



Judicial Ethics and Conduct

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Steven Lubet, Williams Memorial Professor; Director, Bartlit Center for Trial Advocacy, Northwestern Pritzker School of Law: “Stop Calling Him “Judge” Napolitano” The Faculty Lounge Blog and Legal Ethics Forum Blog, March 20, 2017; “Use of Titles by Retired Judges” The Faculty Lounge Blog and Legal Ethics Forum Blog, May 8, 2017.

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Chapter 1 - Introduction and Overview

I. Introduction

The role of judge remains one of the most important in our constitutional democracy. Judges are the key component of one of the three co-equal branches of American government. They play a critical role in determining the legality of both legislation and executive action. Perhaps even more importantly, judges are at the center of the process by which the greatest numbers of citizens come into direct contact with the work of the legislative and executive branches, in our nation's courts.

It is sometimes easy to overlook the importance of an independent, professional judiciary, given the longstanding strength of the judicial branch in the United States. However, events around the world often remind us of the fragility of the rule of law and the independence of the judiciary.

Please read this article ["Lawyers Against Musharraf: Why Are Attorneys Taking to The Streets in Pakistan?"](#) by Michelle Tsai, published in Slate, November 2007.

The constitutional crisis in Pakistan continued for nearly two more years, until Musharraf's successor, Asif Ali Zardari reinstated Justice Chaudhry to his prior position in 2009. However, judicial independence remains a work in progress in Pakistan.

While independence is essential to allowing the judiciary to serve its critical role in the functioning of modern democracies, the flip side of independence is accountability. In addition to being independent, judges must be accountable, ultimately to the people in any democracy, for carrying out their functions with diligence, competence and integrity. And mechanisms must exist to enforce judicial accountability of this kind.

At the international level, following up on a series of conferences addressing government corruption generally, and in the judiciary in particular, in the year 2000 the Chief Justices of eight nations from Asia and Africa formed a Judicial Integrity Group to address the issue of judicial integrity. The countries represented were Nigeria, Uganda, Tanzania, South Africa, Sri Lanka, Karnataka State in India, Bangladesh, and Nepal. Although these countries have greatly differing legal systems, they do enjoy judicial systems with common origins. After a series of further meetings, and pilot programs in three of the participating eight countries, the Group promulgated The Bangalore Principles of Judicial Conduct. The Principles are named after the location of the second meeting of the Judicial Integrity Group, where the group considered a first draft of the Principles. The Principles are intended to meet the original members of the Group's shared goal to articulate universally accepted judicial standards which, consistent with the principle of judicial independence, could be enforced at the national level by the judiciary itself, without assistance from the legislative or executive branches. In preparing the draft, the Group did not write on a blank slate. Rather, it used as a starting point many prior national codes of judicial conduct and

regional and international instruments including the American Bar Association's (ABA) Code of Judicial Conduct and the 1985 United Nations Basic Principles on the Independence of the Judiciary. In 2003, the United Nations Commission on Human Rights passed a resolution noting the Principles and bringing them to the attention of member states to consider. The Principles have enjoyed widespread support around the world as a clear and persuasive statement of basic concepts of judicial independence and integrity. The Principles are linked from the Additional Readings list following this chapter.

II. Overview of Judicial Regulation in the United States

Despite the many challenges to judicial independence and integrity that continue to occur throughout the world, most judges in the United States carry out their essential role in our system with diligence, sincerity, and integrity. However, a small number of judges sometimes, either intentionally or unintentionally run afoul of the norms of appropriate conduct most would ascribe to the judicial function. Thus, for decades many have recognized a need for some sort of regulatory regime by which to measure the appropriateness of judicial conduct.

Until the latter half of the 20th Century, the only remedies to address judicial misconduct were the traditional procedures of impeachment or recall. Then, states began to establish judicial conduct commissions that eventually adopted a broad array of remedies to address judicial misconduct, in addition to the “all or nothing” approach of removal from the bench. By 1989, every state and the District of Columbia had some form of judicial conduct commission. These commissions were established one of three ways: by legislation; by state constitutional amendment; or by decisions of courts themselves.

For the most part, these commissions have been situated within the judicial branch itself, reducing the risk outside regulation poses to judicial independence. In most states, judicial discipline is a two-stage process. The first stage takes place before the judicial conduct commission itself.¹ Such commissions are authorized to receive and investigate complaints of judicial misconduct, and if such complaints are substantiated, bring formal charges against the judge. Such charges may be tried at a fact-finding proceeding, and the commission can issue or recommend sanctions ranging from private admonitions all the way to removal from office. The second stage of the process generally involves review of any commission action by the state's highest court. However, a few states have situated the second step of the process in some sort of separate court, independent from the highest court of general jurisdiction in the state.

California was the first state to create a judicial conduct commission, and a review of the procedures of its “Commission on Judicial Performance” provides a good general overview of how

¹ Each state has its own specific name for its judicial conduct commission. For example, in Illinois the first tier judicial regulatory body is called the Judicial Inquiry Board. In Virginia, it is called the Judicial Inquiry and Review Commission. And in Washington it is called the Judicial Qualifications Commission.

such proceedings work. The Commission reviews complaints of alleged judicial misconduct. If a complaint alleges conduct that would violate the California Code of Judicial Ethics, which is not adequately explained, the Commission will initiate an investigation. If the investigation concludes that minor misconduct did occur, an advisory letter or a private admonishment may be issued to the judge. For more serious misconduct, the Commission may issue a public admonishment or a public censure. Such sanctions occur after a hearing unless the judge agrees to waive a hearing. For cases of persistent and pervasive misconduct, a judge may be removed from office. A judge who is incapable of performing the duties of the office may be medically retired. If any of the more serious sanctions is imposed, the judge may seek review in the California Supreme Court.

In 2016, the California Judicial Conduct Commission disposed of 1,210 complaints. Of these, 1,079 were closed after an initial review. Eighty-one complaints were closed after an investigation without a sanction being issued. In terms of sanctions, 26 complaints resulted in an advisory letter, 11 in a private admonishment, 6 in public admonishment, 1 in public censure, 1 in removal from the bench, and 5 judges retired or resigned while proceedings were pending.² To put these numbers in context, California has more than 2,000 judicial officers.³

Of course, in the federal system, the federal courts are responsible for policing the conduct of federal judges. In 1973, the federal courts adopted a Code of Conduct for United States Judges. In 1980, Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act,⁴ which authorizes judicial councils in each of the 13 federal appellate circuits. These councils review complaints against judges and order sanctions against judges where appropriate. However, because the only mechanism for removing a federal judge from the bench involuntarily is through Congressional impeachment, that highest sanction is not available to judicial councils. However, a range of less serious sanctions are available in the case of federal judicial misconduct.

The ABA has also promulgated Model Rules for Judicial Disciplinary Enforcement that states may adopt as binding authority for a particular jurisdiction.

III. The ABA Model Code of Judicial Conduct

The ABA promulgated its original Canons of Judicial Ethics in 1924. The Canons were drafted by a committee headed by Chief Justice William Howard Taft, and were intended to set forth aspirational ideals, rather than enforceable standards by which sanctions could be issued for inappropriate behavior.⁵ The ABA promulgated its first Model Code of Judicial Conduct (CJC) in 1972. A revised code was adopted in 1990, and another in 2007. Unlike the original Canons,

² State of California, Commission on Judicial Performance, 2106 Annual Report, 14.

³ Judicial Council of California, Fact Sheet, California Judicial Branch, January 2015.

⁴ Appearing at 28 U.S.C. §§ 331, 332, 351 *et seq.*

⁵ Charles Gardner Geyh, James J. Alfini, Steven Lubet, Jeffrey M. Shaman, JUDICIAL CONDUCT AND ETHICS § 1.03 (5th ed. 2013).

the first Model Code and its successors were designed to provide an enforceable set of standards for judicial behavior which would be appropriate for enforcement through a system of sanctions.

Of course, like its analogue which regulates lawyers' ethics, the ABA's Model Rules of Professional Conduct, the CJC has no binding force in and of itself. Only when it is adopted by an entity at the state or federal level that actually has the authority to regulate judges do these model provisions acquire the force of law. However, as of this time, most state and federal judicial conduct codes are based on at least one of the versions of the ABA Code of Judicial Conduct. Thus, the Code itself forms a good basis for a generally applicable study of the topic of judicial ethics and conduct. Further, the National Conference of Bar Examiners (NCBE) has decided to include the ABA's Model Code of Judicial Conduct within the scope of the material tested on the Multistate Professional Responsibility Exam (MPRE). All 50 states require applicants to take and achieve a minimum score on the MPRE in order to be licensed to practice law in the jurisdiction. It is true that only a small portion of the MPRE focuses on the CJC. Of the test's 60 questions, only 2-8% of them are based upon the CJC. The remaining questions are based upon the ABA's Model Rules of Professional Conduct, which address ethics issues for attorneys. Despite the comparatively low emphasis on the CJC on the MPRE, an applicant wishing to take and pass the MPRE on the first try meaningfully enhances their chances of passing the exam by entering the exam with a solid working knowledge of the CJC. Thus, a focus on the provisions of the CJC will be a central component of this text. Indeed, it is intended that students will review the specific provisions of the CJC in conjunction with the corresponding material in this text, and that the Code provisions themselves be assigned as supplemental reading. The following subsections introduce generally the various components of the CJC. Overall, the chapters in this book will be organized according to the five broad subject areas within the CJC that the NCBE has identified as falling within the scope of the MPRE. These are: Maintaining the independence and impartiality of the judiciary (Chapter 2); Performing the duties of judicial office impartially, competently, and diligently (Chapter 3); Ex parte communications (Chapter 4); Disqualification (Chapter 5); and Extrajudicial activities (Chapter 6).

A. Preamble

The CJC begins with a short preamble. It states the importance of an independent, fair, and impartial judiciary to our system of justice. It recognizes the importance of public confidence in the integrity of the judiciary. It sets forth the Code's intent to provide guidance to judges in maintaining the highest standards of conduct both on and off the bench.

B. Scope

The next section of the Code identifies its scope. It basically identifies the various types of provisions that appear in the Code. These will be described in greater detail in the following sections.

C. Terminology

The terminology section of the Code provides definitions of key terms that appear with some frequency throughout the Code. Where one of the terms that appears in this section recurs later in the Code, an asterisk is provided so that the reader knows they can find a definition for that term in the terminology section.

D. Application

This section of the Code notes that while all of its provisions apply to full-time judges, some of the Code's sections do not apply to judges who serve on only a temporary or a part-time basis. This section goes into great detail in specifying which provisions apply to which categories of judges and under what circumstances.

E. Canons

The Canons are a carryover from the ABA's initial foray into judicial conduct regulation. They state "overarching principles of judicial ethics that all judges must observe."⁶ However, the Canons themselves do not set forth standards that can form the basis for judicial discipline. That authority is reserved to the Rules. There are four Canons included in the Code. They are as follows:

1. A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
2. A judge shall perform the duties of judicial office impartially, competently, and diligently.
3. A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of a conflict with the obligations of judicial office.
4. A judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.

⁶ ABA, MODEL CODE OF JUDICIAL CONDUCT, SCOPE, ¶ 2.

F. Rules

Each Canon has a series of Rules that follow it. The Rules are numbered according to the Canon they relate to. For example, the Rules that relate to Canon 1 are numbered 1.1, 1.2, and 1.3.⁷ Many of the Rules contain multiple subsections. The Rules are the heart of the Code, and they contain enforceable standards that judges can be disciplined for violating, although some of the Rules contain permissive language such as the words “may” or “should,” which give judges discretion as to how to interpret the Rules, while other Rules contain mandatory language such as “must” or “shall,” which judges are required to abide by. The Code makes clear that the Rules are only intended to set forth a basis for judicial discipline, and are not intended to create a basis for civil liability.

G. Comments

Many of the Rules are followed by a series of Comments. The Comments are not intended to set forth binding standards, but rather are intended to serve as guides to interpreting the Rules themselves. The comments further provide aspirational standards for judges to follow in attempting to achieve the highest standards for the role of judge.

IV. Additional Reading

1. Nihal Jayawickrama, *Developing a Concept of Judicial Accountability – The Judicial Integrity Group and The Bangalore Principles of Judicial Conduct*, 28 COMMW. L. BULL. 1091 (2002).
2. James J. Alfini, Shailey Gupta-Brietzke, & James F. McMartin IV, *Dealing With Judicial Misconduct in the States: Independence, Accountability and Reform*, 48 S. TEX. L. REV. 889 (2007).
3. ARTHUR H. GARWIN, MARY McDERMOTT, DENNIS RENDLEMAN, ANNOTATED MODEL CODE OF JUDICIAL CONDUCT (AMERICAN BAR ASSOCIATION, 3RD ED. 2016).
4. CHARLES GARNDER GEYH, JAMES J. ALFINI, STEVEN LUBET, JEFFREY M. SHAMAN, JUDICIAL CONDUCT AND ETHICS (LEXISNEXIS 5TH ED. 2013).

⁷ The 1972 and 1990 versions of the Code contained a different numbering scheme. Because many states have not updated the versions of the Code they adopted since promulgation of the 2007 version, many of the opinions contained in this book make reference to the numbering scheme contained in the prior versions of the Code. However, most of the provisions from the earlier versions, particularly those referred to in the materials contained in this book, have direct analogues in the most recent version of the Code.

5. Cynthia Gray, Ethical Standards for Judges (American Judicature Society 1999), available at <https://perma.cc/3S6A-PML7>, last visited May 31, 2017.
6. United Nations and the Rule of Law - [The Bangalore Principles of Judicial Conduct](#).

Chapter 2 – Maintaining the Independence and Impartiality of the Judiciary

I. Introduction

Canon I of the Code of Judicial Conduct (CJC) requires judges “to **uphold and promote the independence, integrity, and impartiality of the judiciary**” and to “**avoid impropriety and the appearance of impropriety.**”⁸ In turn, three Rules appear in the CJC under Canon 1. The first requires judges to comply with the law.⁹ The second requires judges to act at all times in a manner that promotes public confidence in the judiciary.¹⁰ It also calls upon judges to avoid impropriety and “even the appearance of impropriety” in their conduct on and off the bench.¹¹ The third requires judges to avoid using the prestige of judicial office to advance the personal economic interests of the judge or others.¹² The following sections discuss each of these duties.

II. Compliance with Law

A judge’s duty to comply with the law has at least two components. The first relates to the judge’s duty to comply with the law while exercising their judicial function – in other words, to follow binding case authority, statutory and constitutional provisions, etc. The second relates to the judge’s personal compliance with the law when not acting in their judicial capacity, for example in the judge’s personal life. The first form of compliance with law will be addressed in the next chapter. In this section of this chapter, we will focus on judge’s compliance with law in their off bench activities. Not surprisingly, judges have faced discipline for conduct that would be considered illegal if engaged in by a person who is not a judge. Consider the following case.

