Round Table Discussions on the Proposed Code of Judicial Conduct

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INTRODUCTORY OBSERVATIONS ON THE CODE OF JUDICIAL CONDUCT

DONALD T. WECKSTEIN*

“Credibility gap,” “crisis of confidence,” “lack of integrity,” “absence” or “ignoring of values”. These are among the cliches hurled at government today. It is well known that lawyers constitute a disportionately large percentage of executive and legislative government officials. It is an accepted fact that almost every person holding a significant judgeship is a lawyer, and that the bar has designed and operates the machinery of justice in the courts. Thus, the ethical and moral problems of government are in large part the problems and responsibility of lawyers. What have we done about them?

To improve and protect that department of government in which lawyers specialize and enjoy virtually monopoly power, the court system, the American Bar Association in 1924 adopted the Canons of Judicial Ethics. The Preamble stated that “the spirit” of the Canons is suggested “as a proper guide and reminder for judges, and as indicating what the people have a right to expect

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from them.” The principles set forth were said to be summarized by Canon 34:

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor; regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

If the cadence of this Canon resembles the Boy Scout oath, so does its content and realism. But boy-scoutish oaths, no matter how well principled and intended, are hardly adequate guides, let alone controls, for judicial behavior. The situations are too real, the stakes too high, the responsibilities too conflicting, and the judges too human. Accordingly, the ABA, as it has attempted with lawyers' professional conduct, is trying to formulate a judicial code of conduct which will be realistic and enforceable yet responsive to the legitimate expectations of the public.

Although at this stage its efforts appear to be generally successful, in many instances this has required some drawing of fine lines and accommodating of conflicting policies. Thus, it is not surprising that reasonable men—and lawyers—may differ with the ABA Committee on just where a specific line is to be drawn or which particular policy should prevail. It was for the purpose of permitting the drafting committee and the ABA House of Delegates to reconsider its determinations in light of informed public discussion that the Professional Responsibility Round Table Council of the Association of American Law Schools presented a discussion of the proposed draft of the Code of Judicial Conduct at its meeting in Chicago, Illinois in December 1971. This purpose is now enhanced by the broader dissemination of these comments on the Code to the readers of the San Diego Law Review.

The participants in this symposium include Professor E. Wayne Thode, of the University of Utah College of Law, the Reporter for the A.B.A. Committee, and Professor Joel B. Grossman, a political scientist from the University of Wisconsin, who has authored a pioneer work on judicial selection. My own function, beyond that of salutator, is to summarize the key concerns of a special committee of the Association of American Law Schools appointed to review the proposed code of judicial conduct. This

Committee was chaired by Professor A. Leo Levin of the University of Pennsylvania, and included as members Professors Vaughn C. Ball of the University of Southern California, John E. Coons of Boalt Hall at the University of California, Richard W. Effland of Arizona State, Andrew L. Kaufman of Harvard, Dean Murray L. Schwartz of U.C.L.A., and myself. If this summary tends to emphasize my own concerns, it is not entirely coincidental.

The provision which drew the most fire from the law professors' artillery was, not surprisingly, that which proscribed ex parte communications concerning judicial proceedings from law teachers and others. Many judges have in the past solicited selected law professors' judgments on difficult issues of law pending before them. There is probably little doubt that a judge would benefit—if only in the saving of time and effort—by an exchange of views with an impartial scholar on a subject within the latter's expertise. But without disclosure of the fact of such communication or its content, or an opportunity for the parties to meet it, is there any guarantee that the law teacher's observations will be in fact impartial, or accurate, or, indeed, expert? In characteristic scholarly fashion, the professors on the A.A.L.S. Committee divided in opinion and unequivocally refused to take a group position on the merits of this issue.

In support of the Code's ban on ex parte communications, Professor Ball notes that it does not preclude general discussions of the law but only those concerning a specific proceeding. He comments that:

If a judge wishes to seek particularized views from any of us on a specific proceeding, or accept them if we attempt to volunteer them, the important thing is that there be notice and opportunity to be heard afforded to the parties in the proceeding. That is what I take "full right to be heard according to law" to mean. I have no doubt that every judge who wishes (or for the matter of that, every law professor who wishes) can take the legal steps to get views into the case through that filter; and I have no doubt that through that filter (in most cases I can imagine) they ought to go. They will emerge refined, and miscarriages be avoided, by the process. Experience with agency notice in administrative law indicates this, and so does the whole principle that hearings should be fair and be seen to

be fair. The notion that unfair surprises can be corrected on motion for new trial or rehearing ignores the bad taste that will leave behind. It also ignores how steeply "uphill" those paths incline, once the thing is done.

I have not forgotten that as to "the law" there are cases and commentary to the effect that the judge may seek it anywhere, even in academe, but: (1) I am not sure there is such a dichotomy between law and other things as will handle the strains we are speaking of; and (2) the notice and hearing principle removes the need to define such a dichotomy.

If my views are a correct interpretation, we will no doubt be deprived of some hip shooting; but I count a vast deal of that as dross, based on inadequate information about the problem in the first place, and better left undone. In the long run, the administration of justice will be best improved by means other than fitful flashes of light on pending cases, privately shed for the judge by Professor X . . .

In sum, I believe we should presume in every doubtful area that the benefits accruing from any whispering we do into the pink and shell-like judicial ear in specific cases will be far outweighed by the bad impression that whispering creates, even on invitation.

Professor Kaufman's observations recognize the relevant factors, but he comes down in favor of professorial communications and against the Code's provision:

The mere fact of consultation ex parte brings into the decision-making process a person who has not been invested by the system with the responsibility of a judge and who has not been surrounded by the safeguards of independence and the rules relating to impartiality. The parties may well feel put upon by knowledge or suspicion or fear of such consultation. The system makes an exception for the law clerk whom the judge consults but the law clerk occupies a subordinate position and usually lacks the experience and the knowledge to give anywhere near the weight to his opinion that goes with the professor sought out by the judge . . . .

Against all these weighty considerations favoring the Canon are powerful arguments looking the other way. The most persuasive for me is the idea that we should be doing everything we can to enlarge a judge's intellectual horizons. Especially for a judge without a law clerk against whom he may test ideas, the benefits of consultation may be great and the danger of abuse small if the judge is independent-minded and is able to make a fair assessment of the advice he gets. Proposed Canon 3(A)(4) would preclude the possibility of influence on a weak or hurried judge. It would also preclude a fair-minded judge from thinking his way through to a sound conclusion by trying his ideas out on someone whose reactions he values. Law professors are forever doing that with their own ideas on their own colleagues without embarrassment and to their own profit.

Closing the judge off from that branch of the profession committed to dispassionate inquiry is a heavy price to pay in the attempt to assure that only the judge assigned to the case decides. Pushed very far, the logic of the Canon puts this consideration above a more-informed decision. The Canon also rests on a fear of specific abuses and the appearance or fear of abuse. We do not know, and will never know, whether judges' consulta-
tions result in a great deal of abuse. Part of the “fear of abuse,” I suspect, is a product of the lawyer's natural fear of losing a case because the weak points are exposed by someone other than the judge. That somehow isn’t thought to be part of the game. That consideration may not account for the whole point labeled “fear of abuse,” but it is an important part of it.

To the extent that the arguments focus on restricting the judge to the advocacy of counsel and sources available to counsel because of “unfairness” to the parties of any other course of action, the arguments emphasize the pure adversary nature of the system. Permitting him to consult and try out his ideas in appropriate cases focuses attention more on the importance of reaching more informed decisions.

One compromise suggestion that has been made is that the results of consultation be in such form as to be able to be made available to counsel. This seems of limited utility since in many situations the kind of consultation that is involved is informal and of the idea-testing variety.

There may be abuses in the current situation, and in any case of formal consultation, the results ought to be communicated to the parties. But I find myself unwilling to support a flat prohibition against a judge’s attempt to reach the best possible decision his own resources permit by testing out his ideas on a law professor. Obviously, this places a burden on a judge to assess ideas he receives very carefully and accept or reject them on the basis of his own intellect. But greater burdens than that are placed on the judge by our system. A burden is placed on the professor too—to reveal the formed or unformed nature of his own opinion, to reveal opposing doctrines, and to decline to answer when he feels he ought not to. But if teachers of law cannot bear this burden, the future of the profession is not in good hands.

My decision is made easier by the somewhat unreal nature of the notice issue. It is said to be permissible for a judge to do independent research because counsel have the same access to written materials. But counsel have no way of knowing when they prepare their briefs what written materials the judge will consult and must guess at the arguments they must meet. They may in fact not find or not have available or choose not to meet an argument in an article on which the judge relies. Yes, theoretically, there was an opportunity to meet that argument. But likewise the advocate theoretically has available to him the whole range of ideas on any subject and so ought to be able to anticipate anything that a law teacher might say to a judge. In many, if not most, cases there is not an overwhelming practical difference on the notice question between ex parte research and ex parte communication. 2A

Responding to comments on this controversial provision, the

2A. The views of the A.A.L.S. Committee members are presented here in abbreviated form and may have lost something in transfer of context. A more complete statement of Professor Kaufman’s views may be obtained from him at Harvard Law School.
ABA Drafting Committee, while retaining the basic prohibition against *ex parte* communications, has qualified the proscription by adding:

A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.  

