judicial Conduct, which found no merit to the allegations.

However, the Merit Selection Commission found Judge Segars-Andrews unqualified because she created an appearance of impropriety: "[I]in abruptly reversing her decision about recusal, based upon a submission from opposing counsel who had a financial and continuing relationship with her husband's law firm, she raised suspicions about her impartiality that were compounded by connections between opposing counsel and her husband's law firm and by her service on the board of the Office of Judicial Conduct." Three members of the Commission dissented. They concluded that she acted in good faith, and there was "no showing of a pattern of misconduct or that Judge Segars-Andrews is otherwise unfit to serve as a judge."

Judge Segars-Andrews filed suit against the Commission, claiming that the Commission was unconstitutionally organized because it contained six members of the legislature. She argued that membership on the Commission by six legislators violated the state constitutional prohibition against dual office holding, that majority voting control of the Commission by members of the legislature was inconsistent with the constitutional provision creating the Commission because it did not ensure independence from the legislature, and that the Commission's decision violated the principle of separation of powers because the Commission was in essence reversing decisions made by the judiciary. The Supreme Court decided on January 23 to hear the case in its original jurisdiction. On March 23 the Court rejected her arguments and dismissed the complaint against the Commission.

While Judge Segars-Andrews' case is now over, it raises some important issues and indicates some structural defects in our judicial selection process on which I wish to comment. In particular, I write on four points raised by the case. Two deal with the procedures for judicial disqualification, while two deal with the process used by the Judicial Merit Selection Commission.

1. Changing the standard for appellate review of judicial disqualification decisions. In order to reverse a decision based on a judge's refusal to disqualify himself or herself, the appellant must show "prejudice." This was the standard used by the Court of Appeals in affirming Judge Segars Andrews' decision not to disqualify herself. However, prejudice is almost impossible to prove. Such a high standard leaves litigants who claim that a judge should be disqualified with the feeling that their allegations have not been heard and that they have not received their day in court. I suggest that the Supreme Court reconsider the prejudice standard for review of disqualification decisions. Instead, the appellate court should consider the merits of the motion for disqualification. If the court finds that the judge should have disqualified himself or herself, then prejudice should be presumed and the case should be reversed for a new trial before a different judge, unless the other party is able to show that the judge's participation was not prejudicial. This approach is based on the principle that an impartial judge is a fundamental

element of a fair trial. Cf. *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006) (trial court's error in depriving defendant of counsel of his choice amounts to structural defect warranting automatic reversal). Such an approach would give litigants a meaningful opportunity for judicial review of decisions not to disqualify, without unduly burdening the appellate courts because disqualification issues do not arise that frequently.

2. Giving counsel discretion to inform the court of circumstances known to counsel that might reasonably lead to the judge's disqualification. Counsel for the husband complained that while Judge Segars-Andrews may have honestly forgotten about the relationship between her husband's firm and the wife's cocounsel, the cocounsel for the wife almost certainly knew about the relationship and should have disclosed it to the court. This charge is not well founded because even if cocounsel knew about the relationship, his duty of confidentiality to his client would preclude disclosure of the matter to the court. See SCRPC 1.6. Rule 3.3, the duty of candor to the court, is an exception to the duty of confidentiality to the client, but disclosure of information that would be the basis of a judge's disqualification is not covered by Rule 3.3. I suggest that the Professional Responsibility Committee consider proposing an amendment to Rule 3.3 that would give lawyers professional discretion to reveal to the court information that the lawyer reasonably believes raises a substantial question of whether the judge is disqualified. Such a rule should not be burdensome on the bar. Judges already have an obligation to keep reasonably informed of their personal and financial relationships and those of their spouses that could lead to disqualification (Code of Judicial Conduct, Canon 3(E)(2)), so the rule would apply only when a judge either forgot about the matter or concluded privately that it was not disqualifying. Disclosure by counsel could prevent judges from being placed in the awkward situation that Judge Segars-Andrews faced of being on the verge of issuing a final order only to learn of possibly disqualifying circumstances.