In Re Matter of O’Connor
Supreme Court of New Jersey

124 N.J. 18 (1991)

This is a judicial disciplinary proceeding. A formal complaint was filed with the Advisory Committee on Judicial Conduct against the respondent, Michael R. Connor, Judge of the Superior Court. The complaint charged respondent with violations of motor-vehicle laws, namely, driving under the influence of intoxicating liquor, leaving the scene of an accident, and driving in a careless manner. The complaint also charged respondent with making false statements to the investigating

⁸ ABA Code of Judicial Conduct, Canon 1.

⁹ Id. at Rule 1.1.

¹⁰ Id. at Rule 1.2.

¹¹ Id.

¹² Id. at Rule 1.3.

police officer in connection with the charged motor-vehicle offenses. Respondent's conduct, according to the complaint, violated several Canons of the Code of Judicial Conduct, as well as Rules of Court. Respondent filed an answer in which he admitted essentially all of the allegations of the complaint and sought to explain his actions.

The Committee conducted a formal hearing on the charges, during which it reviewed all of the evidence, including respondent's conviction based on a guilty plea to the charged offenses and the testimony of respondent and other witnesses. The Committee found by clear and convincing evidence that respondent was guilty of violating the ethical standards set forth in the Canons and Rules. Finding mitigating circumstances, the Committee recommended that respondent be reprimanded.

I.

The facts are not disputed. Respondent had been an Atlantic County Superior Court Judge since 1979. On Monday, April 16, 1990, respondent left the Atlantic County Courthouse and drove to his home in Linwood, arriving at approximately 5:00 p.m. There he consumed a significant amount of alcohol and subsequently decided to return some books to the library. While driving in a westerly direction on Ocean Heights Avenue in Egg Harbor Township, he failed to realize that the vehicle ahead of him was slowing down to make a left turn. Respondent attempted to go around that vehicle on the right, but his left front bumper struck the right rear of the vehicle. The respondent left the scene at a high rate of speed, substantially in excess of the fifty miles-per-hour speed limit. He turned right off Ocean Heights Avenue onto English Creek Road and turned right again onto Mill Road. Approximately two miles from the accident scene, respondent lost control of his vehicle, which left the road, struck some trees, and came to a stop in a wooded area.

The vehicle that respondent had struck was being driven by Holly J. Bennett, whose three young children were passengers. After being struck, Ms. Bennett followed respondent, catching up to him after respondent's car came to a final stop off the side of Mill Road. Several police officers soon arrived. Following a brief investigation at the scene, they arrested respondent. He underwent two breathalyzer tests, which produced blood alcohol levels of .17 percent and .16 percent, respectively. Respondent was charged with the motor-vehicle offenses recited in the complaint.

On April 23, 1990, respondent appeared before a Judge of the Superior Court and pled guilty to all of the charges. On the charge of driving while intoxicated, the court sentenced respondent to a seven-month suspension of his drivers' license, a fine of \$300, and twelve hours' attendance at an intoxicated-drivers resource center; on the careless driving charge, the court fined respondent \$50; on the charge of leaving the scene of an accident, the court imposed an eight-month drivers-license suspension and a fine of \$250. In addition to those sanctions, respondent was required to pay insurance surcharges imposed by the Division of Motor Vehicles.

II.

We are entitled to give conclusive effect to respondent's convictions. In this case, respondent's conviction established his violations of the motor-vehicle laws. We do not view offenses arising from the driving of an automobile while intoxicated with benign indulgence. They are serious and deeply affect the safety and welfare of the public. They are not victimless offenses.

We concur in the determination of the Committee that respondent's convictions establish by clear and convincing evidence his violation of the following *Canons* of the *Code of Judicial Conduct*: Canon 1, which requires a judge to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved; *Canon 2*, which requires a judge to avoid impropriety and the appearance of impropriety in all activities; and *Canon 2A*, which requires a judge to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. We also concur in the Committee's determination that respondent engaged in conduct that was prejudicial to the administration of justice and brought the judicial office into disrepute, in violation of *Rule 2:15-8(a)(6)*. The Committee stated:

Respondent's conduct was clearly reprehensible. Judges must observe the highest standards of conduct, in both their professional and personal lives. The offenses committed by Respondent, particularly that of driving while intoxicated, have great societal significance. Though Respondent received the same legal penalties as any other citizen under the circumstances, he violated the law that he swore to uphold. The public good required that a judge act at all times in compliance with the law; for a judge to act otherwise erodes public confidence in the judiciary.

Although in judicial and professional disciplinary proceedings we give conclusive effect to a conviction to establish the occurrence of unethical conduct, we may, and should, examine the surrounding circumstances and underlying facts in determining the nature and extent of discipline. That examination in this case discloses aggravating circumstances that bear on appropriate discipline. Those aggravating factors affect our consideration of each of the offenses. The drunk-driving offense resulted in an accident with another vehicle. The offenses of leaving the scene and careless driving were particularly egregious. The former, itself a serious offense, bespeaks a denial of responsibility and a disregard for the proper enforcement of the laws. The careless driving entailed not only an accident with another vehicle, endangering its occupants, but a high-speed chase, presenting significant risks to other innocent persons. As serious are the circumstances that followed those offenses. Rather than simply refusing to discuss the incident with the investigating officers following the commission of these offenses-which respondent had the legal right to do, aside from whether it was morally and ethically proper for him to do so-respondent lied about being involved in any accident and, worse, tried to cast blame on the victim.

Respondent's careless driving created hazards well beyond those entailed in the initial collision between his vehicle and Ms. Bennett's. According to the record, Ms. Bennett gave a statement at the police station, which was admitted into evidence. The statement recited that following the collision, respondent

was going very fast trying to get away from me. He passed 2 cars one on the left and one on the right.... I saw him next, he was on the side of the road and the side of the car was smashed in. It looked like he had skidded quite a bit up the road.

Ms. Bennett also filed a certification with the Committee that was admitted in evidence. That certification was consistent with the statement given to the police, indicating that respondent left the scene, passing cars on the right and left.

Officer Catania, one of the responding officers at the scene, testified at the hearing. His police report, which was admitted in evidence, contained a summary of Ms. Bennett's description of the initial collision and the subsequent chase. The report also contained a description that reconstructed the final accident, indicating that respondent's vehicle had travelled partially off the road for approximately seventy feet and had crossed back and forth over the highway, finally leaving the road and coming to a stop with its right side striking a group of trees.

In addition, respondent's offense of leaving the scene of the accident was itself compounded by conduct that obstructed the investigation of the accident. The police report contained Ms. Bennett's statement that after she caught up to respondent,

I got out of my truck and started yelling at him and he tried to leave. When he couldn't get his car out he got out of the car and walked across the street and talked to the people over there. He then got back into his car a couple minutes later and tried to leave again. (He did get his car out of the dirt). I told him not to leave because the police were coming and he was still going to leave. Then the police came.

In a similar vein, Ms. Bennett certified:

I pulled up along the side of the car. I got out of my truck and went over to the car and began yelling at the driver. The engine was running in the car and the driver ignored me and attempted to drive the car out of the dirt. His windows were up.... I then yelled at the driver that he couldn't leave but it didn't really matter since I had his license plate number.

Ms. Bennett further certified that after the police arrived,

[t]he driver turned off the car and threw his hands up in the air.... The driver then got out of the car and made a statement to the police to my best recollection: "I don't know what she's going to tell you but she was chasing me and tried to run me off the road."

Officer Catania's police report also noted that respondent "did not wish to give a statement." The report further indicated, however, that when respondent did give a version of the accident on Mill Road, it was that "a vehicle was bearing down on him" and that "he started pulling over to the right to let the other vehicle go by and he lost control of his vehicle." The report also noted that the vehicle sustained damages to the left front portion, but respondent "refused to answer how his vehicle obtained the left front damage or how fast he was traveling when his accident occurred."

Similarly, the testimony of Officer Catania indicated that respondent first denied being involved in an accident with Ms. Bennett, and then gave a false version of the second accident. Officer Catania testified that

[respondent] stated to me there was-he was traveling down Mill Road, a vehicle was bearing down on him very quickly and he was pointing to the blue pickup truck that was parked in front of him. He said he pulled off to the side of the road to let the vehicle go by because he thought it was going to hit him in the rear, and he-when he went on to the shoulder of the road to let the vehicle go by, he lost control of his vehicle and hit the trees.

* * * * *

I asked the driver, Mr.-Judge Connors [sic], if he had hit the blue pickup truck on Ocean Heights Avenue.

Q What did he respond?

A He said, no he did not.

Further, the facts indicate that respondent did not initially cooperate or agree to take a breathalyzer test, insisting first that he receive Miranda warnings. However, he ultimately consented. Following his arrest and the breathalyzer tests, respondent was released in the custody of his wife. Later that evening, respondent visited Assignment Judge Richard J. Williams at his home and reported what had occurred.

Notwithstanding respondent's egregious conduct at the time of the incident, there are significant mitigating factors in connection with this episode. On the day following the accidents and arrest, respondent called Ms. Bennett to inquire about her condition and that of the passengers in her vehicle. He apologized to Ms. Bennett for the accident and offered to pay for any damages that she had incurred. Next, he wrote a series of letters to Atlantic County judges explaining what he had been charged with, admitting guilt to all the charges, and apologizing for the incident.

Respondent then called Seabrook House, a clinic specializing in the treatment of substance abuse, and scheduled an interview for that day. The respondent had an interview with a counsellor from Seabrook House who recommended an inpatient treatment program. Recognizing the extent of his drinking problem, respondent decided to enroll in a thirty-day residential treatment program. Later that day, respondent prepared and released to the press a written statement acknowledging responsibility for his actions and offering a general apology.

Immediately after the court hearing, respondent entered Seabrook House for a thirty-day residential treatment program. Following his release from Seabrook House, respondent enrolled in a prescribed outpatient program, consisting of weekly group-therapy sessions run by a counsellor and individual counselling sessions with a therapist. Additionally, respondent followed a recommended course of three meetings per week at Alcoholics Anonymous. He also has a sponsor, an attorney with whom he speaks at least once each week.

The Committee properly considered all of the mitigating circumstances following respondent's arrest. It also fairly accepted and emphasized respondent's explanation of his conduct immediately following the accidents, namely, that respondent's behavior was attributable to panic, confusion, and fear of embarrassment. Accordingly, the Committee recommended that respondent be reprimanded, but receive "less than a suspension or removal from judicial office because of the above related circumstances." It noted that:

The Respondent has explained that his conduct was the product of his problem with alcohol. However, there is no evidence that Respondent's drinking problem impaired his judicial performance. To the contrary, Respondent has enjoyed an otherwise unblemished judicial career. A number of attorneys submitted written statements expressing the highest regard for Respondent, both as a judge and a person. The Committee has also taken into account Respondent's acknowledgement of his problem, albeit too late to prevent the underlying accident, and his voluntary admission into an intensive treatment program. Respondent has assured the Committee that he intends to continue his treatment; he acknowledges a lifelong commitment to abstention from any consumption of alcoholic beverages.

The Committee gave appropriate weight to "[respondent's] past judicial record, the fact that the condition was not directly related to his judicial functions, the aberrational nature of the conduct, his recognition of his alcohol problem, and the remedy he is following," determining that respondent "be required to continue his participation in counselling and that his participation be monitored periodically and accompanied by reports to the Supreme Court."

We acknowledge and give the same weight to most of the mitigating circumstances that influenced the Committee to impose lenient discipline—respondent's acknowledgment of guilt, his contrition,

his public apology, his genuine self-confrontation and commitment to rehabilitation, the absence of a prior record of misconduct, and his exemplary personal and professional reputation. Other alleged mitigating factors, however, are not entitled to the weight assigned by the Committee. Although respondent did not, to his credit, attempt to take advantage of his judicial office, the police on the scene quickly learned he was a judge, albeit nothing more was made of that. Further, while the post-accident events involving the on-the-scene investigations moved swiftly, it does not appear that respondent's cooperation was immediately forthcoming. Respondent did not completely respond to police inquiries concerning the accident, giving evasive or false answers.

Moreover, we cannot overemphasize several aggravating factors. Aside from the gravity *per se* of the motor vehicle violations, the drunk driving offense resulted in an accident involving innocent people; the offense of leaving the scene of the accident not only served to interfere with proper law enforcement but placed the victims of the accident potentially in greater jeopardy; and the careless driving offense clearly posed added dangers to other innocent persons. Further, respondent engaged in other deleterious conduct. When confronted after the final accident, he attempted to leave the scene; he did not respond initially to the investigating officers; and when he did respond, he denied being involved in a prior accident and blamed the victim for the incident.

We have felt in other cases involving judicial misconduct that a public reprimand is fitting disciplinary action with respect to drunk driving and possibly a derivative driving offense. In each of those cases, the judge had no prior record of personal, professional, or judicial misconduct, possessed a well-deserved judicial reputation of excellence, and most importantly, was sincerely contrite and genuinely determined to achieve sobriety and rehabilitation. Those factors redound as well to respondent.

That portrait, however, does not fully depict respondent. The regrettable post-accident circumstances that aggravated the situation were understandably, although not excusably, the result of common human failings: panic, confusion, and overwhelming mortification. They were not the by-product of an evil or antisocial mindset. Nevertheless, discipline in this case calls for more than the sanction found appropriate in other cases because the ethical transgressions in their totality are more serious. Respondent's offenses went beyond drunk driving, posing an actual serious risk to the safety of others, as well as to the proper and effective administration of important laws affecting public safety.

Accordingly, we order that respondent be censured. We determine that this form of discipline denotes a harsher sanction than a reprimand and reflects the more egregious character of the underlying misconduct than that surrounding the misdeeds of other judges heretofore charged with comparable motor-vehicle violations. The censure that we here impose stands in order of severity between a reprimand and formal suspension of the exercise of judicial duties or removal from judicial office. We decline under the circumstances to impose on respondent a suspension from

judicial service. That, we believe, is contraindicated because of his good record as a judge and because his transgressions do not directly affect the performance of his judicial duties. We further impose additional sanctions: respondent shall be required to continue to participate actively in rehabilitative programs, and shall be disqualified from presiding over any cases involving drunk driving until his rehabilitation becomes secure.

Discussion Question

Do you believe that the sanction ordered in *O'Connor* – censure – was appropriate in light of the legal violations committed by the judge? In a later judicial discipline case, *In Re Matter of Collester*, 126 N.J. 468 (1992), the New Jersey Supreme Court suspended a judge for two months without pay for a conviction for speeding and driving under the influence. The Court distinguished *O'Connor* on grounds that *Collester* involved a second offense for DUI, while Judge O'Connor was a first-time DUI offender. *Id.* at 475.