For clarification concerning consultations with clerks and fellow judges, the Committee added in the Commentary that the provision “does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid in carrying out his adjudicative responsibilities.”

Unlike other recent ABA documents, the proposed Code avoids direct comment on trial disruptions or conduct at political trials, and tersely requires that a judge “maintain order and decorum” and “be patient, dignified, and courteous . . . .” While the issue of disruptive conduct may have been temporarily blown out of proportion, it does seem to merit more attention than the Code has given it. I would have liked the Code’s provisions or commentary to specifically draw the line between disruptive conduct that interferes with the fair and orderly administration of justice, which cannot be tolerated, and those breaches of “decorum” involving the dress, appearance, mannerisms, and forcefulness of counsel, parties, or witnesses, which the judge may find offensive but which he should be required to tolerate except in the most extreme cases. To hold otherwise would allow too much authority to a judge in matters of “taste”, and might impair the obligation of a lawyer to represent his clients zealously and even courageously.

The proposed Code adopts the existing ban on broadcasting, televising, recording, and photographing in the courtroom without examination of the premises on which it rests, although the press has long questioned whether “unobtrusive” and controlled activities of this kind would in fact “detract from the dignity of the proceedings, distract participants and witnesses, and tend to dramatize events . . . .” To the extent permitted by the Consti-

3. Id.
empirical findings should be sought through experimentation with modern means of recording and photography to determine their actual impact upon trial proceedings. Short of an overall reappraisal of this issue, the Code's provision was clearly found too restrictive in limiting educational use of a photographic or electronic reproduction to the institution initiating it. Little risk would seem to be involved in permitting the reproduction to be shared with other recognized educational institutions, and such sharing may also minimize the need for each individual institution to risk interfering with a trial by making its own reproductions.

Canon 7 regulating a judge's political activities raised a number of issues which commanded the attention of the A.A.L.S. Committee. It was believed that several of the provisions should apply to appointed as well as elected judges. Revisions in the latest draft of the Code appear to accomplish this purpose, but it should be made clear in the commentary that "candidate for judicial office" includes executive nominees pending confirmation as well as candidates for elective judicial office unless the context is clearly limited to the latter type candidate. One wonders about the realism of prohibiting a candidate for judicial office from directly soliciting or accepting campaign funds or publicly stated support while allowing him to establish committees for such purposes.

Perhaps required disclosure of campaign contributions (to him or his committees) in excess of a minimal amount, such as $20, would be a more realistic alternative serving a similar purpose of avoiding the "purchase of justice" and embarrassment to the judge or judicial candidate. First Amendment problems may also lurk in the prohibition on a judicial candidate announcing "his views on disputed legal or political issues." This may be especially inappropriate as applied to a candidate seeking to unseat a judge.
whose views have already been made known through his judicial opinions. Although unseemly, would it not be better policy—if not constitutionally required—to allow an “anti-busing” judicial candidate to state his views in opposition to a known “pro-busing” judge, or vice versa?

Among other issues addressed by members of the A.A.L.S. Committee were:

(1) Should a judge disqualify himself in a proceeding just because his impartiality “might reasonably be questioned” or only when his relations to the parties or counsels present “a substantial threat to his impartiality”?

(2) Is the ban on a judge voluntarily testifying as a character witness too absolute? Should it apply even where his testimony may be the only available to prevent a possible injustice? Is the availability of a subpoena a realistic alternative? Is it understood that this provision will not preclude a judge from serving as a character witness for an applicant to law school, the Bar, or employment?

(3) Should the amount of retirement benefits be relevant in determining the scope of permissible activities of a retired judge? Why should not federal judges who receive retirement benefits equal to their active status salary be eligible, along with lesser paid retired state judges, to serve as fiduciaries, arbitrators, and mediators, or be engaged in a business not likely to conflict with any judicial duties which they might be recalled to perform?

(4) Assuming a judge will always disqualify himself from hearing cases involving his family’s businesses, should not any judge who is involved in such a business (or perhaps any non-law related business) at the time of his appointment (even after the date the Code becomes effective in his jurisdiction) be permitted to retain an interest in the business if it does not interfere with his judicial duties?

The importance to lawyers and society of the ethics and selection of judges cannot be minimized—as it so often has been in the curriculums of law schools. Judges set the tone for lawyers'

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13. Proposed Code, Canon 3 C (1).
14. Proposed Code, Canon 2 B.
15. Proposed Code, Compliance With the Code of Judicial Conduct, C.
16. Id., Parts A, C; Proposed Code, Canon 5 C (2), D, E.
17. Proposed Code, Effective Date of Compliance (a). An optional provision to accomplish this end, where necessary to supplement low judicial salaries, is provided in Canon 5 C (2), Commentary.
ethics. Judicial behavior significantly influences the attitude of
the lay citizen towards justice and the integrity of his govern-
ment. And, if the courts are to retain their independence and
influence—without either the power of the purse or of the sword—
our judicial officers must be beyond question in matters of ethics
and impartiality. The proposed A.B.A. Code of Judicial Conduct,
if widely adopted and enforced, will be a significant step toward
this goal.

THE DEVELOPMENT OF THE CODE OF
JUDICIAL CONDUCT

E. WAYNE THODE*

I. BACKGROUND

In 1964 the president of the American Bar Association, Mr.
Lewis F. Powell, Jr., proposed to the ABA's House of Delegates
that it undertake a re-examination of the ethical standards ap-
licable to lawyers and to judges. His proposal was accepted.
The first project undertaken involved the lawyers' standards, and
the result was the Code of Professional Responsibility, adopted
by the House of Delegates of the ABA in 1969. Attention was
then immediately turned to the Canons of Judicial Ethics which
had not undergone substantial re-examination or revision since its
adoption by the ABA in 1924. In the fall of 1969, President
Bernard Segal appointed a Special Committee on Standards of
Judicial Conduct, and I was employed as Reporter. From the
beginning I expected that this project would take three years.
We shall present our product to the House of Delegates of the
ABA for adoption next August, two months short of three years.

The Special Committee was carefully and wisely selected, and
has been increased in the same manner. I do not believe that a
better Chairman could have been selected than Chief Justice Roger

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mittee on Judicial Standards
Traynor of California, who was soon to retire from the Bench and revert to his earlier status of professor of law. The other state judges, all capable men, on the Committee are Ivan Lee Holt, Jr., a Missouri trial judge; George H. Revelle, a Washington state trial judge; and Justice James K. Groves of the Supreme Court of Colorado. Three outstanding federal judges are members: Associate Justice Potter Stewart of the Supreme Court of the United States; Judge Irving R. Kaufman of the Second Circuit; and Judge Edward T. Gignoux, the federal district judge for the state of Maine. Six able lawyers were added to the Committee: Whitney North Seymour of New York City; William L. Marbury of Baltimore; E. Dixie Beggs of Pensacola; Walter P. Armstrong, Jr. of Memphis; Edward L. Wright of Little Rock; and W.O. Shafer of Odessa, Texas. To season the mixture, a law professor and former Justice of the Supreme Court of Arkansas, Robert A. Leflar of the University of Arkansas Law School, was selected. I should add that although Bob Leflar needed no assistance in the representation of the law teaching profession, two other law professors—Geoffrey C. Hazard, Jr. of Yale, as Consultant, and I, as Reporter—have been involved in this project.

A project of this magnitude requires not only the services of lawyers and judges and staff, but also a substantial amount of money. The American Bar Foundation has furnished this vital commodity. Although I do not have knowledge of the specific figure, I am confident that the amount already expended exceeds $100,000.

Since October, 1969, the Special Committee has held eleven meetings averaging two days each, and there have been many subcommittee meetings. The Committee meetings have been held on Saturdays and Sundays to achieve maximum attendance. Absenteeism has averaged about one Committee member per meeting—in my opinion, a most remarkable record. Several members have not missed a meeting. You probably are aware of the fact that the Committee members serve without compensation, but you may not realize that their per diem allowance does not cover all of their expenses.

Research to aid the Committee in its decision making process has been extensive. More than one thousand hours of law student time went into the examination of the statutes and Canons of Judicial Ethics of each state in the search for appropriate judicial standards, and into research and the writing of memoranda on many substantive issues. Questionnaires were developed and sent to thousands of judges and to more than one hundred law school
deans to obtain concrete information about the activities in which judges engage. Many judicial organizations established committees that have aided the Special Committee in its work. I have spent half of my time for more than two years in research, directing research, drafting, and the myriad of other duties that are subsumed under the title “Reporter”.