3. Changing the Commission's procedure for handling complaints against judges to increase the likelihood that the Commission's decision will be based on the judge's entire record. Under current Commission rules if an individual wishes to testify at the judge's public hearing, the individual must complete a sworn affidavit. Commission Rule 13. If the individual submits a timely affidavit, the practice of the Commission is to allow the person to testify against the judge, Commission Rule 15(c), unless the individual has made repeated complaints against the same judge. The judge receives the individual's affidavit and has the right to respond both in writing and at the hearing. At the conclusion of the hearing the Commission decides what recommendation to make regarding the judge. Rule 15(d).

In my opinion this procedure has two flaws. First, it gives undue weight to individual complaints. The fact that the judge may have handled thousands of cases with competence and ethical propriety is hardly mentioned or considered. The Commission has created citizens committees throughout the state to evaluate judges and provide recommendations to the Commission. The Low Country Citizens Committee gave Judge Segars-Andrews a recommendation of "well qualified" on all criteria used by the Commission, but this recommendation was apparently given little or no weight by the Commission. Second, the Commission's current procedure has the members of the Commission making a decision immediately after the hearing. If a judge is at risk of losing his or her job, a more deliberate approach seems appropriate. I suggest that after a public hearing, if the Commission tentatively votes to find a judge unqualified, the Commission should not release its decision or the individual votes of its members. Instead, the Commission should inform the judge that the Commission recommendation is deferred until a final hearing. At the final hearing the judge should be allowed not only to present evidence to refute the particular complaint against the judge, but should also be allowed to present evidence bearing on any of the categories on which the Commission evaluates the judge. Representatives of the relevant citizens committee, bar associations, and other organizations should also be allowed to present evidence. This procedure will increase the likelihood that the Commission's decision on the judge is based on the judge's entire record, not an isolated instance.

4. Developing a standard for deciding when a judge is unqualified based on conduct in a single case. The *Segars-Andrews* case presents a stark question: When should a judge be found unqualified based on the judge's actions in a single case? It is clear that a judge's conduct in a single case can and should sometimes be the basis of finding the judge unqualified. Examples are obvious: a judge who accepts a bribe or one who makes sexual advances to a party. Putting aside these extreme cases, it should not be sufficient to find a judge unqualified that the judge has, according to a party or the Commission, made a mistake and a litigant is left with the feeling that justice was not done. We want judges to make as few mistakes as possible, but a decision that at the time seems correct may in hindsight be viewed as a mistake. The subjective feelings of the litigants are relevant to an evaluation of a judge but cannot be determinative because their attitudes are not objective. I offer the following two suggestions: A judge should be found unqualified if the judge has engaged in a series of actions or evidences a pattern of behavior that casts substantial doubt on the judge's competency, honesty, temperament, or judgment. If the judge is being evaluated

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be devoted to trial issues. Not only are trial-related CLEs easily available at the Bar Convention via the Trial and Appellate Advocacy Section's seminars, but several other trial-related courses are offered, including Judge Joe Anderson's *The Art of Advocacy* and the S.C. Defense Trial Attorneys' week-long skills course. The Bar recently held its first ever three-day NITA trial skills workshop and also offers many trial skills courses online.

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based on the judge's conduct in a single matter, however, the standard should be more demanding before the judge is found unqualified. I suggest that Commission members use the following standard in this situation: Does the judge's conduct in this matter create such a high level of doubt about the judge's competency, honesty, temperament, or judgment that the judge should not be allowed to continue to serve? Under this standard the judge who takes a bribe or engages in sexual advances should clearly not be reappointed. I propose these standards, not as rules, but as guidelines for members of the Commission to use in discussions with their fellow members and as the basis for making their individual decisions.

The *Segars-Andrews* case is unfortunate no matter how you look at it. A litigant feels that justice was not done. A judge who has served the state well for 16 years, who is highly regarded by the bar, and who was found to be well qualified by the local citizens committee is losing her job. The Supreme Court faced difficult constitutional issues that pitted the judicial system against the legislature. Perhaps adoption of the recommendations in this article might reduce the risk that such a situation could reoccur. ■

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