Not surprisingly, judges have been disciplined for committing a wide range of violations of law unrelated to the performance of their judicial duties. In addition to driving under the influence, judges have been sanctioned in conjunction with the following offenses: 1) theft; 2) drug use; 3) tax evasion; 4) solicitation of prostitutes; 5) assault; and 6) domestic violence. For citations to cases involving these and many more violations of law by judges, *see* Arthur H. Garwin, Mary T. McDermott & Dennis A. Rendleman, *Annotated ABA Model Code of Judicial Conduct* (3d ed. 2016), Rule 1.1.

It is important to note that a criminal conviction is not required in order for a judge to be disciplined for violating the law. Consider the following case.

In Re Matter of Hensley N.Y. Comm'n on Jud. Conduct (2012)

The respondent, Paul M. Hensley, a Judge of the District Court, Suffolk County, was served with a Formal Written Complaint dated October 26, 2010, containing one charge. The Formal Written Complaint alleged that respondent attended and participated in unlawful, for-profit poker games. Respondent filed an amended Answer dated May 16, 2011.

On June 5, 2012, the Administrator, respondent's counsel and respondent entered into an Agreed Statement of Facts stipulating that the Commission take its determination based upon the agreed facts, recommending that respondent be censured and waiving further submissions and oral argument. The Commission had rejected an earlier Agreed Statement.

On June 14, 2012, the Commission accepted the Agreed Statement and made the following determination.

1. Respondent has been a Judge of the District Court, Suffolk County, since 2002. His current term expires on December 31, 2014. He was admitted to the practice of law in New York in 1987.
2. During 2008, respondent was an announced candidate for the position of District Court Judge and was actively campaigning for that position.
3. From August 13, 2008, to November 5, 2008, respondent attended and/or participated in numerous for-profit poker games called "Texas Hold 'Em" held at a facility owned and operated by the Fraternal Order of Eagles ("FOE") in Northport, New York.
4. Respondent is a member of the FOE but has never been an officer or otherwise managed its business affairs. It was well known among the membership that respondent was a judge.
5. From August 13, 2008, to November 5, 2008, the FOE rented its facility on Wednesday evenings, for \$300 per time, to an individual named Frank Servidio, who organized and hosted the poker games on those evenings. On the nights that respondent attended, card games were usually taking place at one or two tables, with a dealer at each table provided by the host. In such games, it is called "raking the pot" when the dealer takes money from the ante or "pot" for the benefit of the "house" or host/organizer.
6. There were tournament games, in which players paid entry fees of \$120, and the evening's top three or four winners were awarded prizes ranging from \$300 to \$1250, depending on the number of participants. There were also "cash games," in which participants at the table played against each other for individual stakes, with a minimum buy-in of \$200.
7. The players included members of the FOE and their guests, or guests of Mr. Servidio, the host. Among the players in attendance on one or more occasions was a Suffolk County police officer.
8. While it is a crime under the New York State Penal Law to advance or profit from unlawful gambling activity, and to run (A) a for-profit game in which the dealer "rakes the pot" for the benefit of the "house" or (B) a tournament game where all the entry fees are not paid out in prizes to the players, it is not unlawful to attend gambling events, or to participate as a player.

9. On August 13, 2008, respondent participated in a for-profit tournament card game at the FOE. The total amount of the prizes paid out was less than the amount of entry fees collected from the players; the remaining funds were kept by the "house." Respondent understood that a cash game was scheduled to start later; however, respondent left the premises prior to the start of the cash game.

10. On August 20, 2008, respondent participated in a for-profit tournament card game at the FOE and observed prizes being paid to tournament winners from the pot. The total amount of prizes paid out was less than the amount of entry fees collected from the players; the remaining funds were kept by the "house."

11. On September 10, 2008, respondent attended for-profit cash card games at the FOE during which the dealer "raked the pot," but respondent did not play in such games.

12. Between October 1 and 8, 2008, respondent learned from other card players at the FOE that a Suffolk County police sergeant had come to the facility to investigate a complaint regarding an illegal Texas Hold 'Em poker game and noise. Respondent had not been there at the time. No arrests were made, and no additional action was taken.

13. On October 8, 2008, respondent went to the FOE to play cards. Smoking is not permitted inside the facility. Respondent did not observe anyone smoking cigarettes or marijuana inside or outside the FOE. However, on prior occasions he thought it possible that when some players stepped outside for a break, some may have smoked marijuana.

14. In the course of conversation on October 8, 2008, during and between card games, respondent and other players commented on the possibility that the police would return to the FOE one day. In that context, respondent said it would be a good idea to "get rid of your pot," to which one player responded, "I don't have any," to which respondent replied, "I'm not suggesting you do."

15. On October 22, 2008, respondent attended for-profit cash card games at the FOE during which the dealer "raked the pot," but respondent did not play in such games.

16. On November 5, 2008, respondent arrived at the FOE at approximately 11:45 PM, to celebrate his having been re-elected to District Court the day before. Respondent had been at other election celebrations earlier in the evening, including one at the local Knights of Columbus and one at his campaign manager's home.

17. Approximately eight other men were present, with a congratulatory ice cream cake in honor of respondent's re-election.

18. Although others may have been playing poker before respondent arrived, respondent himself did not play. About ten minutes after respondent arrived at the FOE, before the celebratory cake was eaten, four officers from the Suffolk County Police Department arrived and executed a search warrant of the premises.

19. At least some of the officers in attendance already knew respondent was a judge. In response to police officer inquiries that all in attendance identify themselves and produce identification, respondent showed Detective Anthony Schwartz his New York State Driver's license and judicial identification card. Respondent also asked to speak to the "person in charge" and was directed to Lieutenant William Madigan.

20. Respondent and Lieutenant Madigan spoke in the kitchen of the FOE. Referring to the celebratory cake, respondent said he had been re-elected to the bench the day before, was at the FOE to celebrate, and had not played in any card games that night.

21. Lieutenant Madigan asked respondent if he would be conducting any arraignments that might eventuate from the search warrant then being executed at the FOE. Respondent responded that he was not assigned to arraignments.

22. Lieutenant Madigan asked respondent who was running the gaming tables, and respondent said he did not know because he only just arrived, but the Lieutenant could find out by determining who was sitting in the dealer's chair at each table. Respondent did not know whether one or two tables had been in use for poker before his arrival. Respondent said he knew that many of the people in attendance were members of the FOE.

23. While the police on the scene were talking to other players, respondent was approached by a man whom he recognized as a card player from previous visits to the FOE. Unknown to respondent, the man was an undercover police officer. The man asked what respondent would do if the police asked him questions, and respondent said that he did not want to make a statement.

24. Frank Servidio, the host, was arrested and charged with gambling related offenses. The charges were eventually disposed of on consent of the District Attorney with an Adjournment in Contemplation of Dismissal and were dismissed on July 23, 2009.

25. Neither respondent nor any of the other players were arrested or charged with any offenses. The police did not accord respondent special consideration or otherwise treat him differently than any of the other players at the FOE.

Additional Factors

26. Respondent's participation in the poker games did not violate any law, and he was not arrested or charged with a crime.

27. Respondent recognizes that his participation in for-profit tournament games and presence at for-profit cash games was inconsistent with his role as a judge and his obligation to respect and comply with the law, because he was voluntarily in the presence of those who *were* violating the law by operating such games. He acknowledges that, at least, he should have left the premises upon observing that illegal games were taking place.

28. Respondent is extremely remorseful and assures the Commission that such lapses in judgment will not recur. Respondent avers that he has not attended any gambling tournaments or similar events since November 5, 2008.

29. Respondent has never before been disciplined by the Commission.

30. Respondent has submitted significant evidence of his good character.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.2(e), 100.4(A)(2) and 100.4(A)(3) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge I of the Formal Written Complaint is sustained, and respondent's misconduct is established.

Both on and off the bench, judges are held to higher standards of conduct than members of the public at large and ... relatively slight improprieties subject the judiciary as a whole to public criticism and rebuke. As the Court of Appeals has stated:

Standards of conduct on a plane much higher than for those of society as a whole, must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved. A Judge must conduct his everyday affairs in a manner beyond reproach. Any conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function ...

[Citations Omitted.] Under the facts presented in this record, respondent's participation as a player in unlawful, for-profit poker games violated these standards and reflects adversely on the judiciary as a whole.

While it has been stipulated that respondent's involvement in gambling activities as a player did not violate the law, the person or persons who ran and profited from the games were engaging in criminal conduct, as respondent should have been recognized. Thus, respondent and the other players who participated in the poker games made it possible for the crimes to occur. Significantly, even after learning that a police sergeant had come to the premises to investigate a complaint about the poker games, respondent continued to attend the games. This reckless behavior showed extremely poor judgment. Moreover, since respondent's judicial status was well known at the facility, his presence at and participation in the games gave his judicial imprimatur to this unlawful activity.

Respondent compounded his misconduct by his behavior when the police arrived to execute a search warrant and arrested the individual who organized and hosted the event. During these events, respondent made two gratuitous references to his judicial status, conveying an appearance that he was asserting his judicial position to obtain special treatment. Initially, when asked for identification, he identified himself as a judge by providing his judicial identification card while asking to speak to someone "in charge." Then, after being directed to another officer, he again referred to his judicial office, volunteering that he had just been re-elected to the bench. By interjecting his judicial status into the incident, respondent conveyed an appearance that he was seeking special consideration because of his judicial office. In addition, by advising another player (an undercover officer) that he did not want to make a statement to the police, respondent gave legal advice to one of the participants in the incident, which was, in itself, inconsistent with his role as a judge.

In its totality, respondent's conduct showed insensitivity to the high ethical standards incumbent on judges and detracts from the dignity of judicial office. Such conduct affects public confidence in the integrity of the judiciary even though it is unrelated to respondent's performance on the bench. In considering the appropriate sanction, we note that respondent has no previous disciplinary record, is remorseful and has acknowledged that his conduct was inconsistent with his obligations as a judge. By reason of the foregoing, the Commission determines that the appropriate disposition is censure.

III. Promoting Public Confidence in the Judiciary

It is frequently said that unlike the other two branches of government, the judiciary lacks the power of the purse or the lawful use of force to compel compliance with its decisions. Rather, it is public acceptance of the legitimacy of its processes and the wisdom of decisions that leads to the

enforceability of judicial decision making. Thus, maintaining public confidence in the judiciary is a critical role for judges to play. Rule 1.2 of the CJC requires judges “to act in a manner that at all times promotes public confidence in the independence, integrity, and impartiality of the judiciary.” It also requires judges “to avoid impropriety and the appearance of impropriety.” One common way that judges can undermine public confidence in the judiciary is by demonstrating an inappropriate demeanor while on the bench. The next section offers a graphic example of a judge whose demeanor on the bench undermined public confidence in and respect for the judiciary. The section after that discusses some other situations where judges have been disciplined for engaging in conduct that undermines confidence in the judiciary. Finally, the section after that discusses Rule 1.2’s “appearance of impropriety” standard, and some examples of discipline imposed pursuant to it.

A. Demeanor on the Bench

Inquiry Concerning Judge DeAnn M. Salcido California Commission on Judicial Performance (2010)

* * *

III DISCIPLINE

Article VI, section 18, subsection (d) of the California Constitution provides that the commission may "censure a judge ... for action ... that constitutes willful misconduct in office, .. or conduct prejudicial to the administration of justice that brings the judicial office into disrepute." Judge Salcido concedes that her conduct as stipulated in the first two counts was prejudicial to the administration of justice that brings the judicial office into disrepute (prejudicial misconduct) and that her conduct as stipulated in the third count constitutes, at minimum, prejudicial misconduct. The purpose of a commission disciplinary proceeding is "the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity ... of the judicial system." (Citations omitted).

The commission concludes that this purpose is best served by the discipline proposed in the Stipulation: a public censure with an agreement that Judge Salcido will resign and will not at any time seek or hold judicial office in California or seek or accept judicial assignment from any California state court.

Judge Salcido admits that she engaged in thirty-nine separate instances of prejudicial misconduct. "The number of wrongful acts is relevant to determining whether they were merely isolated occurrences or, instead, part of a course of conduct establishing lack of temperament and ability to perform judicial functions in an even-handed manner." [Citation.] (Citations omitted). The numerous incidents of misconduct as described in the stipulated facts cannot be characterized as

isolated occurrences. Rather, they establish a pattern of misconduct which demonstrates a temperament ill-suited for judicial office.

In many instances, Judge Salcido's misconduct made a mockery of the judicial system. She used her court proceedings as an audition for her own television entertainment program, giving the unseemly appearance of playing to the cameras and the audience. While the cameras were rolling, the proceedings took on the atmosphere of a game show. Defendants were asked if they wanted to use "a life line," and "which door" they wanted to walk out. Another defendant was told "we're doing double or nothing now," and asked if he was prepared to "double down." The judge repeatedly solicited audience participation and even polled the audience: "Can I get a woo, woo?"; "Does he need to call the lifeline?"; asking the audience to repeat the slogan, "Do or do not, there is no try."; "What should he do? Take the deal, take the deal, take the deal." In response, the audience laughed and "wooded" without admonishment from the court. Judge Salcido failed to appreciate that "a courtroom is not the Improv and the presider's role model is not Judge Judy." (Citation Omitted). The judge's showmanship behavior together with her statement to the producer that she would line up her more interesting cases for the day of the filming created the appearance that she was more interested in promoting herself for a role in a television show than in delivering justice to those who appeared before her.

It is self-evident that crude comments and sexually suggestive jokes from a judge have no place in a courtroom. Yet, Judge Salcido made manifestly inappropriate remarks of a lewd nature in an open courtroom as the proceedings were being filmed. For instance, she ordered a defendant charged with exposing himself in public to stay away from a certain location because "they'll recognize you in more ways than one." When a defendant smiled, she remarked to him that "they might like your smile in jail." In a particularly offensive instance, she told a defendant that he would be "screwed" if he violated his probation and "we don't offer Vaseline for that." We have previously condemned joking or making a casual comment about the possibility of an inmate having to endure same gender rape while incarcerated, which "may be perceived as not only an indifference to and acceptance of a tragic reality in our criminal justice system, but as a perhaps unintended admission of its inevitability under present conditions." (Citation omitted).

Even when not auditioning for her own television show, Judge Salcido engaged in conduct that was seriously at odds with her duty under the canons to be patient, dignified and courteous to litigants, attorneys, and those with whom she deals in an official capacity and to maintain decorum in the proceedings. In open court, the judge ridiculed and belittled litigants, referred to court clerical staff as "cucumbers" who "aren't even potatoes because potatoes have eyes" or "corn because com have ears," ridiculed a deputy district attorney, and made several disparaging remarks about an assistant public defender, often in the presence of his potential client. When a defendant accidentally called her "sir," Judge Salcido demonstrated a disturbing lack of decorum by raising

her leg above the bench, holding her leg by the ankle, and stating, "Do these look like the boots of a sir?"