Two published documents have resulted from the research, the drafting, and the work of the committee and the sub-committees. In June, 1970, the Committee issued its Interim Report and distributed 14,000 copies to judges, lawyers, and other interested persons. The Interim Report was not a draft of a code; rather it was a statement of general ethical principles that the Committee had developed for use as guidelines in the drafting of the code. The Committee invited suggestions and criticisms, in writing or at public hearings held in August, 1970, at the annual ABA meeting. Over five hundred suggestions were received, and many found their way into the Tentative Draft of the code that was published in May, 1971, and circulated in the same manner as was the Interim Report. Again, more than 500 suggestions were received; all were considered, and many were incorporated into the Proposed Final Draft of the Code of Judicial Conduct. One of the amazing things to me is the number of comprehensive reports that were received during this second round—we had reports from 27 organizations, including one from a Special Committee of the Association of American Law Schools. I will add the self-serving declaration for the Committee that although each report included some suggestions for improvement, every report endorsed the Tentative Draft.

II. Method of Proceeding

At the first meeting of the Committee several important decisions were made. The first was that neither the form nor the style of the old Canons of Judicial Ethics was satisfactory. Therefore, the conclusion was reached that we should start over. This decision did not mean that the substance of the old canons was rejected; in fact, there is a close correlation between some portions of the old canons and certain sections of this new Code. A second important decision was that an independent judiciary cannot continue to exist unless the members of the judiciary not only comply
with, but also are actively involved in establishing and enforcing, proper standards of conduct for judges. This basic premise eventually became Canon 1 of the new Code. A third decision was that the standards for judges should be mandatory and enforceable, although this Committee also decided that it would not undertake to suggest the proper enforcement mechanisms or penalties.

Early in our work the three-part division of a judge's conduct—judicial, quasi-judicial, and extra-judicial—was adopted. We think it has served us well as a tool of analysis and as a basis for the subject matter definition of Canons 3, 4, and 5. The remaining canons pertain to subjects that do not lend themselves to the three-part division.

The Committee did not start its work with a set of pre-conceived ideas about the substance of the code, and it has continued to exhibit commendable flexibility and broadmindedness in considering its own previous work as well as suggestions and criticisms from others. As I look back, however, I think there were at least five general principles that emerged and have been applied throughout this process. I shall attempt to verbalize them and in some instances cite examples:

1. The Code should set standards that are appropriate for full time, part time, and retired judges.
   The complexity of this undertaking is demonstrated by the following figures: In 1970 there were 478 full time federal judges; 16,394 full time state judges; and literally uncounted thousands of part-time and retired judges.

2. The Code must speak to the critical ethical issues of the day, and should not hide its conclusions under ambiguous or abstract phrases or shift the responsibility for decision-making to another group.
   Public financial reporting is one of these issues. Strong representations were made in favor of complete public financial reporting and equally strong representations were made in favor of no reporting at all. Also, there was a suggested middle ground that each jurisdiction should be allowed to make its own decision about public reporting without the Committee's taking a position. In Canon 6 the Committee made its decision in clear and specific terms stating the items that it felt should be publicly reported, and it has not been persuaded to move from that position.
   Extra-judicial appointments by the executive are another example of a critical issue that the Committee was urged to avoid. The Committee did not follow that advice; instead, it directly faced the issue in Canon 4G.

3. Although generalization is necessary in any code, concreteness and specificity should be employed wherever feasible.
   Old Canon 13 states that a judge "should not act in a controversy when a near relative is a party", and Canon 29 provides that he should "abstain from performing any judicial
act when his personal interests are involved". These are the disqualification standards in the old Canons. Canon 3C of the new Code begins with a general standard requiring disqualification if the judge’s “impartiality might reasonably be questioned”, and then sets a series of specific standards for disqualification based on relational, financial, and other matters. These specific standards present concrete answers to many disqualification problems.

4. With regard to each area of the Code, the general minimum ethical standard should be ascertained and then care should be taken to insure that specific applications do not fall below that minimum. In making each specific application thought should be given to setting the standard above the ethical minimum, but in so doing practical considerations must be kept in mind. Compromise may be necessary in the attempt to upgrade the standard, but should not be considered in establishing the minimum ethical standard.

Two examples come readily to mind. The first concerns the business activities of judges. Canon 5C(1) and (2) set the upgraded standards that the Committee believes every full time judge should be required to meet. The facts are, however, that in some jurisdictions the salaries of full time judges do not approach an adequate level, and judges who are not independently wealthy must “moonlight” or resign. To meet this deplorable situation, the Committee drafted an alternative standard that sets the minimum with which every full time judge must comply, no matter how low his salary.

The second example is Canon 7, the canon setting standards for political activities of judges and candidates for elective judicial office. The Committee recognized that the ethical standards of impartiality and the appearance of impartiality are basically incompatible with the practical political necessities involved in being elected to judicial office. The Committee also recognized that thousands of our judges are elected to office and that the system will not change overnight. Canon 7 is the Committee’s attempt not only to set ethical minimums, but also to upgrade the campaigns for elective judicial offices.

5. Each standard should be rational and defensible as an ethical standard.

Whether or not this latter standard has been satisfied I will leave to the judgment of others.

III. HIGHLIGHTS

I shall now list and discuss briefly the highlights of the Code as I see them, but let me make clear that I do not intend to indicate by silence that those standards not mentioned are unimportant. If importance were the standard to be applied at this point, I should simply quote the Code.
Canon 1 has already been referred to, but I want to add a few more observations. Some persons have criticized this Canon and its text as hortatory and useless and have suggested that it be eliminated. There has been some sentiment on the Committee to do just that. My own view is that it sets a proper tone for the rest of the Code, and that placing an obligation on judges to participate in establishing and maintaining proper standards of conduct is essential to a complete judicial code.

Canon 2 provides general conduct standards taken largely from the old canons. Although these general conduct standards are broad and almost hortatory, at least in part, the Committee nevertheless viewed them as essential to the Code. The last sentence, "He should not voluntarily testify as a character witness," raises the most difficult issue under this Canon. The Committee received numerous reports of attempts to use the prestige of a judge, called as a character witness, to bolster a defendant's standing with a jury. Is this a matter that should be dealt with in a code of judicial conduct? If so, has the Committee adopted the right solution?

Canon 3 establishes the standards for a judge in performing the duties of his office. This canon applies to all of his duties of office, not just adjudicative duties. Many of the principles of Canon 2 have their origin in the old canons, but some of the significant changes and additions are as follows: (1) Under the new Code competence in law and in judicial administration is a facet of proper judicial conduct. (2) A method is established whereby a judge may consult with a disinterested person on issues of law, but he must give notice of the name of the person consulted and the substance of the advice received. (3) Broadcasting and televising from the courtroom are authorized for purposes of judicial administration, and a limited educational use of media reporting from the courtroom is sanctioned. (4) Extra-judicial statements about pending cases are prohibited. (5) A judge's responsibility for the conduct of his staff and court officials subject to his control is established. (6) Many bases for disqualification are specified, with a hard line being taken with regard to financial interests of a judge and members of his family residing in his household—any economic interest will require the judge's disqualification. (7) A waiver procedure is made available if the lawyers and parties believe a judge's interest to be insubstantial or his relationship to a party or lawyer to be immaterial. (8) Investments in mutual funds, savings associations, and government securities are excluded from the financial interest
definition unless the litigation will substantially affect their value, thereby giving a judge a few investment possibilities without great danger of disqualification.

The technique of incorporation of a procedural device into a standard of conduct was used twice in Canon 3, with regard to communications from disinterested persons and with regard to waiver of the disqualification of a judge. I will be very interested in the reactions to the appropriateness of this technique.

I should point out that the provision of the Canons of Judicial Ethics that “ours is a government of law and not of men” is not to be found in this Code. I hope that no one feels aggrieved by its absence.

Canon 4 pertains to a judge’s quasi-judicial activities. These are not mandatory activities, but the text makes clear that they are proper and are encouraged to the extent that they do not interfere with judicial duties or cast doubt on a judge’s impartiality. You may be interested to learn that approximately 200 judges regularly teach or lecture part-time in law schools. Many lawyers and judges recommended to the Committee that this area of conduct be very substantially curtailed, but the Committee took the opposite position.

In addition to the general limitations in Canon 4, two specific limitations have been added. A judge may consult with the executive or a legislative body only on matters of judicial administration. He may not be a general political or economic advisor to the executive. The other limitation is that a judge may not participate in public fund raising activities on behalf of “legal” organizations—that is organizations devoted to the improvement of the law, the legal system, or the administration of justice—although he may assist in fund raising for such organizations.