We appreciate that each judge has his or her own style, and that "a modest injection of humor at the appropriate time" can have a place in the courtroom. (Citation omitted). "However, the cultivation of a particular judicial personality may not be used as an excuse for unethical conduct.... regardless of the judge's style, she or he must respect the litigants and attorneys who appear in her or his court." (Citation omitted). Judicial humor should never be used in a courtroom, as it was by Judge Salcido, to ridicule, embarrass or disparage others, or in a manner that diminishes the dignity of the judicial process. Judge Salcido's brand of "humor," as exemplified by the stipulated facts is, without question, unbecoming a judge.

The utter lack of decorum and inappropriate judicial demeanor exhibited in the stipulated misconduct reflects poorly, not only on Judge Salcido, but on the reputation of the entire judiciary. "The public looks to judges to set the tone of judicial proceedings." (Citation omitted). Unfortunately, the tone set by Judge Salcido was undignified, unprofessional, and degrading to litigants, attorneys and court staff. Members of the public observing the proceedings on the day the producer was filming could not help but wonder if they were in a courtroom or on the set of a reality television program. On other occasions, her courtroom took on a comedy show atmosphere. She told the courtroom audience that they had no sense of humor, stating: "God, you guys are dead, you guys are like, dead. I'm like, God, I need a warm up, I need a warm up comedian before I come out. Okay, Yes, sir. Are you ready? You're volunteering? ... We're getting fun back in the courthouse. Fun, courthouse, they don't have to be separate." Judges are expected to administer justice and resolve serious issues, not to provide entertainment. Judge

Salcido's misconduct cheapens the dignity of the court and undermines public confidence in and respect for the judicial system.

Judge Salcido's misconduct also includes abuse of authority and embroilment through her incarceration of a defendant for direct contempt without affording the defendant due process or complying with the requisite legal procedures. The importance of strict adherence to statutory and constitutional procedural requirements before exercising the "ultimate weapon" of contempt has been repeatedly emphasized by the Supreme Court and this commission. (Citations omitted). It should have been apparent to Judge Salcido that she could not summarily remand a defendant to custody for what she perceived to be contemptuous conduct without affording the defendant any due process.

Based on the totality of the judge's misconduct, we conclude that the stipulated disposition, including the judge's agreement to resign and not thereafter hold judicial office or accept judicial assignment, is in the best interest of the public and the reputation of the judiciary. In accordance

with the terms of the Stipulation, and good cause appearing, we hereby censure Judge DeAnn Salcido.

B. Other Conduct Warranting Discipline under Rule 1.2

A variety of other types of conduct have also subjected judges to discipline under Rule 1.2 or its equivalent for conduct both on and off the bench. Other types of on bench conduct which have led to discipline include rude and abusive behavior,¹³ comments demonstrating bias on grounds of race,¹⁴ gender,¹⁵ religion,¹⁶ or another protected category, and abuse of the contempt power.¹⁷ Off bench conduct which has led to discipline under Rule 1.2 or its equivalent includes abusive treatment of court staff,¹⁸ sexual harassment of court employees,¹⁹ and sexual misconduct.²⁰

C. The Appearance of Impropriety

While Rule 1.2 subjects a judge to discipline if they engage in actual impropriety, it also provides for discipline of judges whose conduct creates even “the appearance of impropriety.” This particular aspect of the Rule has proven to be quite controversial. Some contend it goes too far to punish based upon appearances, if no actual impropriety occurred. Perhaps even more forceful is the critique that the “appearance of impropriety” standard is too vague and ill-defined to give judges fair warning as to what conduct will or will not violate the standard.

A similar debate regarding the appropriateness of using the “appearance of impropriety” standard in lawyer disciplinary rules has also gone on for many years. Canon 9 of the ABA’s 1969 Model Code of Professional Responsibility provided that “A Lawyer Should Avoid Even the Appearance of Impropriety.” Similarly, the Model Code’s Disciplinary Rule (DR) 9-101 was entitled “Avoiding Even the Appearance of Impropriety.” However, when the ABA replaced the Model

¹³ See, e.g., *In Re Lamdin*, 948 A.2d 54 (Maryland 2008); *In Re Wright*, 694 So.2d 734 (Florida 1997); *In the Matter of Jenkins*, 503 N.W.2d 425 (Iowa 1993).

¹⁴ See, e.g., *In re Moore*, N.W.2d 374 (Michigan 2001); *In Re Inquiry Concerning Carr*, 593 So.2d 1044 (Florida 1992); *Miss. Jud. Performance Comm’n v. Walker*, 565 So.2d 1117 (Miss. 1990).

¹⁵ See, e.g., *In Re Greene*, 403 S.E.2d 257 (N.C. 1991); *Kennick v. Commission on Judicial Performance*, 787 P.2d 591 (Cal. 1990); *Complaint Concerning Kirby*, 354 N.W. 410 (Minn. 1987).

¹⁶ See, e.g., *Gonzales v. Commission on Judicial Performance*, 657 P.2d 372 (Cal. 1983).

¹⁷ See, e.g., *In Re Toth*, 978 A.2d 914 (N.J. 2009); *In Re Judge Sassone*, 959 So.2d 859 (La. 2007); *In Re Hart*, 849 N.E.2d 946 (N.Y. 2006).

¹⁸ See, e.g., *In Re Brown*, Opinion (July 14, 2006) and Order (Penn. Ct. of Judicial Discipline, October 2, 2006); *Inquiry Concerning Van Voorhis*, Decision and Order (Cal. Comm’n on Judicial Performance Feb. 27, 2003); *In Re Donohue*, 458 N.E.2d 323 (Mass. 1983).

¹⁹ See, e.g., *In Re Gordon*, 917 P.2d 627 (Cal. 1996); *Fitch v. Commission on Judicial Performance*, 887 P.2d 937 (Cal. 1995); *In re McAllister*, 646 So.2d 173 (Fla. 1994).

²⁰ See, e.g., *In Re Downey*, 937 So.2d 643 (Fla. 2006); *In Re Toler*, 625 S.E.2d 731 (W.Va. 2005); *In Re Gravely*, 467 S.E.2d 924 (S.C. 1996).

Code in 1983 with its Model Rules of Professional Conduct, the “appearance of impropriety” standard was omitted. Even prior to then, the ABA itself concluded in an Ethics Opinion that the “avoiding even the appearance of impropriety [standard] ... is too vague a phrase to be useful.”²¹

While the appearance of impropriety standard has drifted into increasing irrelevance in the lawyer discipline context, in the judicial ethics context it remains an enforceable standard pursuant to which judges can and indeed are disciplined. Perhaps this difference can be explained in terms of the perception that because of the great importance of judges to the success of our judicial system, it is valid to expect a higher standard of probity from judges than from mere lawyers. In any event, judges can be, and indeed are still disciplined for conduct that creates even the appearance of impropriety.²² A Comment to CJC Rule 1.2 offers a test for determining the appearance of impropriety: “whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in conduct that reflects adversely on the judge’s honesty, impartiality, temperament, or fitness to serve as a judge.”²³ Note that this test sets forth an objective, “reasonable person” standard. The judge’s subjective intent or understanding whether the relevant conduct did or did not create an appearance of impropriety is not material to the judicial disciplinary inquiry.

D. Related Rules from Canon 2

Canon 2 of the CJC overlaps significantly with Canon 1, as the former requires judges to perform the duties of their office impartially, competently and diligently. Further, at least two of the Rules within Canon 2 also seem to overlap significantly with Rule 1.2. Rule 2.6 requires judges to ensure that persons with an interest in a legal dispute have an opportunity to be heard with regard to the matter. Intemperate conduct by a judge while on the bench may deprive a party from exercising their right to be heard with regard to the matter. Rule 2.6 also allows judges to participate in settlement discussions involving the parties to a lawsuit, but prohibits the judge from acting to coerce any party to settle a case. Rule 2.8 requires a judge both to display proper decorum and demeanor while on the bench, as well as to maintain order and proper decorum within their courtroom. Though for the most part, it is the rough and tumble world of trial courts that leads to discipline for judges under these provisions, occasionally an appellate judge may also be sanctioned for intemperate behavior. Consider the following case.

²¹ ABA Formal Op. 342 n.17 (1975).

²² See, e.g., *In Re Johnstone*, 2 P.3d 1226 (Alaska 2000); *In Re Flanagan*, 690 A.2d 865 (Conn. 1997); *Adams v. Commission on Judicial Performance*, 897 P.2d 544 (Cal. 1995).

²³ ABA Model Code of Judicial Conduct Rule 1.2 cmt. [5].

In the Matter of Frederick Brown
Massachusetts Supreme Judicial Court

427 Mass. 146 (1998)

The Commission on Judicial Conduct (Commission) has issued a report and recommended a public reprimand in the matter of Justice Frederick L. Brown. We conclude that a public reprimand is appropriate.

1. *The facts.* George Edwards sued the National Association of Government Employees (NAGE), alleging that NAGE had breached its duty of fair representation by not representing him in an earlier bypass appeal. The Labor Relations Commission dismissed his complaint against NAGE, and Edwards appealed from that decision to the Appeals Court. On December 4, 1995, an Appeals Court panel that included Justice Brown heard argument in the case of *Edwards v. Labor Relations Comm'n.* During oral argument, at which Edwards represented himself, Justice Brown made a series of comments to counsel for the Labor Relations Commission. His comments, which we set out in full in the Appendix, criticized NAGE, its president, Kenneth T. Lyons, and members of his family. Justice Brown stated, among other things, that Lyons “had his whole family on the [NAGE] payroll,” that “[t]his is a [] union gone amok,” that “people in the courthouse here who pay their dues get absolutely nothing,” that “Mr. Lyons and all his family are making \$200,000 a year, plus they have cars and expense accounts,” and that “[t]hey [NAGE] don’t represent anybody, as far as I can see. They just take the money and keep on stepping and buy more condos and have more expense accounts and have fancy banquets.”

On February 16, 1996, after learning of these statements, Lyons filed a complaint against Justice Brown with the Commission. The Commission initiated an investigation, and on November 15, 1996, this court, at the Commission’s request, appointed special counsel. On February 10, 1997, the Commission issued a statement of allegations against Justice Brown, and on April 8, 1997, it filed formal charges against him. These charges alleged that Justice Brown’s conduct in the *Edwards* case violated G.L. c. 211C, § 2(5)(c), which prohibits a judge from “willful misconduct which, although not related to judicial duties, brings the judicial office into disrepute,” as well as Canons 1, 2(A), 3(A)(3), and 3(C) of the Code of Judicial Conduct. On April 30, 1997, this court appointed a retired judge of the Superior Court to hold formal hearings on these charges. These hearings were held in July and August, 1997, and on August 26, 1997, the hearing officer issued his report and recommendations, in which he concluded that the Commission had proven by clear and convincing evidence that Justice Brown violated Canons 2(A) and 3(A)(3). He found neither a violation of the statute nor of Canons 1 and 3(C). The hearing officer recommended the imposition of a private reprimand or censure and an order that Justice Brown recuse himself in future proceedings involving NAGE, Lyons, or any member of the Lyons family. Both the special counsel and Justice Brown objected to the hearing officer’s final report, and on October 14, 1997, the Commission held a hearing regarding the recommendation for discipline. At Justice Brown’s

insistence, the hearing was public. On October 30, 1997, the Commission unanimously recommended to this court the imposition of a public reprimand in light of previous incidents of misconduct.

2. *The Canons.* Canon 2(A) provides that “[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.” Canon 3(A)(3) states, in relevant part, that “[a] judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity....” As we have said before, “The Code of Judicial Conduct requires judges in this Commonwealth to exhibit the highest standards of professional conduct.” [Citation omitted]

Justice Brown insists that in this case he was entirely impartial and fair. Several of his fellow Justices on the Appeals Court, including those who were on the panel in this case, testified that integrity and impartiality characterize Justice Brown’s work as a judge not only in this case but in general. We do not doubt that this is so. The two other Justices on the panel in this case had the opportunity to hear his discussion in the *semble* following the argument of the case. And Justice Brown and his fellow panel members point out that the Commission’s judgment favorable to NAGE was unanimously affirmed by the panel on which Justice Brown was a member. Canons 2 (A) and 3(A)(3) both, however, address matters of appearance. It is quite possible for a judge to uphold the highest standards of integrity and impartiality and yet violate these canons. That is not to say that these canons therefore address only superficial matters of etiquette and should count for little if the substance of integrity and impartiality has obtained.

Judges wield an awesome and final power over the liberty and property of their fellow citizens. This power is the more awesome because in this Commonwealth, as in the Federal system, we are neither elected nor subject to recall or retention elections. This power is tolerable in a democracy because judges speak only for reason and the law. As stated in *The Federalist* No. 78 (Alexander Hamilton), we have “neither force nor will, but merely judgment.” For every litigation at least one-half of those involved are likely to come away sorely dissatisfied, and every citizen has reason to apprehend that one day he might be on the losing side of our exercise of judgment. Therefore, this arrangement requires an exacting compact between judges and the citizenry. It is not enough that we know ourselves to be fair and impartial or that we believe this of our colleagues. Our power over our fellow citizens requires that we appear to be so as well. How else are ordinary citizens to have the faith in us that we have in ourselves and Justice Brown’s colleagues testified that they have in him? An impartial manner, courtesy, and dignity are the outward sign of that fairness and impartiality we ask our fellow citizens, often in the most trying of circumstances, to believe we in fact possess. Surely it is arrogance for us to say to them that we may not seem impartial, but we know we are, and so they must submit. Precisely because the public cannot witness, but instead must trust, what happens when a judge retires to the privacy of his chambers, the judiciary must

behave with circumspection when in the public eye.

Finally, patience and courtesy are required of a judge toward those he deals with in his official capacity for the additional reason that a judge in that official capacity is granted the power to command silence and respect in his presence. It is not punishable to interrupt or show disrespect to a legislator, the Governor, or even the President. But this unusual deference is granted the judge only to allow him to do his work. When a judge berates or acts discourteously to those before him—even if he cannot affect their interests as litigants—he abuses his power and humiliates those who are forbidden to speak back. Of course there are times when a judge must and should admonish and express harsh judgment to those before him, but they must be limited to the necessities of the occasion, being neither gratuitous nor irrelevant to it.

The remarks that are the subject of this complaint violate both Canons 2(A) and 3(A)(3). They express what appears to be a strong animus against the union and its leadership, accusing them of a general and persistent neglect of their obligations to the membership and of self-dealing that is disgraceful if not criminal. Such accusations go far beyond any comment appropriate to the circumstances of this particular dispute, although of course if Edwards’s complaint were valid it might stand as an example of the general situation Justice Brown described. In making these remarks Justice Brown did not conduct himself “in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” It is if anything even clearer that these remarks were the very opposite of the “patient, dignified, and courteous” conduct required of a judge. They were intemperate, excessive, unjustified by anything properly before the court, and gratuitously insulting of persons directly and indirectly implicated in the case at bar.