The fund raising issue is a difficult one. In Canon 5 a judge is precluded from soliciting funds for an educational, religious, charitable, fraternal, or civic organization, although in Canon 4 he is authorized to assist in fund raising for a “legal” organization provided he does not personally participate in public fund raising activities. Can this distinction be justified? I think so.

Some “legal” organizations have only judges as members. If judges can’t assist in fund raising, then those organizations are
effectively precluded from being involved in projects that require substantial financial backing. Indeed, the Committee felt that the projects of all "legal" organizations that require outside financing would probably be in jeopardy if judges in the membership could not even voice their approval of the project—hence the "assist in fund raising" authorization. The Committee did not view the role of a judge to be nearly as significant with regard to fund raising by Canon 5 organizations, and the prohibition was made absolute.

I look upon the solution to the fund raising issue as another example of an attempt to upgrade the ethical standard. The minimum standard was adhered to in Canon 4, but the Committee was able to upgrade the minimum in Canon 5. The Committee has put a great deal of time and thought into this fund raising issue—possibly more than it has put into any other single issue in the Code, and these sections on fund raising have drawn more suggestions and criticisms than has any other section. Taking the long view of standards of judicial conduct, I think this issue may be minor, but it certainly engenders a great deal of response, whatever the solution suggested.

Canon 5 sets the minimum standards for a judge's extra-judicial activities. The types of potential activities vary widely. Some are a matter of choice, such as avocational or civic and charitable activities. Others, such as financial activities, must be engaged in, whatever the size of a judge's income.

The standards adopted for avocational and civic and charitable activities hopefully avoid discouraging these activities. On the other hand, the standards for financial activities are much stricter than those of the old Canons of Judicial Ethics. To sum it up succinctly, a judge should not engage in business. This however, is the upgraded standard, and a jurisdiction that does not pay its full time judges an adequate salary may adopt the minimum standard that allows the judge to engage in business if such activity does not: (1) reflect adversely on his impartiality, (2) interfere with the proper performance of his judicial duties, (3) exploit his judicial position, or (4) involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves. As you can see, even the minimum standard rather severely limits the full time judge's business potentialities.

The attempt to place rational limits on gifts, loans, bequests, and favors to a judge and his family has also taken a great deal of the Committee's time and thought. I will be interested to learn whether others think that the Committee has drawn a defensible line. Basically the position is that neither a judge nor a member
of his family residing in his household should accept a gift, loan, bequest, or favor from a lawyer, a party, or a potential litigant, but there must be some exceptions to this hard line. Must a judge go out of town to obtain financing for the purchase of a house or car because the local financial institutions are, or may be, litigants in his court? This is only one of the many problems encountered in this area.

Fiduciary activities of a judge are severely curtailed under the new Code. He may act as a fiduciary only for a member of his family. However, a judge may not be a desirable fiduciary in any event because he must apply the same standards to his financial activities as a fiduciary that he is required to apply in handling his own financial affairs.

The practice of law by a full time judge, as well as his acting as an arbitrator or mediator, is forbidden. Extra-judicial appointments of judges to commissions and committees are also precluded unless the matter at issue involves the improvement of the law, the legal system, or the administration of justice—the same standard applied in Canon 4 to the judge's quasi-judicial activities. Although extra-judicial appointments of Supreme Court Justices in times past immediately come to mind, the same problem also exists on the state level. The Committee squarely faced and answered this issue. I hope readers will give us their judgment on whether the right policy decision was made.

Canon 6 authorizes payment of compensation and reimbursement of expenses for quasi-judicial and extra-judicial activities permitted by the Code. There are limitations on the amount and the source, and the compensation received for these activities must be publicly reported. The Committee has not receded from its original position that the public is entitled to know to whom and for how much a full time judge "sells" his extra time.

The reporting provision of Canon 6 has engendered more reaction from judges than has any other provision of this proposed code. The responses indicate that most state judges oppose this requirement, but that most federal judges do not (probably because they are presently operating under an even broader reporting requirement). On the other hand, lawyers and others who have responded have in general either approved of Canon 6 or have opted for a broader reporting requirement. If this code runs into
trouble when it is presented to the various states for adoption, the public reporting provision is likely to be the issue causing the trouble.

Canon 7, the political activity canon, has much in common with old Canon 28 and 30, but the Committee has attempted to be much more specific and concrete in the Code. One major change is that of requiring a candidate for judicial office, even if he is not a judge, to comply with this Canon. Some criticism has been received on the basis that the Canon cannot be enforced against a candidate who is not a judge. I think the criticism is not well taken. Public opinion is often the most important enforcement weapon in a political campaign. The very threat of a public statement that a candidate for judicial office is violating Canon 7 may induce the candidate to comply.

As pointed out earlier, Canon 7 is filled with compromises with the ethical ideal that a judge be impartial and appear to be impartial. The clash between that important judicial policy and the policy of Jacksonian democracy that a judge regularly and frequently be subject to the will of the electorate is obvious. Can a judge ever “appear to be impartial” to the lawyers and potential litigants who publicly opposed his election? The Committee has not yet set a standard for campaigning by a judge who runs against his record in a “merit system” election, but has organized opposition. Suggestions are invited.

Canon 7 does attempt to place a buffer between the candidate and those being solicited for funds or publicly stated support. Also, it places responsibility on a judge to prohibit court personnel subject to his control from doing for him what he is prohibited from doing for himself during a campaign—a much needed improvement, in my opinion. I look to the panel members for their reactions to the propriety and rationality of the specific provisions of Canon 7.

This completes the discussion of the Canons, but an important new section, the Compliance Section, remains. The Canons of Judicial Ethics made no effort to identify the persons who should comply with the canons, but the new Code undertakes that difficult task.

“Judge” is defined in a manner to make clear that every officer of the judicial system—whether or not a lawyer—who performs judicial functions is within the scope of this Code. Coverage is determined by an analysis of functions, not on the basis of a title.

Another shortcoming of the Canons of Judicial Ethics that is rectified in the Code is the failure to regulate the conduct of part-
time and retired judges. The method adopted is to require all judges to comply with all of the canons unless the exception for part-time or retired judges apply. The Committee examined each provision of the Code and made a decision about its application to the part-time (including the pro tempore) judge and the retired judge. I will not attempt to explain the details, but, in general, part-time and retired judges are granted a wider latitude in business activities, are not precluded from practicing law or from being arbitrators or mediators, and are not required to report publicly income from outside activities.

Finally, there are two grandfather clauses applicable to persons who are judges at the time the new Code is adopted. (Note that the statement I just made assumes that the Code will be adopted somewhere at sometime.) A judge may continue in a family business, and he may continue as a fiduciary for persons or estates that do not meet the “family” requirement. The foregoing provisions were adopted to alleviate the potential hardship to a person who accepted a judicial position when such activities were proper income supplementing activities.

This concludes my review of the highlights of the Code. The Committee contemplates the printing of Reporter's Notes, which I now have in rough draft, as an Appendix to the Code. The purpose of the Appendix will be to give an insight into the reasons for Committee decisions, (at least as the Reporter understood them), to make available some of the statistical data collected, and to give a view of the history of the development of the Code and its relationship to the old Canons of Judicial Ethics.

A POLITICAL VIEW OF JUDICIAL ETHICS

JOEL B. GROSSMAN*

Law and legal institutions in the United States today are faced with a crisis of public confidence that may be unequalled in American history and is at least the worst such crisis since 1937.

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The law and legal institutions have always been under attack from one or another side of the political spectrum. The role they play in allocating values and resources for the society and in regulating processes of change is much too important and complex to expect a continuing pattern of general acquiescence and support. What makes the present crisis of special concern, therefore, is not that the courts and the law are under fire but that they appear to be under attack from all sides of the political arena. Except possibly in the abstract, who speaks for the courts today? Given the heterogeneous makeup of our population and the essential pluralism of our political system, it is unlikely that everyone and all positions can be kept satisfied. The courts, and particularly the Supreme Court, can operate reasonably well, if not entirely effectively, without majority support. But to survive they will need—and have in the past had—the support of at least one major—if not majority—faction which actively gives its support and a second segment which if it does not extend specific support for what the Court is doing at least supports it symbolically as an institution. Public support at this level may be the necessary foundation for effective judicial functioning in a democratic society.

To some extent the present lack of confidence in legal institutions is part of a more widespread withdrawal of support from the political system. But for many, especially young people, it also reflects a recognition of the inadequacy of courts and the law to achieve their social objectives and/or a feeling that the legal system is hopelessly biased against the values to which they subscribe. I would not go so far as Edgar Friedenberg, who has argued that law is almost always ill-suited to achieve justice in our society. But his observation does serve the useful purpose of emphasizing that even under the best of conditions law and justice are neither identical in means nor in ends, and that we best not allow the gap between theory and reality to get too wide.

There has always been and always will be a gap between law and justice. It is inherent in the nature of the two concepts. And it seems equally the case that resort to the law as a primary means of accomplishing social change will almost always prove to be a disappointment in the long run. The law, and particularly the courts, plays a significant role in the processes of change in the United States, perhaps more significant than in other countries. Since, as a mediating institution, the law is also concerned with order and peaceful resolution of conflicts, total goal realization

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by any one group is unlikely.2 Thus, to the extent that one chooses to invoke the law in the pursuit of social goals there is an expectable tariff of reduced achievement. Perhaps a tension between achievement and aspiration is a necessary ingredient of societal stability and progress.

But where the judicial process is seen not only as inadequate to the realization of certain goals, but positively dysfunctional to their achievement, lack of confidence could indeed reach serious proportions. If an increasingly large radical segment of the society believes, as Robert Lefcourt has argued, that “the judicial process appears to worsen pressing problems rather than solve them,” then the costs to the society of a loss of legitimacy in the courts are readily apparent.3 When “Legalism”4 becomes an epithet instead of a tribute to the rationality of the legal system the seeds of crisis have begun to sprout.

All of this, a necessarily abbreviated discussion of an important subject in itself, is by way of preface to my comments on the proposed new Code of Judicial Conduct. I have begun this way to underscore (and perhaps exaggerate) what I believe to be the disparity between crisis conditions and the response which the Code makes to that crisis. I am aware, of course, that it is not within the scope or purview of a document like the Code to respond fully to this crisis.5 The behavior of judges is not our only problem; perhaps it is not even the most pressing problem of the legal system. Nor am I oblivious to the limitations inherent in the efforts of a quasi-public professional group, such as the American Bar Association, to provide solutions to problems and conditions which represent a far-reaching indictment of our entire social, economic and political system. Nonetheless it does not seem wholly unfair to subject this Code, representing some of the best thinking in the legal profession today, to the critical test of relevance. How accurately and effectively does the Code con-

2. There is an expanding literature on this subject. Among others, see J. Grossman and M. Grossman, LAW AND CHANGE IN MODERN AMERICA (1971); Symposium: Law and Social Change, 13 AMERICAN BEHAVIORAL SCIENTIST (1970) No. 4.
ceptualize and state the problems that exist? And how well does it provide solutions to these problems?

This is the first major revision of the Canons of Judicial Ethics. It reflects a consensus that a modernized and updated document was needed, but also some lesser consensus as to how that document should be changed, what subjects should be covered and which items ignored. The Canons combined an effort to regulate economic conflicts of interest in which a judge might find himself with some extensive sermonizing about the nature of the judicial function, the evils of dissent on appellate courts and related proscriptions then of concern to some members of the bar. Quite naturally they reflected the prevailing opinion of 45 years ago about the "ideally" mechanical nature of the judicial process. The Canons were hardly even touched by the influence of judicial realism. By comparison the proposed new Code is a refreshing change. Sermons and biblical injunctions are kept to a minimum, if not virtually eliminated, and the useless but deceptive admonition, "ours is a government of laws and not of men" is omitted. Dissent is no longer condemned and some of the least defensible mechanical conceptions of the judge's function have been excised. But, primarily, the focus still is on the avoidance of individual economic bias, with additional admonitions about courtroom demeanor and behavior in electoral contests.

It is understandable that a revision stimulated in large part by allegations against former Justice Abe Fortas and Judge Clement Haynsworth should concentrate on the individual economic integrity of judges. No one doubts that this is, and should continue to be, an important concern of the bar and bench, and of all citizens. But, following Rondal Downing's suggestion, judicial ethics should not be conceived of solely in terms of economic bias. But if the focus should lie there, then it should be on an expanded conception which sees such bias not only in personal conflict of interest situations, but also in the degree to which the law and judges have traditionally favored the interests of the rich and the middle class over the rights of the poor. A dishonest and corrupt judiciary might well sap the strength and legitimacy of the courts, and the political system as a whole. But there is little evidence to suggest that most American judges are not honest and anxious to avoid conflicts of interest, or that the subject is much on the public mind except in occasional transient periods of publicity over an alleged judicial impropriety. For example,

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a recent survey of ghetto, white working class, and white middle class residents in Milwaukee, revealed that none of these groups thought judges were predominantly corrupt, although the white middle-class residents rated judges somewhat higher on the honesty scale than the other two groups. On the other hand, perceptions about the lack of economic justice distributed by the judiciary seem much more important but receive no mention in the Code of Conduct. Indeed, the terms justice and equality are barely mentioned at all. Yet numerous studies demonstrate that the discrepancy in economic justice between the poor and the rich is very large, and accurately perceived as such by poor people who score appropriately low on judicial efficacy scales. Why is there no mention of this critically important problem?

What is the function of a Code of Judicial Conduct? Primarily, I gather, it is to contribute to the maintenance for a quasi-public profession of a relatively autonomous system of self-regulation, particularly where most judges are elected and thus perceived as subject to a variety of undesirable political pressures. A second, and derivative, purpose of such a code is public relations, in the best sense of that term. While the Code itself is likely to be invisible to the general public, the norms of behavior which it endorses may contribute to public education about the judicial process and the proper judicial role, as well as to some reassurance about the integrity of the courts. Of course, for those on the fringes of the system the code may be just another “put on” by the establishment.

The American Bar Association cannot regulate the behavior of either judges or lawyers, but it can influence judicial conduct by promulgation of norms which may also receive the force of law if incorporated into law or the disciplinary machinery of state bar groups. The first requirement of any code of conduct is that it must be reasonably clear about what is or is not prohibited behavior. The second is that standards must be acceptable to most groups within a relatively diverse profession, and must at

7. Jacob, Black and White Perceptions of Justice in the City, 6 Law and Society Review 69 (1971).
least be within sight of actual practices. The code cannot be successful if it appeals only to an abstract sense of right or wrong. It must contain some recognition of the realities of the professional roles which it seeks to regulate.

We know from studies of legal ethics that the stratification of the American Bar is a major barrier to a realistic unitary conception of the lawyer's role.9 A lawyer who deals primarily with corporation executives and business law does not operate under the same constraints as a store-front lawyer in the ghetto or a criminal lawyer who must hustle for his daily bread. One can argue at length about whether it is fair to impose the values of the upper status Wall Street lawyer on the lower status solo practitioner. But it seems almost beyond debate that it is at best very difficult to do this. The milieu in which he operates, the clients he serves, the financial constraints with which he must constantly deal, the petty bureaucrats with whom he must negotiate—all of these factors make a uniform regulation for the entire legal profession too costly to achieve. (I do not refer here to financial costs exclusively.) New pressures on lawyers serving radical clients appear to be widening the gap between orthodox and deviant lawyer roles.

If this is true for lawyers it is also true for judges. The differences in milieu, in resources, in types of cases, in background experiences and values make it difficult to frame a set of rules equally applicable to all judicial situations. What seems appropriate decorum for the silent majesty of Supreme Court proceedings makes little sense in the assembly line of Chicago's police courts. A set of rules which presupposes an adversary system cannot effectively counsel or bind a judge presiding over what is essentially an administrative process.10

Do the standards set down in the Code flow from an accurate and realistic conception of the judicial process and of how the public is likely to view that process? On the whole it does not assume or try to prescribe a cloistered judicial role; indeed, to the extent that it encourages a judge to engage in a variety of activities and not recede into monastic contemplation it recognizes that the business of judging is more than the mere application of precedents and requires more than merely being "learned" in the law. It does not appear to set impossible standards for urban

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9. For example, see J. CARLIN, LAWYERS' ETHICS (1966) and other works cited therein.
criminal court judges. Its fault in this regard, if any, is simply to
ignore the special problems of such courts and judges.

To strictly prohibit judges from all extra-judicial activity, as
many have suggested, would be counterproductive; the small pos-
sible net gain in diminished conflicts of interest would be out-
weighed by the resulting losses in judicial vision and independence
of thought. Judicial independence is a value worth supporting
if it implies and creates the conditions under which judges can
offer a fresh, enriched, and informed view of solutions to society’s
problems. It is not worth supporting if it means only that judges
are to be artificially and excessively isolated. As Judge Irving
Kaufman has noted, “the increasingly sensitive and complex issues
our society leaves to be settled by litigation” leave little room for
encouragement of judicial myopia.11 The biases of ignorance and
parochialism seem to me, on the whole, more difficult to combat
than economic partiality.

On the other hand, the new Code tends to support perpetuation
of the image of judges as nonpolitical actors, with allowances
made only for that minimum political involvement necessary to
secure election to judicial office. And flowing from this it for-
bids judges or judicial candidates from engaging in certain pro-
scribed behavior without adequate allowance for the political cul-
tures or machinery within which they must operate.