Justice Brown argues that these canons do not forbid the comments that he made at the *Edwards* argument. First, he claims that Canon 3(A)(3) applies only to comments made about the parties and attorneys before a judge, and not about nonparties such as Lyons, his family, or NAGE. This is incorrect. The canon requires a judge to be patient and dignified generally, regardless of the context or content of a judge’s speech. As to courtesy, the canon explicitly commands that it be shown to all with whom the judge deals in an official capacity. Justice Brown admits that his “comments were directed to the lawyer for the Labor Relations Commission,” who clearly was before the court. Moreover, any discourtesy or impatience in Justice Brown’s statements had implications for those in the courtroom; the justice spoke insultingly of persons directly affected by the outcome of the matter before him. In any event, the spirit and purpose of Canon 3(A)(3) would hardly be served by holding that a judge may act in an undignified manner while on the bench so long as he only chooses to berate persons not present before him. Any discourtesy to NAGE, Lyons, and Lyons’s family was clearly within the scope of Canon 3(A)(3).

Second, Justice Brown argues that his comments are immunized from discipline because they derived from his knowledge of [two prior cases involving NAGE]. Citing the “extrajudicial

source” doctrine discussed in *Liteky v. United States*, 510 U.S. 540, 545 (1994), Justice Brown claims that, if a judge’s statements are based on experience in a prior case or on judicial materials, they cannot be the basis of a disciplinary proceeding under Canon 3(A)(3). This misreads the canon and the *Liteky* case. A judge may, indeed sometimes must, form opinions concerning those appearing before him, *Liteky*, *supra* at 551, and at times he may choose to share those opinions publicly. This does not, however, license a judge to violate Canon 3(A)(3)’s restriction on the *manner* in which a judge must conduct herself. For the purposes of Canon 3(A)(3), the foundation of a judge’s comments are largely irrelevant.

Moreover, many of Justice Brown’s comments at the *Edwards* argument were not based on a judicial source or on his prior judicial experience. Nothing in [the prior cases] supports Justice Brown’s assertions that NAGE is a union run “amok” or that Lyons and his family take members’ money and buy condos or hold banquets. Nor do these cases support Justice Brown’s comment that he knew of union members in the courthouse who “get absolutely nothing” for their union dues. These comments derived from personal opinion, not judicial sources.

Third, Justice Brown argues that Canon 3(A)(3) should only be applied to sanction behavior that is so discourteous that it raises sufficient doubts about a judge’s impartiality to require recusal. The Justice again points to *Liteky v. United States*, *supra*, in which the Supreme Court interpreted the Federal statute addressing judicial recusal, 28 U.S.C. § 455(a) (1994), and held that “expressions of impatience, dissatisfaction, annoyance, and even anger,” *id.* at 555-556, do not suffice to establish the bias or prejudice required for recusal of a Federal judge, unless “they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.” *Id.* at 555. Although we have referred to *Liteky*’s reasoning in the recusal context, [citation omitted], the case has little relevance in the context of Canon 3(A)(3). Impatience, a lack of dignity, or discourtesy—the stuff of Canon 3(A)(3)—may not suffice to demand recusal, but the bias and prejudice relevant in a recusal proceeding are not therefore necessary to find a violation of Canon 3(A)(3). We have not previously required a showing of bias or prejudice to find a violation of Canon 3(A)(3), and we do not now.

Fourth, Justice Brown argues that his conduct is somehow excused by his position as an appellate justice, rather than a trial judge. He argues that we should consider the “unique dynamics of the appellate process,” which compel an appellate justice to question litigants closely and to press for the validity of the presented arguments. All judges must exhibit rigor in their work, and Justice Brown has done so admirably for many years. But this does not diminish the importance or scope of Canons 2(A) and 3(A)(3), which safeguard the public’s confidence in the judiciary’s impartiality without which a judge’s search for truth and justice, both aims of rigorous questioning at oral argument, would be futile. There are differences between trial and appellate proceedings, but they do not excuse the behavior in this case. In many respects a trial judge labors in more difficult circumstances, seeking to control parties, witnesses and advocates, all of whom may have

an interest in improperly swaying the minds of the jury. The appellate justice operates in a cooler atmosphere and has less excuse for the occasional display of temper. It is certainly appropriate for an appellate judge in oral argument to probe counsel's arguments for weaknesses in reasoning or factual support. By no stretch can the remarks we have recounted be seen as serving that function. In any event, the canons in question do not distinguish between trial and appellate judging, nor do we see why they should. Although we certainly consider the context within which a judge's alleged misconduct takes place when applying the Code of Judicial Conduct, we are certain that the appearance of impartiality and courtesy are as important in appellate judging as at trial.

Finally, Justice Brown contends that the hearing officer erred in his application of Canon 2(A). The hearing officer's final report to the Commission found that Justice Brown's "remarks were of such a nature as to create the appearance of partiality in the minds of at least those persons against whom they were directed." The hearing officer thus concluded that, although Justice Brown was in fact impartial and did not lack integrity, Justice Brown's comments failed to maintain the *appearance* of impartiality required by the canon. Justice Brown argues that this conclusion was impermissibly focused on the subjective impression of those in the courtroom, rather than on an objective analysis of whether a reasonable person would have found his comments offensive to the appearance of impartiality.

The hearing officer's report did not misapply Canon 2(A). In context, the hearing officer's statement must be taken to mean these remarks would have created an appearance of partiality to a reasonable person in the situation of the person to whom they were directed. In any event, reading them for ourselves we firmly conclude that they create an appearance of partiality. No reasonable person could doubt that certain of Justice Brown's comments cast a shadow on the appearance of impartiality. Statements that NAGE was "an outfit that's always in trouble" and a "union gone amok" give an appearance of bias. Comments that "[t]hey don't represent anybody, as far as I can see. They just take the money and keep ... buy[ing] more condos and hav[ing] more expense accounts" were groundless, irrelevant, and inappropriate, and would make an objective observer question the judge's neutrality.

3. *Reprimand.* Several of Justice Brown's colleagues on the Appeals Court have testified warmly on his behalf. They paint a picture of a judge who is conscientious, learned, intelligent, creative, and independent. Though we do not know him as well as they do, we know that his work exhibits these qualities. But the conduct we review today, though largely a matter of appearances, is unacceptable. It is, moreover, the third time that Justice Brown has been called to order for his injudicious and intemperate remarks-the two previous occasions (noted in the Commission's report) having resulted in the Commission's issuing a "confidential letter of concern" and in a confidential "informal adjustment," in which Justice Brown acknowledged he had violated Canons 1 and 3 of the Code of Judicial Conduct. The statements which are the subject of this proceeding were made less than a month after Justice Brown executed that informal adjustment. Justice Brown

must show appropriate restraint, lest he destroy his ability to perform effectively the very great service he has over many years rendered the people of the Commonwealth. We therefore publicly reprimand Justice Brown for violating Canons 2(A) and 3(A)(3) of the Code of Judicial Conduct, and order that Justice Brown be recused from future cases involving NAGE, Lyons, or any member of Lyons's immediate family.

So ordered.

APPENDIX

Justice Brown's comments included:

1. "This NAGE, whether you know it or not, is really an outfit that's always in trouble. And that's why [the last time NAGE's attorney] was here, the position that [inaudible] NAGE was so bad we sanctioned him and made him pay extra money for bringing the case here."
2. "[T]he last time NAGE was here they-he had his whole family on the payroll. And he sued the Boston Herald. And [w]e threw the case out summarily."
3. "This [NAGE] is not one of the great American unions of our country. And unions are important. If Judge Goodman were here, he would be upset, one of the greatest judges ever to sit on this court. He was a great union man. He believed in unions. This is [a] union gone amok."
4. "If [Lyons] didn't like his job he ought to quit his \$100,000 job."
5. "We're talking about representation. In other words, a man or woman pay their dues for something. What do they get? For instance, I know the people in the courthouse here who pay their dues get absolutely nothing. Now, what do these people get for paying their dues? They get in trouble, they get a problem, and they expect their union to do it."
6. "I mean, they're paying big money to these unions. They must be, because I know, I just happen to have the case. Because Mr. Lyons and all his family are making \$200,000 a year, plus they have cars and expense accounts. So the money is not small change.... So what are they doing for the money? Here's a poor guy, and I'm not getting to the merits, and here's a guy who's got a legitimate complaint. And they just throw him out, saying they don't handle this kind of stuff."
7. "The last time we were here, if you were here, I don't know. [NAGE's counsel] was here. Same case: duty of fair representation. They [NAGE] don't represent anybody, as far as I can see. They just take the money and keep on stepping and buy more condos and have more expense accounts and have fancy banquets. I mean, when is somebody going to put their foot down? And if [the Labor Relations Commission is] not going to do it, we're going to do it."

IV. Avoiding Abuse of the Prestige of Judicial Office

Rule 1.3 of the Model Code of Judicial Conduct prohibits judges from using the prestige of their office to advance their personal or economic interests. Of course, in the most egregious examples, it is easy to see how the judge in question traded on the prestige of their office for personal gain. For example, a Judge's efforts to recruit a couple who were appearing as parties in a case before him as sales people in a multi-level marketing business run by the judge ran afoul of this prohibition. *See Matter of Phalen*, 475 S.E.2d 327 (W.Va. 1996). On the other hand, efforts by a judge to take advantage of the prestige that comes with judicial office can be much more subtle and can land much closer to the line of what we would consider receiving appropriate credit for the honorable endeavor of engaging in public service. Consider the following two examples from recent current events.

Stop Calling Him "Judge" Napolitano

Steven Lubet²⁴

The Faculty Lounge Blog and Legal Ethics Forum Blog

March 20, 2017

By now, everyone knows that Fox News contributor Andrew Napolitano was the source behind the recent White House claim that the British intelligence service, known as GCHQ, colluded with President Obama to conduct surveillance of Donald Trump in the midst of the 2016 campaign. The British government has rightly branded the assertion "nonsense," saying it was "utterly ridiculous and should be ignored." Napolitano's scoop was also disavowed by the actual news branch of Fox News itself.

But even as the story is repeatedly debunked, some reporters and commentators continue to refer to its originator as "Judge Napolitano," which only serves to lend some unwarranted credence to his false report.

It is true that Napolitano once served on the New Jersey Superior Court, but he resigned in 1995 and has not held judicial office since then. Nonetheless, he insists on being addressed as "Judge" and he is said to have demanded that his set on Fox News be designed to resemble a judge's chambers. His website – which he calls JudgeNap.com – refers to him as "Judge Napolitano" in virtually every paragraph, as does his bio on the Fox News site.

The American Bar Association has cautioned against the exploitation of judicial titles by former judges, noting that it is wrong to use "Judge" or "The Honorable" in connection with law practice. In its Formal Opinion 95-391, the ABA Commission on Ethics and Professional Responsibility noted that continued "use of the title is misleading because it may be misunderstood by the public as suggesting some type of special influence" or "to create an unjustified expectation." In fact, said

²⁴ Professor of Law, Northwestern University. Permission granted to CALI to reprint his articles.

the ABA, “there appears to be no reason for such use of the title other than to create such an expectation.”

Although the ABA opinion addressed only the use of the honorific in law practice, some states have gone further. The Ohio Rules of Professional Conduct, for example, provide that a former judge may only use the title or honorific if it is preceded by the word “retired” (or “former,” if the judge had been defeated for reelection), and the rule does not limit the restriction to law practice.

Sean Spicer, of course, cited “Judge Andrew Napolitano” when he first introduced the phony story at a press briefing. Fox News, InfoWars, the Daily Caller, and Breitbart, needless to say, always call him by the honorific. But CNN’s Wolf Blitzer also repeatedly refers to “Judge Napolitano” in his television reports, as do other stories on CNN.com. Mainstream news sources such as Business Insider, Real Clear Politics, the Huffington Post, the New York Daily News, and even the Washington Post have also referred to “Judge Napolitano,” and not in quotation marks. In fact, the British GCHQ called him “Judge Napolitano,” even as it called for his ridiculous remarks to be ignored.

Nothing can be done about Napolitano’s insistence on calling himself “judge,” but there is no reason for anyone else to go along with him. Fox News describes Napolitano as its “senior judicial analyst,” and the use of his former title is obviously for the purpose of enhancing his credibility.

To their credit, The New York Times, Politico, The Hill, and other outlets refer only to Mr. Napolitano or Andrew Napolitano. Like everyone else, Napolitano is entitled to his opinion, even when trafficking in absurd conspiracy theories, but we do not need to afford him the respect of an office that he no longer holds.

Use of Titles by Retired Judges

Steven Lubet

The Faculty Lounge Blog and Legal Ethics Forum Blog

May 8, 2017

My [earlier post](#) on Andrew Napolitano got mixed responses, with some readers (and tweeters) comparing his use of “Judge” to the fairly common practice of using honorifics for former senators, governors, and other office holders. Let me suggest that there is a difference, depending on the nature of the former office. Everyone understands that governors and senators have always been political figures, so there is no exploitation when they use their former titles for political purposes. Nobody expects Pres. Bill Clinton to be anything other than a partisan Democrat.

Judges, on the other hand, are supposed to be objective and politically neutral. (Yes, I know that is not strictly true, but many citizens still idealize judges and certainly respect them more than mere politicians.) Consequently, the use of a formerly-held judicial honorific can appear to lend greater weight to a political or legal argument, even decades after the individual has left the bench. Even in situations where individuals are entitled to call themselves whatever they want, I think

that media organizations, as a matter of discretion, ought to omit judicial honorifics for former judges. That is the practice of The New York Times, The Hill, and other organizations, which use honorifics sparingly in all circumstances.

But if the Napolitano situation isn't persuasive, let me raise another example.

As many readers know, Graham Spanier, the former president of Penn State University, was [convicted](#) in March of misdemeanor child endangerment, growing out of the Jerry Sandusky child abuse scandal. Spanier had earlier been forced out of office following an investigation led by former federal judge and FBI director Louis Freeh. In the aftermath of the Spanier conviction, Freeh issued a written [statement](#) condemning Spanier (who had yet to be sentenced and announced that he planned to appeal) and two co-defendants who pled guilty. He also called for the resignation of current Penn State president Eric Barron and two members of the board of trustees. The caption on the statement reads:

FOR IMMEDIATE RELEASE

March 24, 2017

STATEMENT OF JUDGE LOUIS FREEH UPON THE JURY CONVICTION OF FORMER
PSU PRESIDENT SPANIER FOR CHILD ENDANGERMENT

I have no quarrel with Freeh's decision to make post-conviction comments on the Spanier case – which I have not followed – but I think he is exploiting his former office by continuing to call himself “Judge,” the purpose of which is obviously to add greater weight to his opinion, including the defense of his own investigation:

These very sad criminal convictions also completely confirm and verify all the findings and facts which my team and I established after an exhaustive investigation commissioned by the then-PSU board.

If you don't think it was wrong to issue this statement as “Judge Louis Freeh,” imagine that he had instead issued it as “FBI Director Freeh,” without indicating that he no longer holds the office. And if you agree that the latter would have been wrong, why would the judicial honorific be acceptable?