Because the official position of the Bar is in opposition to judi-
cial elections, the old Canons as well as the revised Code severely
limit the freedom of judicial candidates to mobilize voters, to
discuss relevant issues, and thereby to educate citizens about the
operation of the courts. Most judges in the United States are
elected, so this is no minor point.12 Not surprisingly voter turnout
at judicial elections is poor, especially where these are held sepa-
ately from the general election. One reason for poor public
response—perhaps the main reason—is that the voters don’t un-
derstand the issues or perceive much salience in the outcome.
Since judicial candidates rarely attempt an intelligent discussion
of issues,13 the voters are asked to make an impossible choice, to

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11. Supra note 22 at 7.
12. It should be noted that most judges in election states first reach the
bench by gubernatorial appointment.
13. Ladinsky and Silver, Popular Democracy and Judicial Independence,
Wis. L. Rev. 128-69 (1967).
perform a relatively meaningless act, and it is little wonder that they decline to do so in wholesale numbers.

All Americans are now well aware that Supreme Court justices are chosen because they espouse judicial and political philosophies compatible with those of the appointing President. What reason is there to deny citizen voters in judicial elections the information they need to make a similar choice? In Wisconsin, and I assume in other states with contested judicial elections, some of this information is transmitted surreptitiously. The candidates openly say very little, but their general policy views and political backgrounds and affiliations are openly described by their supporters and the media. This is done usually without any intimation of how a prospective or incumbent judge would decide any particular case; it could be done even more effectively by the candidate himself. The result is that the canons are not effectively enforceable while at the same time prevent realization of the full benefits of judicial elections. The worst of both worlds is effectively realized. And the chief losers are the voters who remain apathetic because they have not been attracted by the candidates or informed as to what difference it makes who is chosen as a judge.

I do not believe that judicial candidates, or the judiciary as a whole, will be demeaned by a clear but careful rendition of issues and policy choices. On the contrary, public confidence in the judiciary might positively increase if the workings of the process and the values of the aspirants are exposed to public view. In a democracy, after all, elections are a primary if not exclusive means of legitimation. If voters are able to perceive that they have a stake in the outcome they are more likely to participate and, at least arguably, choose better judges. There are countless studies by social scientists which do more than merely suggest that the outcomes of the judicial process depend in part on who the judges are, that judges with different backgrounds follow different decisional patterns. Trial lawyers have always known this to be a fact, and litigants are likely to arrive at the same conclusions. And there is evidence that citizens want this information. For the Bar to maintain to the contrary and enforce these

15. Supra note 30.
17. Supra note 30.
norms becomes increasingly difficult, especially when the Bar's campaign to influence judicial selection constitutes at least an implicit recognition of this fact.

For many years the American Bar Association has advocated what has become known as the Missouri Plan for selection of judges. It has supported this plan "to take the selection of judges out of politics." But recent studies have shown that the Plan doesn't materially result in the selection of different judges, and that far from removing the selection process from politics it merely substitutes a more elitist version of the same political game.\(^1\)

Cleavages within the Bar roughly approximate popular political divisions and indeed, at least in Missouri, the two lawyers factions have even taken over some "party" functions such as nomination of candidates and campaigning. Upper status lawyers tend to favor continuation, lower status lawyers are less favorable. Even within Bar politics there is a strong ideological component and many of the interests and values that might concern interested publics are apparently effectively raised in the Missouri Plan context.

While the final verdict on the operations and consequences of the Missouri Plan is not yet in, there is as yet little evidence to support the Bar's continued and exclusive preference for this method of judicial selection. If one were to take into account the question of public confidence, raised earlier, then perhaps other options ought to be explored. Election of judges—especially non-partisan elections—might lead to greater minority and ethnic representation, would give the public more information about how courts operate, and might well serve to reinforce rather than destroy support for the judiciary. We know that lawyers are not held in particularly high esteem by their fellow citizens, and it is thus even more difficult to sustain the elitist argument, often voiced by Missouri Plan advocates, that lawyers have special qualities which entitle them to a monopoly in the selection process, and that giving them this monopoly will result both in better judges and more general support for the judiciary.\(^2\)


\(^2\)What produces "better" judges is, in one sense, a non-question. Better in what respect? better educated? more compassionate? more common sense? smarter? There is certainly no evidence that a particular recruitment system produces better judges. See Jacob, The Effect of Institu-
I am not arguing, perhaps knowing it would be futile, that the Bar should endorse judicial elections. Nor am I proposing that lawyers play no role in the selection process. What I am saying is that in times of change some of the old premises should be re-examined. After all I suspect that few lawyers today would share the ideological opposition to economic reform which was so central to the evolution of the ABA's position against popular judicial election.

Since I am talking about public confidence, and that is almost certainly related to legitimacy, I must concede that there are some arguments, not entirely unpersuasive, that judicial elections are likely to be destructive of public confidence in the courts. It is said that the "declaratory" theory of judicial decision-making, under which a judge impersonally performs a mechanical function and exercises no individual choice, supports a myth which is necessary in securing respect for, and obedience to, judicial decisions. Belief in the ideal of a "government of laws and not of men" is said to be essential to public support for the judiciary. I am opposed to this view and agree with those who argue that the solution is to educate people to the reality rather than perpetuate the myth. A recent survey in Wisconsin showed one-third of the respondents supporting the idea of judicial candidates criticizing each other, 70 percent thought that judicial candidates should disclose their general views about relevant issues likely to come before the Wisconsin Supreme Court, and equal numbers of respondents thought that lawyers and citizens were best qualified to choose judges. Ninety percent thought that judges were doing a good job.20

On the other hand, there is some evidence, also from a Wisconsin survey, which suggests that citizens who hold the myth of mechanical judicial interpretation are more likely to support the Supreme Court as an institution.21 And a doctoral dissertation study just completed showed the possibility of a high correlation between myth-holding, the norm of obeying the law, and general support for the political system.22

One way to increase support for judicial institutions may well be to reinforce the myth-holding propensities of American citizens.

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20. Supra note 30.
But many would argue that the social costs of this endeavor are too high. Increased myth-holding is likely to result in more rather than less elite control of policy-making and a diminished role for citizens' views. And it also seems a distinct possibility that changing public attitudes about political realism and toward the disclosure of the government's business will require more rather than less openness about judges and the judicial process. If the Code of Judicial Conduct is to present the judiciary in its best public light then it should seek not the "best" image of the courts but the most accurate portrayal. And, reflecting the temper of the times, it will, or ought to, encourage the increase rather than contribute to a decrease in the contacts between judges and citizens.

Any attempt to set norms for judicial behavior must recognize the changing role of the courts. To a greater extent than ever before the courts have, in the last 30 years, functioned as positive social change policymakers. They have been called upon to decide issues previously considered unsuitable for judicial action, requiring, in many cases, considerations of data and theory beyond the scope of traditional legal knowledge and legal education. Courts have always played a representative role in the American political system. But in the past generation they have emerged as the best representatives of the black and the poor and the politically unpopular and others trying to overcome the effects of past exclusion from the political system. It is true that it has been nonelective courts which have taken the lead in advancing the "idea of progress." But there is no reason to assume that it was the way these judges were selected which made them more responsive or progressive.

In American history the courts were traditionally the voice of achievement. Now some have become, and are being asked to become even more, perhaps even too much, the voice of aspiration. In so doing they have occasionally had to leave the protective umbrella of middle-class consensus, precedent and authority. In a very real sense the courts have developed a new constituency. The new constituency is not nearly as stable in values or membership as the old. Consensus about societal goals is not only lacking but replaced by polarization. And this new constituency lacks the

weapons to protect the courts effectively in time of crisis. But, in the process they have also acquired many new problems. There are many, including the Chief Justice of the United States, who have urged the courts to forsake these new friends and return to the comfort of the tried and the true. But such a return, though not totally improbable, carries great risk for the stability of the changing society. The result is that, as Arthur Miller has so cogently argued, the legal system presently operates under almost unbearable tension. And the courts have as yet not found the way out from under. For the courts now to reject further aspirations to justice and equality would be, from the point of view of the continued need for stable change, suicidal. The increased attention which the courts have paid to the rights of the poor and the black has only highlighted the extent to which those and other groups are still treated unjustly. The initial recognition of injustice has only led to increased emphasis and heightened demands to remove the considerable maltreatment which still remains. For the courts to reject out of hand the invitation to rejoin old friends would be damaging to the courts and incomparably more damaging to the political system as a whole.

The Code of Judicial Conduct cannot solve this dilemma. But it might help to reduce the destructive tensions by giving at least symbolic support to this new and evolving judicial role. I do not think that widely shared maxims of judicial self-restraint should be rejected. But the code might at least suggest the primacy of certain substantive values such as, but not limited to, justice and equality. Except for a brief mention in Canon 1, one looks in vain for any admonition to judges along these lines.

In light of the foregoing comments I would propose consideration of the following thoughts as additions or amendments to the proposed Code of Judicial Conduct:

(1) To make it eminently clear what the courts should stand for, I would insert in Canon 3A, possibly at the end of A(1): “His primary duty is to achieve justice in each individual case, applying the law so that a fair and equitable result is achieved.” I am aware, of course, that many believe that the consistency of the law is more important than the achievement of individual equitable results. Without denying that there is some merit in the notion of consistency, I would argue that there are already strong inducements toward stare decisis and consistency but insufficient reaffirmation of the primary need to achieve justice or, at least,

to make citizens believe that justice is being done. There would be no way of enforcing this command, but there are many other statements in the Code which are equally unenforceable.

(2) At the end of Canon 3A(4), I would add: "Consistent with the above a judge should seek, as widely as time and resources permit and from any source, to obtain facts and opinions which may enhance his ability to decide a case justly." This does not imply that a judge should seek third-party accounts of the facts of a particular case. It does seek to encourage judges to decide or conduct cases with the broadest possible background of general information. There are many judges, on high courts and lower courts, who have amply demonstrated this commitment to horizon broadening. But, alas, the average general jurisdiction judge has neither the time, the resources, or the incentive to make this commitment. For him the safety of his position lies in the routinization of the law and the dependence on counsel. Again, this admonition would be unenforceable. Hopefully it would inspire some additional increment of judges to escape from the narrow intellectual confines of their chambers.

(3) I would substitute the following for Canon 7D(1)(a): "A candidate for judicial office should (a) endeavor to inform the electorate as fairly and honestly as he can about his general views on important and controversial social and political issues without announcing or promising how he would decide any particular case that might come before him, or, if he is an incumbent judge, which is presently before him for decision. He should make no pledges or promises of conduct in office other than the faithful, impartial, and compassionate performance of his duties; he should not misrepresent his identity, qualification, present position or other fact; . . ." While following this policy would help solve the problem of the ignorant or apathetic elector, it would also invite the pronouncement of popular views on questions unrelated to judicial performance. And it would countenance the proclamation of views that we dislike ("segregation now and forever") as well as encourage those that we favor. But this is not a serious problem since we know that in some jurisdictions a candidate's views of race relations or law and order or even Vietnam will not be in doubt, whatever else he may articulate as his campaign platform.
Professor Grossman's paper is a valuable contribution to this Round Table. The views of an expert in a discipline other than law have special relevance with regard to the proposed new Code. There are, however, certain statements to which I desire to make a reply. Although the disclaimer I am about to make should be obvious, I think it should be made. My response has been neither approved nor considered by the Traynor Committee.

First, Professor Grossman's statement, "It is understandable that a revision stimulated in large part by allegations against former justice Abe Fortas and Judge Clement Haynsworth should concentrate on the individual economic integrity of judges," is factually in error. I outlined at the beginning of my paper the history of the project undertaken by the Traynor Committee. Although the episodes alluded to by Professor Grossman may have underscored the need for new standards, they were not the stimuli for the revision.

I now wish to give my reaction to each of the three suggestions Professor Grossman makes at the end of his paper:

1. Duty to achieve justice. Everyone is, or should be, in favor of justice and fair and equitable application of the law. The issue is: "Should such a standard be a part of a code of conduct for judges?" My answer is "No." Professor Grossman states that such a command in the Code could not be enforced but that there are many other statements in the Code which are equally unenforceable. He doesn't point them out, and I do not know to which provisions he is referring. All standards in mandatory language in the Code are intended to be enforceable, so I am opposed to the statement of a standard in the mandatory language he suggests unless there is the expectation that it will be enforced.

I believe, as stated above, that the requirement that a judge should apply the law so that "a fair and equitable result is achieved" is misplaced as a standard in a general code of judicial conduct. The effect would be to transform every claim of injustice or inequity in a decision on the merits into a basis for challenging the judge for a violation of the ethical standard prescribed for him. The loser at trial level in many cases reversed on the merits by a higher court would have a prima facie claim of a vio-
lation of the Code against the trial judge rendering the decision. Errors by a judge in a decision on the merits, unless there is a history of them that raises the competency issue, should not be dealt with as a matter of a claimed breach of a standard of judicial conduct.

2. **Obtaining facts and opinions from any source.** Professor Grossman’s explanation of his second proposal makes it appear to be much less sweeping than the language he suggests to implement his proposal. His explanation indicates that as a minimum he is requiring that a judge do a competent job and as a maximum that he do justice in every case. The competency requirement is already prescribed in Canon 2A, and justice in every case cannot be obtained through the medium of a code of judicial conduct. A third position, and the one that is suggested to me by the tendered language, is that Professor Grossman is proposing a sweeping change in the adversary system. Such a basic change in our system should not be attempted by three lines in a code of judicial conduct. The proposal transcends the issue of ethical judicial conduct; it involves a new philosophy of trial and of the function of a judge.

3. **Campaigning for an elective judicial office.** Professor Grossman is in agreement with President Andrew Jackson’s philosophy that a close check should be kept on the judiciary through the popular election process. Professor Grossman proposes that each candidate for judicial office enter into political combat on the vital issues of the day. If the issues are of the type that cannot be settled in the judicial arena, the election to judicial office will obviously be determined on the basis of factors having nothing to do with competence in judicial office. If the issues can be settled within the judicial arena, Professor Grossman is willing to sacrifice the policies of impartiality and the appearance of impartiality on the altar of “full information” for the voter. The Committee and Professor Grossman are at opposite philosophical poles on the issue of the kind of campaigning that should be engaged in by candidates for elective judicial office.

One interesting anomaly in Professor Grossman’s position is found in the following statements by him:

But in the past generation they [the courts] have emerged as the best representatives of the black and the poor and the politically
unpopular and others trying to overcome the effects of past exclusion from the political system.

It is true that it has been non-elective courts which have taken the lead in advancing the "idea of progress".

Professor Grossman, with what I believe is a great deal of naivete, then states:

But there is no reason to assume that it was the way these judges were selected which made them more responsive or progressive.

I suggest that the processes by which the judges were selected—in most instances either appointment or a merit system type of election—played a very substantial part in the developments in the areas Professor Grossman mentions.

I appreciate the opportunity to make this short response to the proposals advanced by Professor Grossman.
Proposed Final Draft of the Code of Judicial Conduct

PREFACE

Almost fifty years ago the American Bar Association formulated the original Canons of Judicial Ethics. Those Canons, occasionally amended, have been adopted in most states. In 1969 the Association determined that current needs and problems required revision of the Canons. In the revision process, the Association has sought and considered the views of the Bench and Bar and other interested persons. In the judgment of the Association this Code, consisting of statements of norms denominated Canons, the accompanying text setting forth specific rules, and the commentary, state the standards that judges should observe. The Canons and text establish mandatory standards unless otherwise indicated. It is hoped that all jurisdictions will adopt this Code and establish effective disciplinary procedures for its enforcement.

TABLE OF CONTENTS

CANON 1
A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

CANON 2
A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

CANON 3
A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

CANON 4
A JUDGE MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

CANON 5
A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE CONFLICT WITH HIS JUDICIAL DUTIES
CANON 6
A JUDGE SHOULD REGULARLY FILE REPORTS OF COMPENSATION RECEIVED FOR QUASI-JUDICIAL AND EXTRA-JUDICIAL ACTIVITIES

CANON 7
A JUDGE SHOULD NOT ENGAGE IN POLITICAL ACTIVITY EXCEPT TO THE EXTENT NECESSARY TO OBTAIN OR RETAIN A JUDICIAL OFFICE THROUGH AN ELECTIVE PROCESS

Compliance with the Code of Judicial Conduct
Effective Date of Compliance

CANON 1
A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2
A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not voluntarily testify as a character witness.

Commentary

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject
of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

CANON 3

A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of his staff, court officials, lawyers, and others subject to his direction and control.

Commentary

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and business-like while being patient and deliberate.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be
heard according to law, and, except as authorized by
law, neither initiate nor consider ex parte or other com-
munications concerning a pending or impending proceed-
ing. A judge, however, may obtain the advice of a dis-
interested expert on the law applicable to a proceeding
before him if he gives notice to the parties of the person
consulted and the substance of the advice, and affords the
parties reasonable opportunity to respond.

Commentary

The proscription against communications concerning a proceed-
ing includes communications from lawyers, law teachers, and other
persons who are not participants in the proceeding, except to the
limited extent permitted. It does not preclude a judge from con-
sulting with other judges, or with court personnel whose function
is to aid in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court to ob-
tain the advice of a disinterested expert on legal issues is to invite
him to file a brief amicus curiae.

(5) A judge should dispose promptly of the business of the
court.

Commentary

Prompt disposition of the court's business requires a judge to
devote adequate time to his duties, to be punctual in attending
court and expeditious in determining matters under submission,
and to insist that court officials, litigants and their lawyers co-
operate with him to that end.