The Freeh statement was reported by the [Chronicle of Higher Education](#), the AP and the [local press](#) in State College, none of which referred to him as “Judge.” They did describe him as “former FBI director,” although only once in each article, which I think is appropriate.

I am not making a blanket argument against the use of former titles, but I do think that judges hold a unique position in our society. Although they may use their honorifics for purposes [other than the practice of law](#), I suggest that reporters and commentators ought to follow the practice of the New York Times and leave judicial titles out of it.

Discussion Questions

What do you think of Napolitano and Freeh's use of the title "Judge" in conjunction with their work after leaving the bench? Was their use of the term in this manner a violation of the spirit, if not the letter of Rule 1.3?²⁵ Or, were either or both examples of a proper use of an honorific term that was earned through the prior public service of each of the parties? Is there any way to distinguish between the two cases? Does it matter that Napolitano's work appears to be more commercial in nature than Freeh's?

Rule 1.3 also prohibits judges from using the prestige of their office for the purpose of benefitting others besides themselves. Some areas where judges have run afoul of this rule include "ticket fixing,"²⁶ letters of recommendation, and case referrals.²⁷ While letters of recommendation are not problematic where the judge is familiar with applicant's work, it is possible for judges to cross a line where the judge is clearly attempting to leverage the prestige of their office for someone whose work they have little basis on which to offer an assessment.²⁸ A more recent development along these lines raises the question whether judges may offer endorsements of lawyers in online "rating" sites. States are split on the question of whether it is permissible for judges to provide information about individual lawyers to such rating sites, or if doing so would amount to use of judicial prestige to advance the career of another lawyer.

V. Review Questions

There is a [CALI Lesson](#) available with multiple choice questions that review the materials covered in this chapter.

²⁵ Of course neither Napolitano nor Freeh could be disciplined by a judicial disciplinary body because neither is still a sitting judge.

²⁶ See, e.g., *Miss. Comm'n On Jud. Performance v. McKenzie*, 63 So.3d 1219 (Miss. 2011).

²⁷ Colo. Jud. Ethics Adv. Bd. Op. 2006-01.

²⁸ See, e.g., *In Re Steiner* (Cal. Comm'n on Jud. Performance 2012).

Chapter 3 – Performing the Duties of Judicial Office Impartially, Competently, and Diligently

I. Introduction

Canon 2 of the Code of Judicial Conduct requires judges to “**perform the duties of judicial office impartially, competently, and diligently.**” Canon 2 contains the largest number of rules at sixteen of any of the Code’s 4 Canons. These rules all relate to the core judicial values of impartiality, fairness, and diligence. Each of the individual rules will be addressed below.

II. Impartiality, Competence, and Diligence

A. Priority of the Judicial Function

Rule 2.1 requires judges to place their judicial responsibilities ahead of all of their other professional obligations. While this Rule obviously does not apply to part-time judges, and the Rule does not prohibit judges from engaging in any professional endeavors at all in addition to their judicial responsibilities, it does make clear that the responsibilities of a full-time judge must take precedence over whatever additional projects the judge may be engaged in.

B. Applying the Law Fairly and Impartially

Rule 2.2 requires judges both to uphold and apply the law, and to perform the duties of their office fairly and impartially. Each of these significant responsibilities will be discussed in turn.

1. Uphold and Apply the Law

A judge’s duty to comply with the law in their off bench conduct was addressed in conjunction with Canon 1. The duty to uphold and apply the law that is addressed here relates to a judge’s conduct while on the bench. Of course, the notion that a judge is required to follow the law while serving in their official capacity is uncontroversial in itself. However, unlike the situation arising from violations of law in the judge’s personal life, imposing discipline based upon the decisions a judge makes while hearing cases can raise a significant threat to the paramount value of judicial independence. Certainly, if a judge simply ignores the requirements of legal authority, or makes no effort to determine the actual requirements of legal authority, discipline may be warranted. And, at the other end of the spectrum, Comment 3 to the Rule makes clear that good-faith errors made by a judge in deciding cases are not an appropriate basis for discipline under the rule. However, the line between a good faith error and a punishable instance of malfeasance is not always clear. And, there is certainly a risk that judicial decisions that are unpopular or are at the margins of mainstream legal thought are more likely to be subject to criticism than those that are less controversial. But it is precisely the concern that unpopular or counter-majoritarian decisions will

result in discipline that provides the greatest threat to judicial independence. Consider the following recent controversial decision.

In the Matter of Roy S. Moore, Chief Justice, Supreme Court of Alabama

State of Alabama Court of the Judiciary

2016 WL 7106073

[By way of background, the disciplinary case against Judge Moore involved the intersection of four cases, each of which challenged bans on same-sex marriages. *Searcy v. Strange*, 81 F. Supp. 3d 1285 (S.D. Ala. 2015), and *Strawser v. Strange*, 44 F. Supp. 3d 1206 (S.D. Ala. 2015), were U.S. District Court cases, each of which held that Alabama’s ban on same sex-marriage violated the United States Constitution. *Ex parte State ex rel. Alabama Policy Institute*, 200 So. 3d 495 (Ala. 2016) involved a challenge in Alabama’s State Courts to the state’s ban on same-sex marriages. And [*Obergefell v. Hodges*](#), 135 S. Ct. 2584 (2015), was the U.S. Supreme Court decision which held that state bans on same-sex marriages violate the United States Constitution. *Searcy* and *Strawser* were decided first, followed by *API*, which upheld the validity of Alabama’s same-sex marriage ban. It appeared that *Obergefell* finally and conclusively decided the issue, but approximately six months after the *Obergefell* decision, Judge Moore, who had recused himself from the *API* case, issued an “Administrative Order of the Chief Justice of the Alabama Supreme Court,” which after a lengthy discussion of the proceeding four cases concluded as follows:]

“NOW THEREFORE,

“As Administrative Head of the Unified Judicial System of Alabama, authorized and empowered pursuant to Section 12-2-30(b)(7), Ala. Code 1975, to ‘take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state,’ and under Section 12-2-30(b)(8), Ala. Code 1975, to ‘take any such other, further or additional action as may be necessary for the orderly administration of justice within the state, whether or not enumerated in this section or elsewhere’;

“And in that ‘an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.’ *United States v. Mine Workers*, 330 U.S. 258, 293 (1947) (quoted in *Fields v. City of Fairfield*, 143 So. 2d 177, 180 (Ala. 1962));

“IT IS ORDERED AND DIRECTED THAT:

“Until further decision by the Alabama Supreme Court, the existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect.”

(Capitalization and bold-face type in original.)

II.

We now turn to the charges of the complaint, the evidence presented, and the parties' arguments. The complaint alleges the following six charges against the Chief Justice:

Charge No. 1: "By willfully issuing [the January 6, 2016, order,] in which he directed or appeared to direct all Alabama probate judges to follow Alabama's marriage laws, completely disregarding a federal court injunction when he knew or should have known every Alabama probate judge was enjoined from using the Alabama marriage laws or any Alabama Supreme Court order to deny marriage licenses to same-sex couples, Chief Justice Roy S. Moore violated ... [Canons 1, 2, 2A, 2B, and 3]."

Charge No. 2: "In demonstrating his unwillingness in [the January 6, 2016, order] to follow clear law, Chief Justice Roy S. Moore violated ... [Canons 1, 2, 2A, 2B, and 3]."

Charge No. 3: "In issuing [the January 6, 2016, order] and in abusing his administrative authority by addressing and/or deciding substantive legal issues while acting in his administrative capacity, Chief Justice Roy S. Moore violated ... [Canons 1, 2, 2A, 2B, and 3]."

Charge No. 4: "In issuing [the January 6, 2016, order] and thereby substituting his judgment for the judgment of the entire Alabama Supreme Court on a substantive legal issue in a case then pending in that Court, i.e., the effect of the decision of the United States Supreme Court in Obergefell, Chief Justice Roy S. Moore violated ... [Canons 1, 2, 2A, 2B, 3, 3A(6)]."

Charge No. 5: "By issuing [the January 6, 2016, order] and willfully abusing his administrative authority to issue [that order], Chief Justice Roy S. Moore interfered with legal process and remedies in the United States District Court and/or the Alabama Supreme Court available through those courts to address the status of any proceeding to which Alabama's probate judges were parties. In so doing, Chief Justice Moore ... violated [Canons 1, 2, 2A, 2B, and 3]."

Charge No. 6: "By taking legal positions in [the January 6, 2016, order] on a matter pending before the Alabama Supreme Court in *API*, Chief Justice Roy S. Moore placed his impartiality into question on those issues, thus disqualifying himself from further proceedings in that case; yet he participated in further proceedings in *API*, after having disqualified himself by his actions, in violation of [Canons 1, 2, 2A, 2B, and 3]."

([Judicial Inquiry Commission] JIC’s complaint, pp. 26-32.)

The JIC alleges that Chief Justice Moore’s conduct that resulted in the above charges violated the Canons of Judicial Ethics in that he specifically

- a. “[f]ailed to uphold the integrity and independence of the judiciary, Canon 1” (Charges 1-6);
- b. “[f]ailed to participate in establishing, maintaining, and enforcing and to himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, Canon 1” (Charges 1-5; Charge 6 alleges that he “[f]ailed to observe high standards of conduct so that the integrity and independence of the judiciary may be preserved”);
- c. “[f]ailed to avoid impropriety and the appearance of impropriety in all his activities, Canon 2” (Charges 1-6);
- d. “[f]ailed to respect and comply with the law, Canon 2A” (Charges 1-6);
- e. “[f]ailed to conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, Canon 2A” (Charges 1-6);
- f. “[f]ailed to avoid conduct prejudicial to the administration of justice that brings the judicial office into disrepute, Canon 2B” (Charges 1-6);
- g. “[f]ailed to perform the duties of his office impartially, Canon 3” (Charges 1-5; Charge 6 alleges that he “[f]ailed to perform the duties of his office impartially and diligently”); and/or
- h. “[f]ailed to abstain from public comment about a pending proceeding in his own court, Canon 3A(6)” (Charge 4).

In sum, the first five charges relate to the issuance of the January 6, 2016, order, and the sixth charge relates to the January 6, 2016, order and Chief Justice Moore’s subsequent participation in API II.

A. Charges Nos. 1-5

The JIC starts with the premise that binding federal court injunctions—such as the May 2015 injunction in *Strawser* that bound all Alabama probate judges—are to be obeyed. To that, the JIC adds the premise that the United States Supreme Court is the final arbiter of the United States Constitution and that its decisions on matters of constitutional law are binding on lower federal and state courts. From these premises, the JIC asserts that the Chief Justice should not issue an

order that, if followed, would constitute disobedience to a binding federal injunction supported by a controlling decision of the United States Supreme Court. The central claim of charges nos. 1-5 of the JIC's complaint is that the January 6, 2016, order required, or appeared to require, Alabama's 68 probate judges to defy the United States Supreme Court's decision in *Obergefell* and the expressed prohibitions of a binding injunction by the federal district court in *Strawser*.

The JIC argues that Chief Justice Moore's actions in this case are the same as—indeed, worse than—his actions that led to his removal from the office of Chief Justice in 2003. In 2003, the Court of the Judiciary found that Chief Justice Moore had personally violated numerous Canons of Judicial Ethics based on his “willful[] and public[]” refusal to obey the binding orders of a United States district court. As a sanction, this court removed Chief Justice Moore from the office of Chief Justice because, this court found, Chief Justice Moore had indicated unequivocally that he had no remorse for his defiance of that order and that he would, in fact, “do it again.” This court reasoned that “[a]nything short of removal would only serve to set up another confrontation that would ultimately bring us back to where we are today.”

According to the Chief Justice, at the time he issued the January 6, 2016, order, there were a number of differences between his conduct and the circumstances in 2003 and his conduct and the circumstances in this case. The primary difference, the Chief Justice asserts, is that the Alabama Supreme Court had issued injunctions in March 2015 in *API I* that told Alabama's probate judges not to issue same-sex marriage licenses. (The injunctions in *API I* are at times referred to as “the existing orders” of the Alabama Supreme Court in *API*.)

The JIC's position is that at the time of the January 6, 2016, order, the March 2015 *API* orders had been nullified by *Obergefell*, as well as by the injunction entered against all probate judges in *Strawser* in May 2015 that by its terms took effect once the United States Supreme Court decided *Obergefell*. The JIC further cites the Eleventh Circuit's statement in October 2015 that *Obergefell* had “abrogated” the orders in *API*.

The Chief Justice, however, finds significance in the Alabama Supreme Court's June 29, 2015, order—issued three days after the *Obergefell* decision—in which the Alabama Supreme Court invited the parties in *API I* “to submit any motions or briefs addressing the effect of the Supreme Court's decision in *Obergefell* on this court's existing orders in [*API I*].” The Chief Justice argues that the Alabama Supreme Court, by inviting additional briefing, did not view its orders as having been automatically abrogated or nullified by *Obergefell*. The Chief Justice asserts that the Eleventh Circuit's October 2015 statement was therefore incorrect, and he cites decisions standing for the proposition that the Eleventh Circuit does not have the authority to review decisions of the Alabama Supreme Court.

The crux of the Chief Justice's argument is that he issued the January 6, 2016, order not as a

direction to anyone to do anything but merely as a sort of “status update” informing the probate judges that the issues addressed in the June 29, 2015, invitation for “additional briefing” remained pending before the Court. Chief Justice Moore argues that he “merely recited the status of the *API* orders” and that he “did not offer an opinion, pro or con, as to their validity.” He asserts that he respected the prerogative of the Alabama Supreme Court and did not anticipate how the Court would rule.

He claims further that he “did not counsel the probate judges to disobey the federal injunction. In fact, he did not mention it.” Finally, he claims that the JIC’s complaint is “double minded”:

“On the one hand, the JIC accuses the Chief Justice of failing to declare that *Obergefell*, the federal injunction [in *Strawser*], and the Eleventh Circuit had rendered the *API* orders meaningless. On the other hand, the JIC criticizes the Chief Justice for allegedly usurping the authority of the Alabama Supreme Court to decide the fate of its own orders. In the eyes of the JIC, the Chief Justice is guilty of an ethical violation no matter what he does.”

As the JIC points out, however, this is a false dilemma. There is a third option Chief Justice Moore fails to mention: He could have simply not issued the January 6, 2016, order.

Chief Justice Moore testified that the purpose of the January 6, 2016, order was to preserve the public reputation of the Court and to urge compliance with Canon 3A(5), Canons of Judicial Ethics, which states that “[a] judge should dispose promptly of the business of the court.” He offered into evidence two partially redacted, internal memoranda he wrote to other members of the Alabama Supreme Court—one dated September 9, 2015, and one dated October 7, 2015—in support of this claim. He further offered evidence that complaints were filed by third parties with the JIC against each of the Justices on the Alabama Supreme Court on February 18, 2016, alleging ethical violations because of the delay in ruling on the *API* motions. Chief Justice Moore asserted that he issued the January 6, 2016, order “to address the confusion and uncertainty among the probate judges of Alabama arising from the Court’s delay.”