(6) A judge should abstain from making any extra-judicial
public statement about a pending or impending proceeding
in any court, and should require similar abstention on the
part of persons subject to his direction and control.

(7) A judge should prohibit broadcasting, televising, record-
ing, or taking photographs in the courtroom and areas
adjacent thereto during sessions of court or recesses be-
tween sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the
presentation of evidence, for the perpetuation of a
record, or for other purposes of judicial administra-

(b) the broadcasting, televising, recording, or photo-
graphing of investitive, ceremonial, or naturalization proceedings;

(c) with the consent of the parties, the photographic or electronic reproduction of appropriate court proceedings for use exclusively in the curricula of accredited law schools.

Commentary

Photography in the courtroom and broadcasting or televising court proceedings may detract from the dignity of the proceedings, distract participants and witnesses, or tend to dramatize events that should be considered dispassionately. Temperate conduct of judicial proceedings is essential to the fair administration of justice.

B. Administrative Responsibilities.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a lawyer for unprofessional conduct of which the judge may become aware.

Commentary

Disciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary body.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.
Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse, or a member of his family residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

Commentary

The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1) (d) (iii) may require his disqualification.
Roundtable Discussions
SAN DIEGO LAW REVIEW

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and members of his family residing in his household.

(3) For the purposes of this Code:

(a) the degree of relationship is calculated according to the civil law system;

Commentary

According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "member of his family residing in his household" means any relative by blood or marriage, or a person treated in fact as a relative, who resides in a judge's household;

(d) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a
“financial interest” in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a “financial interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. Remittal of Disqualification. A judge disqualified by the terms of Canon 3C (1) (c) or Canon 3C (1) (d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge’s participation, all agree in writing that the judge’s relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Commentary

This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. When a party is not immediately available, the judge may without violating this section, proceed on the written assurance of his lawyer that the party’s consent will be subsequently filed.

CANON 4

A JUDGE MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

Subject to the proper performance of his judicial duties, a judge may engage in the following quasi-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other
activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities.

Commentary

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Extra-judicial activities are governed by Canon 5.

CANON 5

A JUDGE SHOULD REGULATE HIS EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE CONFLICT WITH HIS JUDICIAL DUTIES

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if they do not detract from the dignity of his office or interfere with the performance of his judicial duties.

Commentary

Complete separation of a judge from extra-judicial activities is
neither possible nor wise; he should not become isolated from the society in which he lives.

B. Civil and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

Commentary

The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to re-examine the activities of each organization with which he is affiliated to determine if it is proper for him to continue his relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. He should not be a speaker or the guest of honor at an organization's fund raising events, but he may attend such events.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

Commentary

A judge's participation in an organization devoted to quasi-judicial activities is governed by Canon 4.
C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

*(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as an officer, director, manager, advisor, or employee of any business.

Commentary

The Effective Date of Compliance provision of this Code qualifies this subsection with regard to judges engaged in a family business at the time this Code becomes effective.

Canon 5 may cause temporary hardship in jurisdictions where judicial salaries are inadequate and judges are presently supplementing their income through commercial activities. The remedy, however, is to secure adequate judicial salaries.

[Canon 5C(2) sets the minimum standard to which full-time judges should adhere. Jurisdictions that do not provide adequate judicial salaries but are willing to allow full-time judges to supplement their income through commercial activities may adopt the following substitute until such time as adequate salaries are provided:

*(2) Subject to the requirement of subsection (1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity including the operation of a business.

Jurisdictions adopting the above substitute may also wish to prohibit a judge from engaging in certain types of businesses such as banks, public utilities, insurance companies, and other businesses affected with a public interest.]

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he
is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and, if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

Commentary

This subsection does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 7.

(5) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

Commentary

Canon 3 requires a judge to disqualify himself in any proceeding in which he has a financial interest, however small; Canon 5 requires a judge to refrain from engaging in business and from fi-
nancial activities that might interfere with the impartial performance of his judicial duties; Canon 6 requires him to report all compensation he receives for activities outside his judicial office. A judge has the rights of an ordinary citizen, including the right to privacy of his financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of his duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

(6) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. **Fiduciary Activities.** A judge should not serve as an executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with his judicial duties. “Member of his family” includes a spouse, child, grandchild, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the state, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

**Commentary**

The Effective Date of Compliance provision of this Code qualifies this subsection with regard to a judge who is an executor, administrator, trustee, or other fiduciary at the time this Code becomes effective.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

**Commentary**

A judge's obligation under this Canon and his obligation as a fiduciary may come into conflict. For example, a judge should
resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon 5C(3).

E. *Arbitration.* A judge should not act as an arbitrator or mediator.

F. *Practice of Law.* A judge should not practice law.

G. *Extra-judicial Appointments.* A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with educational and cultural activities.

*Commentary*

Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by to-day's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

**CANON 6**

**A JUDGE SHOULD REGULARLY FILE REPORTS OF COMPENSATION RECEIVED FOR QUASI-JUDICIAL AND EXTRA-JUDICIAL ACTIVITIES**

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. *Compensation.* Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. *Expense Reimbursement.* Expense reimbursement should be limited to the actual cost of travel, food, and lodging reasonably
incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Public Reports. A judge should report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. His report should be made at least annually and should be filed as a public document in the office of the clerk of the court on which he serves or other office designated by rule of court.

CANON 7

A JUDGE SHOULD NOT ENGAGE IN POLITICAL ACTIVITY EXCEPT TO THE EXTENT NECESSARY TO OBTAIN OR RETAIN A JUDICIAL OFFICE THROUGH AN ELECTIVE PROCESS

A. General Political Conduct. A judge or candidate for a judicial office should not solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, except as authorized below; he should not act as a leader or hold any office in a political organization; he should not make speeches for a political organization or candidate or publicly endorse a candidate for public office; and he should not engage in any other political activity except on behalf of measures to improve the administration of justice. The term “candidate” includes an incumbent judge and any other person seeking election to a judicial office.

Commentary

A candidate does not publicly endorse another candidate for public office by having his name on the same ticket.

An incumbent judge seeking re-election to his office under a merit system in which there is no other person competing for the office is not a candidate. [This draft does not attempt to set the standards of political conduct to be applied to a judge seeking re-
election under a merit system in the circumstance of an organized campaign in opposition to his re-election. The Committee will be grateful for suggestions on this issue.]

B. Resignation from Office. A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office.

Commentary

This section does not preclude a judge from continuing to hold his judicial office while being a candidate for election or serving as a delegate to a state constitutional convention, if he is otherwise permitted by law to do so.

C. Political Party Relationships. A judge holding an office that is filled by public election between competing candidates may attend political gatherings, and, to the extent permitted by law, identify himself as a member of a political party and pay an assessment or make a contribution to a political party or organization.

D. Campaign Conduct.

(1) (a) A candidate for judicial office may, to the extent permitted by law, identify himself as a member of a political party, pay an assessment or make a contribution to his party or organization, and speak at political gatherings on behalf of his candidacy.

(2) A candidate for judicial office should not:

(a) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; misrepresent his identity, qualifications, present position, or other fact;

(b) himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure funds for his campaign and public statements of support for his candidacy. A candidate's committees may solicit funds for his campaign no earlier than [90] days before primary election and no later than [90] days after the last election in which he participates during the election year. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers.
Commentary

Unless the state law requires the candidate to file a list of his campaign contributors, their names should not be revealed to the candidate.

[Each jurisdiction adopting this Code should prescribe a time limit on soliciting campaign funds that is appropriate to the elective process therein.]

(3) A candidate for judicial office should:

(a) prohibit court personnel subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection (2) (b) above, he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(b) maintain the dignity appropriate to judicial office, and should encourage the members of his family to adhere to the same standards of political conduct that apply to him.

COMPLIANCE WITH THE CODE OF JUDICIAL CONDUCT

A judge, whether or not a lawyer, is an officer of the judicial system who performs judicial functions, including such officers as referees in bankruptcy, special masters, court commissioners, and magistrates. All judges should comply with this Code except as provided below.

A. Part-time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C (2), D, E, F, and G, and Canon 6C;

(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.
B. Judge Pro-Tempore. A judge *pro tempore* is a person who is appointed to act temporarily as a judge.

1. While acting as such, a judge *pro tempore* is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.

2. A person who has been a judge *pro tempore* should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

C. Retired Judge. A retired judge who receives the same compensation as a full-time judge on the court from which he retired and is eligible for recall to judicial service should comply with all the provisions of this Code except Canon 5G, but he should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G. All other retired judges eligible for recall to judicial service should comply with the provisions of this Code governing part-time judges.

**EFFECTIVE DATE OF COMPLIANCE**

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may:

(a) continue to act as an officer, director, or non-legal advisor of a family business;

(b) continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family.

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836
Roundtable Discussions
SAN DIEGO LAW REVIEW

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