This court does not find credible Chief Justice Moore’s claim that the purpose of the January 6, 2016, order was merely to provide a “status update” to the State’s probate judges. Chief Justice Moore repeatedly has asserted to this Court that he wanted to draw attention to the “conflicting orders” of *API I* and the injunction in *Strawser*. Thus, Chief Justice Moore clearly knew about the contrary, binding injunction in *Strawser*. Chief Justice Moore’s failure in the January 6, 2016, order to acknowledge the recipients’ obligations under the binding federal injunction in *Strawser*—and the potential dire implications of open defiance of that injunction—did not negate the existence of the injunction in *Strawser* (or *Obergefell*’s clear holdings quoted above). Moreover, the failure to mention the *Strawser* injunction did not prevent the January 6, 2016, order—with its

clear statement that probate judges could not issue same-sex marriage licenses—from being in direct conflict with *Strawser*.

We likewise do not accept Chief Justice Moore’s repeated argument that the disclaimer in paragraph 10 of the January 6, 2016, order—in which Chief Justice Moore asserted he was “not at liberty to provide any guidance ... on the effect of *Obergefell* on the **existing orders** of the Alabama Supreme Court”—negated the reality that Chief Justice Moore was in fact “order[ing] and direct[ing]” the probate judges to comply with the *API* orders regardless of *Obergefell* or the injunction in *Strawser*.

Chief Justice Moore’s arguments that his actions and words mean something other than what they clearly express is not a new strategy. In 2003, this court’s order removing Chief Justice Moore quoted the following testimony from him before the JIC:

“I did what I did because I upheld my oath. And that’s what I did, so I have no apologies for it. I would do it again. I didn’t say I would defy the court order. I said I wouldn’t move the monument. And I didn’t move the monument, which you can take as you will.”

Just as Chief Justice Moore’s decision that he “wouldn’t move the monument” was, in fact, defiance of the federal court order binding him, a disinterested reasonable observer, fully informed of all the relevant facts, would conclude that the undeniable consequence of the January 6, 2016, order was to order and direct the probate judges to deny marriage licenses in direct defiance of the decision of the United States Supreme Court in *Obergefell* and the *Strawser* injunction.

Indeed, to see that the January 6, 2016, order can be reasonably read as requiring defiance of the United States Supreme Court and the district court in *Strawser*, we need look no further than a press release issued by Mat Staver—Chief Justice Moore’s own counsel in these proceedings and one of the counsel of record in *API*—that was issued the same day as the January 6, 2016, order. In that press release, which solely addressed the January 6, 2016, order, Staver asserted: “In Alabama ... state judiciaries ... are standing up against the federal judiciary or any one [sic] else who wants to come up with some cockeyed view that somehow the Constitution now births some newfound notion of same-sex marriage.”

Chief Justice Moore’s contention that the only purpose and plausible reading of the January 6, 2016, order is that of a “status update” is entirely unconvincing.

Furthermore, as the JIC correctly argues, the United States Supreme Court in *Cooper v. Aaron*, 358 U.S. 1 (1958), clearly rejected the theory underlying the January 6, 2016, order and Chief Justice Moore’s special writing in *API II*—namely, the theory that only the parties to a United States Supreme Court decision are bound by the decision. *Cooper* held that states are bound by the decisions of the United States Supreme Court, even when a state has not been a party to the case

that generated the decision. In addressing attempts by the State of Arkansas to resist the school-desegregation decision of the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), the *Cooper* Court stated:

“[W]e should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.

“Article VI of the Constitution makes the Constitution the ‘supreme Law of the Land.’ In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as ‘the fundamental and paramount law of the nation,’ declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that ‘It is emphatically the province and duty of the judicial department to say what the law is.’ This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, ¶3 ‘to support this Constitution.’ Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers’ ‘anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State. ...’ *Ableman v. Booth*, 21 How. 506, 524.

“No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: ‘If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery’ *United States v. Peters*, 5 Cranch 115, 136. A Governor who asserts a power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, ‘it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases ...’ *Sterling v. Constantin*, 287 U.S. 378, 397-398.”

358 U.S. at 17-19 (emphasis added).

Chief Justice Moore recognized the holding and validity of *Cooper* in 2003, when he argued then that his case was distinguishable from *Cooper*. Chief Justice Moore’s understanding of *Cooper*—as evidenced by his arguments in 2003—means that he could not have actually thought that *Obergefell* bound only the parties to that case. Thus, we agree with the JIC’s contention that Chief

Justice Moore is disingenuous in his suggestion in the January 6, 2016, order that “recent developments of potential relevance since *Obergefell* may impact” whether *Obergefell* abrogated *API*.

We likewise are not persuaded by Chief Justice Moore’s attempt to, in effect, blame the Alabama Supreme Court for creating a situation that necessitated his issuance of the January 6, 2016, order. Because the Alabama Supreme Court chose to take no action on its June 29, 2015, invitation for additional briefing other than eventually to dismiss all pending motions and to certify its judgment in *API I*, this court does not know what field of operation, if any, the Alabama Supreme Court thought its “existing orders” in *API I* had after the decision in *Obergefell* was released. What is clear to this court, however, is that the Alabama Supreme Court’s decision to take no action after *Obergefell* other than to give a deadline to submit additional briefing in its June 29, 2015, order is qualitatively different from the language Chief Justice Moore used in the January 6, 2016, order. That order, with its clear statement — “IT IS ORDERED AND DIRECTED THAT ... the existing orders of the Alabama Supreme Court ... remain in full force and effect”—was not, as the JIC pointed out in its closing argument, merely a status update. A judge does not issue a “status update” that “orders and directs” that a law remain in effect. Rather, a judge “orders and directs” individuals to do something: in this instance, to comply with law that is in “full force and effect.” The January 6, 2016, order called for action—and that action would have been in defiance of *Obergefell* and of the injunction in *Strawser*.

An additional difference in the Alabama Supreme Court’s June 29, 2015, invitation for briefing and the January 6, 2016, order is that the Alabama Supreme Court cited no legal authority in its order other than the rule of the United States Supreme Court giving the parties in *Obergefell* “a period of 25 days to file a petition for rehearing in that case.” The January 6, 2016, order, on the other hand, includes three paragraphs of legal authority, which the order describes as standing for the “elementary” proposition that “a judgment only binds the parties to the case before the court.” As noted above, the United States Supreme Court has rejected the notion that only the parties to a United States Supreme Court judgment are bound by it. Regardless of the merits of the statement in the January 6, 2016, order, however, it is clear to this court that Chief Justice Moore in fact took a legal position in the January 6, 2016, order, despite his claim that he was not taking any such position.

Further, Chief Justice Moore’s use of legal authority in support of that position was incomplete to the point that this court finds it was intended to be misleading. First, his brief description of *Obergefell* in the January 6, 2016, order as holding “unconstitutional certain marriage laws in the states of Michigan, Kentucky, Ohio, and Tennessee” is, as the JIC explains, at best incomplete and at worst intentionally misleading. That brief description of *Obergefell* did not address the clear holding of *Obergefell*—that same-sex couples may exercise the right to marry in all states, not just Michigan, Kentucky, Ohio, and Tennessee.

Second, Chief Justice Moore’s use of authority from the Eighth and Tenth Circuits was selective and misleading. In each of the cases Chief Justice Moore cited in the January 6, 2016, order, the lower federal courts had issued injunctions before *Obergefell* was decided—and each of those injunctions was consistent with what *Obergefell* later held. Thus, the question was whether *Obergefell* had rendered moot the need for the lower federal courts to continue to exercise jurisdiction to enforce the injunctions they had already entered before *Obergefell* was decided. In each case, as the JIC explains, “it appears the courts remained unconvinced that the states would actually abide by *Obergefell*’s mandate. To say that these cases somehow indicate that *Obergefell* does not impact Alabama law has no basis.” At best, as the JIC asserts, the “selective inclusion” and “selective omission” of authority was ““one-sided”; at worst, it was “fully misleading” and was a “thinly-veiled order directing probate judges to defy federal law.” Indeed, as we have already noted, Chief Justice Moore’s own attorney in this proceeding interpreted the January 6, 2016, order as a call for open defiance of federal court decisions and issued a press release to that effect on the date the order was released.

In sum, this court rejects Chief Justice Moore’s argument that the January 6, 2016, order “merely recited the status of the *API* orders” and “did not offer an opinion, pro or con, as to their validity.” The order clearly asserts that the **“existing orders of the Alabama Supreme Court that Alabama probate judges have a ministerial duty not to issue any marriage license contrary to the Alabama Sanctity of Marriage Amendment or the Alabama Marriage Protection Act remain in full force and effect.”** (Bold-face type in original.)

Beyond question, at the time he issued the January 6, 2016, order Chief Justice Moore knew about *Obergefell* and its clear holding that the United States Constitution protects the right of same-sex couples to marry. Similarly, at the time he issued the January 6, 2016, order he knew the binding application of the federal injunction in *Strawser*. Accordingly, we conclude that the omission from the January 6, 2016, order of any mention of the federal injunction in *Strawser* was intentional. Further, this intentional omission was a failure to follow clear law and a failure to uphold the integrity and independence of the judiciary.

As noted, Chief Justice Moore’s use of caselaw in the order was incomplete, misleading, and manipulative. We find that, when coupled with the intentional omission of binding federal authority, the clear purpose of the January 6, 2016, order was to order and direct the probate judges—most of whom have never been admitted to practice law in Alabama—to stop complying with binding federal law until the Alabama Supreme Court decided what effect that federal law would have.

Based on the foregoing, this court finds that the JIC has proved by clear and convincing evidence that Chief Justice Moore is guilty of charges nos. 1-5. As to charge no. 1, by willfully issuing the

January 6, 2016, order, in which he directed or appeared to direct all Alabama probate judges to follow Alabama’s marriage laws, completely disregarding a federal court injunction when he knew or should have known every Alabama probate judge was enjoined from using the Alabama marriage laws or any Alabama Supreme Court order to deny marriage licenses to same-sex couples, the evidence that Chief Justice Moore violated Canons 1, 2, 2A, 2B, and 3 is clear and convincing.

As to charge no. 2, the evidence is clear and convincing that the January 6, 2016, order demonstrated an unwillingness to follow clear law, and Chief Justice Moore thereby violated Canons 1, 2, 2A, 2B, and 3.

As to charge no. 3, the evidence is clear and convincing that in issuing the January 6, 2016, order, and deciding substantive legal issues while purporting to act in his administrative capacity, Chief Justice Moore violated Canons 1, 2, 2A, 2B, and 3.

As to charge no. 4, the evidence is clear and convincing that in issuing the January 6, 2016, order, Chief Justice Moore substituted his judgment for the judgment of the entire Alabama Supreme Court on a substantive legal issue in a case then pending in that Court—the effect of the decision of the United States Supreme Court in *Obergefell*—and thereby violated Canons 1, 2, 2A, 2B, 3, 3A(6).

As to charge no. 5, the evidence is clear and convincing that, by issuing the January 6, 2016, order Chief Justice Moore interfered with the legal process and remedies in the United States District Court and/or the Alabama Supreme Court available through those courts to address the status of any proceeding to which Alabama’s probate judges were parties. In so doing, Chief Justice Moore violated Canons 1, 2, 2A, 2B, and 3.

Discussion Questions

Do you agree with the conclusion of the Alabama Court of the Judiciary that Judge Moore’s Order prohibiting probate judges from issuing marriage licenses to same-sex couples amounted to a clear violation of federal law, for which Moore deserved to be disciplined? Or is it possible that Moore’s Order was based on a good faith, if erroneous interpretation of the relevant authorities and the complex interplay between the four, federal and state cases discussed in the opinion? If you agree with the opinion, what sanction do you believe should be imposed upon Judge Moore?

As the opinion notes more than once, this was not the first instance in which Judge Moore was disciplined for failing to follow the orders of a federal court. In 2003, Judge Moore was sanctioned for refusing to remove a monument depicting the Ten Commandments he had installed in the

Supreme Court building in Alabama. See *Moore v. Judicial Inquiry Commission of the State of Alabama*, 891 So.2d 848 (2004). The sanction in that instance was to remove Judge Moore from the bench. However, Judge Moore was subsequently re-elected to the State Supreme Court by the voters in Alabama. Does the voters' willingness to re-elect Judge Moore say anything about the impact his initial violations had on "public confidence in the judiciary?"

Note that in a separate, and omitted portion of the opinion, the Alabama Court of the Judiciary also concluded that the fact that Judge Moore participated in the second phase of the *API* case (*API II*), after having both recused himself from the first phase of the case, and after the series of events relating to the case outlined above, called into question his fairness and impartiality in the case, the portion of Rule 2.2 we will turn to next, thus warranting discipline on that ground as well. The ultimate sanction against Judge Moore was again removal from the bench.

Following his second removal from the bench, in 2017 Moore ran for the United States Senate seat vacated by Jeff Sessions when the latter was appointed United States Attorney General. During the campaign, allegations arose that Moore had inappropriate contact with underage women prior to his appointment to the bench. Moore denied these allegations. Though Moore won the Republican primary election, he was defeated in the general election by Democrat Doug Jones.

2. Fairness and Impartiality

Of course, impartiality is one of the core values of judicial decision making. However, exactly what do we mean by impartiality? And does impartiality trump all other values when it comes to the conduct of judges? Consider the following landmark Supreme Court decision.

Republican Party of Minnesota v. White

United States Supreme Court

536 U.S. 765 (2002)

[Justice Scalia delivered the opinion of the Court, which was joined by Justices Rehnquist, O'Connor, Kennedy, and Thomas.]

The question presented in this case is whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues.

I

Since Minnesota's admission to the Union in 1858, the State's Constitution has provided for the selection of all state judges by popular election. Since 1912, those elections have been nonpartisan. Since 1974, they have been subject to a legal restriction which states that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or

political issues.” This prohibition, promulgated by the Minnesota Supreme Court and based on Canon 7(B) of the 1972 American Bar Association (ABA) Model Code of Judicial Conduct, is known as the “announce clause.” Incumbent judges who violate it are subject to discipline, including removal, censure, civil penalties, and suspension without pay. Lawyers who run for judicial office also must comply with the announce clause. Those who violate it are subject to, *inter alia*, disbarment, suspension, and probation.

* * *

II

Before considering the constitutionality of the announce clause, we must be clear about its meaning. Its text says that a candidate for judicial office shall not “announce his or her views on disputed legal or political issues.”

We know that “announc[ing] ... views” on an issue covers much more than *promising* to decide an issue a particular way. The prohibition extends to the candidate’s mere statement of his current position, even if he does not bind himself to maintain that position after election. All the parties agree this is the case, because the Minnesota Code contains a so-called “pledges or promises” clause, which *separately* prohibits judicial candidates from making “pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office,” — a prohibition that is not challenged here and on which we express no view.

In any event, it is clear that the announce clause prohibits a judicial candidate from stating his views on any specific nonfanciful legal question within the province of the court for which he is running, except in the context of discussing past decisions—and in the latter context as well, if he expresses the view that he is not bound by *stare decisis*.

III

As the Court of Appeals recognized, the announce clause both prohibits speech on the basis of its content and burdens a category of speech that is “at the core of our First Amendment freedoms”—speech about the qualifications of candidates for public office. The Court of Appeals concluded that the proper test to be applied to determine the constitutionality of such a restriction is what our cases have called strict scrutiny; the parties do not dispute that this is correct. Under the strict-scrutiny test, respondents have the burden to prove that the announce clause is (1) narrowly tailored, to serve (2) a compelling state interest. In order for respondents to show that the announce

clause is narrowly tailored, they must demonstrate that it does not “unnecessarily circumscrib[e] protected expression.”

The Court of Appeals concluded that respondents had established two interests as sufficiently compelling to justify the announce clause: preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary. Respondents reassert these two interests before us, arguing that the first is compelling because it protects the due process rights of litigants, and that the second is compelling because it preserves public confidence in the judiciary. Respondents are rather vague, however, about what they mean by “impartiality.” Indeed, although the term is used throughout the Eighth Circuit’s opinion, the briefs, the Minnesota Code of Judicial Conduct, and the ABA Codes of Judicial Conduct, none of these sources bothers to define it. Clarity on this point is essential before we can decide whether impartiality is indeed a compelling state interest, and, if so, whether the announce clause is narrowly tailored to achieve it.

A

One meaning of “impartiality” in the judicial context—and of course its root meaning—is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law. That is, it guarantees a party that the judge who hears his case will apply the law to him in the same way he applies it to any other party. This is the traditional sense in which the term is used.

We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality) in this sense. Indeed, the clause is barely tailored to serve that interest *at all*, inasmuch as it does not restrict speech for or against particular *parties*, but rather speech for or against particular *issues*. To be sure, when a case arises that turns on a legal issue on which the judge (as a candidate) had taken a particular stand, the party taking the opposite stand is likely to lose. But not because of any bias against that party, or favoritism toward the other party. *Any* party taking that position is just as likely to lose. The judge is applying the law (as he sees it) evenhandedly.

B

It is perhaps possible to use the term “impartiality” in the judicial context (though this is certainly not a common usage) to mean lack of preconception in favor of or against a particular *legal view*. This sort of impartiality would be concerned, not with guaranteeing litigants equal application of the law, but rather with guaranteeing them an equal chance to persuade the court on the legal points

in their case. Impartiality in this sense may well be an interest served by the announce clause, but it is not a *compelling* state interest, as strict scrutiny requires. A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason. For one thing, it is virtually impossible to find a judge who does not have preconceptions about the law. As then-Justice Rehnquist observed of our own Court: "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers." *Laird v. Tatum*, 409 U.S. 824, 835 (1972). Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so. "Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias." *Ibid.* The Minnesota Constitution positively forbids the selection to courts of general jurisdiction of judges who are impartial in the sense of having no views on the law. Minn. Const., Art. VI, § 5 ("Judges of the supreme court, the court of appeals and the district court shall be learned in the law"). And since avoiding judicial preconceptions on legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the "appearance" of that type of impartiality can hardly be a compelling state interest either.

C

A third possible meaning of "impartiality" (again not a common one) might be described as open-mindedness. This quality in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case. This sort of impartiality seeks to guarantee each litigant, not an *equal* chance to win the legal points in the case, but at least *some* chance of doing so. It may well be that impartiality in this sense, and the appearance of it, are desirable in the judiciary, but we need not pursue that inquiry, since we do not believe the Minnesota Supreme Court adopted the announce clause for that purpose.

Respondents argue that the announce clause serves the interest in open-mindedness, or at least in the appearance of open-mindedness, because it relieves a judge from pressure to rule a certain way in order to maintain consistency with statements the judge has previously made. The problem is, however, that statements in election campaigns are such an infinitesimal portion of the public commitments to legal positions that judges (or judges-to-be) undertake, that this object of the prohibition is implausible. Before they arrive on the bench (whether by election or otherwise) judges have often committed themselves on legal issues that they must later rule upon. More common still is a judge's confronting a legal issue on which he has expressed an opinion while on

the bench. Most frequently, of course, that prior expression will have occurred in ruling on an earlier case. But judges often state their views on disputed legal issues outside the context of adjudication—in classes that they conduct, and in books and speeches. Like the ABA Codes of Judicial Conduct, the Minnesota Code not only permits but encourages this. That is quite incompatible with the notion that the need for open-mindedness (or for the appearance of open-mindedness) lies behind the prohibition at issue here.

The short of the matter is this: In Minnesota, a candidate for judicial office may not say “I think it is constitutional for the legislature to prohibit same-sex marriages.” He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.

Moreover, the notion that the special context of electioneering justifies an *abridgment* of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. “[D]ebate on the qualifications of candidates” is “at the core of our electoral process and of the First Amendment freedoms,” not at the edges. “The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.” “It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign.” We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

[Justice Ginsburg wrote a dissenting opinion which was joined by Justices Stevens, Souter, and Breyer]

I

The speech restriction must fail, in the Court’s view, because an electoral process is at stake; if Minnesota opts to elect its judges, the Court asserts, the State may not rein in what candidates may say.

I do not agree with this unilocular, “an election is an election,” approach. Instead, I would

differentiate elections for political offices, in which the First Amendment holds full sway, from elections designed to select those whose office it is to administer justice without respect to persons. Minnesota's choice to elect its judges, I am persuaded, does not preclude the State from installing an election process geared to the judicial office.

Legislative and executive officials serve in representative capacities. They are agents of the people; their primary function is to advance the interests of their constituencies. Candidates for political offices, in keeping with their representative role, must be left free to inform the electorate of their positions on specific issues. Armed with such information, the individual voter will be equipped to cast her ballot intelligently, to vote for the candidate committed to positions the voter approves. Campaign statements committing the candidate to take sides on contentious issues are therefore not only appropriate in political elections; they are “at the core of our electoral process,” for they “enhance the accountability of government officials to the people whom they represent[.]”

Judges, however, are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. “[I]t is the business of judges to be indifferent to popularity.” They must strive to do what is legally right, all the more so when the result is not the one “the home crowd” wants. Even when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of which cannot depend on the will of the public.

Thus, the rationale underlying unconstrained speech in elections for political office—that representative government depends on the public's ability to choose agents who will act at its behest—does not carry over to campaigns for the bench. As to persons aiming to occupy the seat of judgment, the Court's unrelenting reliance on decisions involving contests for legislative and executive posts is manifestly out of place. In view of the magisterial role judges must fill in a system of justice, a role that removes them from the partisan fray, States may limit judicial campaign speech by measures impermissible in elections for political office.

The Court sees in this conclusion, and in the Announce Clause that embraces it, “an obvious tension,” The Minnesota electorate is permitted to select its judges by popular vote, but is not provided information on “subjects of interest to the voters,”—in particular, the voters are not told how the candidate would decide controversial cases or issues if elected. This supposed tension, however, rests on the false premise that by departing from the federal model with respect to who *chooses* judges, Minnesota necessarily departed from the federal position on the *criteria* relevant to the exercise of that choice.

The Minnesota Supreme Court thought otherwise:

The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling

legislation is the same: to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences.

Nothing in the Court's opinion convincingly explains why Minnesota may not pursue that goal in the manner it did.

Minnesota did not choose a judicial selection system with all the trappings of legislative and executive races. While providing for public participation, it tailored judicial selection to fit the character of third branch office holding. The balance the State sought to achieve—allowing the people to elect judges, but safeguarding the process so that the integrity of the judiciary would not be compromised—should encounter no First Amendment shoal.

Discussion Question

Do you agree with the majority or the dissent here? Do you believe the First Amendment value of an informed electorate outweighs the speech restrictions here? Or do you believe that the interests in an independent and impartial judiciary justify the restrictions on campaign speech embodied in the “announce clause?”

Note that in the underlying case, Minnesota authorities decided **not** to seek discipline against the judicial candidate who initially brought the case, for campaign literature that criticized three prior decisions of the Minnesota Supreme Court. The candidate brought the case essentially as a declaratory judgment action, out of fear that future campaign statements might result in sanction against him. In her dissent, Justice Ginsberg also argued that the fact that Minnesota had chosen not to apply the clause to statements criticizing prior judicial decisions demonstrated that the clause could be applied in a manner that was consistent with the First Amendment's values. Justice Scalia, of course, was not persuaded that the manner the clause was applied in the case below could salvage its constitutionality.

3. Elected and Appointed Judges

As the Court points out in an omitted portion of the majority opinion, judicial elections were uncommon at the time the United States was founded. Only Vermont, of the original states, provided for judicial elections. Of course the U.S. Constitution provides for the appointment of federal judges, as well as life tenure, in order to preserve the independence and impartiality of the federal judiciary. However, beginning with the election of President Andrew Jackson and the movement toward greater popular sovereignty (Jacksonian Democracy), states began to move toward greater use of elections to select judges. By the time of the *White* decision 39 of the 50 states used elections to select at least some of the state's judges. In an omitted concurring opinion, Justice O'Connor criticizes the practice of judicial elections generally, on grounds that fears of the

impact of judicial decisions on future elections cannot help but impact the decisions of judges.

Where do you stand on the question of whether judges should be elected or appointed? Is there one right answer to this question, or might the answers differ for federal and state judges, trial versus appellate judges, etc.?

Note that despite the decision in *White* the ABA's Model Code still contains some provisions that restrict the campaign activities of judges and candidates for judicial office. These restrictions will be discussed further in Chapter 4.

Does the practice of appointing judges rather than electing them solve all of the problems surrounding judicial speech? Does the practice perhaps create some speech related issues of its own? Consider the following comment relating to the appointment process concerning Supreme Court Justice Neil Gorsuch.

Please read this 2017 article written by Mark Joseph Stern from Slate, "[Can Neil Gorsuch Answer A Question?](#)"

Discussion Questions

Do you agree with Judge Gorsuch that answering any of the questions he was asked during his confirmation hearings would have called into question his independence and impartiality? Based upon his opinion in *White*, do you think that Justice Scalia (the Justice who Gorsuch was appointed to replace) would have agreed with that view?

To be fair, Gorsuch is not the first Supreme Court nominee to stay away from answering substantive questions during their confirmation hearings. Nor was his a partisan approach. Indeed, Justice Ruth Bader Ginsberg is often credited with initiating the modern practice of extreme reticence on the part of Supreme Court Nominees to discuss the substance of case law or legal issues in their confirmation hearings. This approach, in turn is seen as a reaction to the failed Supreme Court nomination of then U.S. Circuit Court judge Robert Bork by President Ronald Reagan in 1987. In addition to having a lengthy paper trail of writings as both a law professor and a federal judge, Bork went into great detail during his confirmation hearings regarding his judicial philosophy and his thoughts on particular cases. As a result, Bork's opponents emerged with more than enough ammunition to derail the judge's appointment by describing his views and comments as reactionary and outside of the judicial mainstream.

Is there a middle ground between the Bork approach and the Gorsuch approach? Where Senators about to vote on confirmation and members of the public can learn something about what a nominee might do if they were confirmed, without threatening that judge's independence and impartiality if their nomination is approved?

C. Bias, Prejudice, and Harassment

Judges are required to perform their judicial functions without bias or prejudice against any particular person, or group of persons, on any basis including race, gender, religion, ethnicity, national origin or sexual orientation. Judges are also required to refrain from harassing anyone on these or any other bases as well. Judges are also compelled to require lawyers appearing before them to similarly refrain from engaging in harassment or manifesting bias or prejudice in such proceedings.

Not surprisingly, judges have been disciplined in the past for comments that should be considered offensive on grounds of race, gender, religion, ethnicity and national origin. Fortunately, as time goes on, instances of such overtly biased or prejudiced conduct occur less frequently. However, it is equally important that judges refrain from non-overt forms of bias and prejudice as well. And advances in cognitive science and psychology have demonstrated that virtually everyone harbors “implicit” and often unconscious biases or prejudice against certain people or groups of people. The requirement of fair and unbiased judging demands that we make affirmative efforts to combat such unconscious biases as well as the more overt forms that served as a basis for judicial discipline in the past. Consider the following article.

Implicit Bias in the Courtroom²⁹

Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson, Jennifer Mnookin

54 U.C.L.A. L. Rev. 1124 (2012)

Introduction

The problems of overt discrimination have received enormous attention from lawyers, judges, academics, and policymakers. While explicit sexism, racism, and other forms of bias persist, they have become less prominent and public over the past century. But explicit bias and overt discrimination are only part of the problem. Also important, and likely more pervasive, are questions surrounding implicit bias--attitudes or stereotypes that affect our understanding, decisionmaking, and behavior, without our even realizing it.

How prevalent and significant are these implicit, unintentional biases? To answer these questions,

²⁹ CALI gratefully acknowledges permission from Professor Jerry Kang to include portions of this article.

people have historically relied on their gut instincts and personal experiences, which did not produce much consensus. Over the past two decades, however, social cognitive psychologists have discovered novel ways to measure the existence and impact of implicit biases--without relying on mere common sense. Using experimental methods in laboratory and field studies, researchers have provided convincing evidence that implicit biases exist, are pervasive, are large in magnitude, and have real-world effects. These fascinating discoveries, which have migrated from the science journals into the law reviews and even popular discourse, are now reshaping the law's fundamental understandings of discrimination and fairness.

Given the substantial and growing scientific literature on implicit bias, the time has now come to confront a critical question: What, if anything, should we do about implicit bias in the courtroom? In other words, how concerned should we be that judges, advocates, litigants, and jurors come to the table with implicit biases that influence how they interpret evidence, understand facts, parse legal principles, and make judgment calls? In what circumstances are these risks most acute? Are there practical ways to reduce the effects of implicit biases? To what extent can awareness of these biases mitigate their impact? What other debiasing strategies might work? In other words, in what way--if at all--should the courts respond to a better model of human decisionmaking that the mind sciences are providing?

We are a team of legal academics, scientists, researchers, and a sitting federal judge who seek to answer these difficult questions in accordance with behavioral realism. Our general goal is to educate those in the legal profession who are unfamiliar with implicit bias and its consequences. To do so, we provide a current summary of the underlying science, contextualized to criminal and civil litigation processes that lead up to and crescendo in the courtroom. This involves not only a focused scientific review but also a step-by-step examination of how criminal and civil trials proceed, followed by suggestions designed to address the harms. We seek to be useful to legal practitioners of good faith, including judges, who conclude that implicit bias is a problem (one among many) but do not know quite what to do about it. While we aim to provide useful and realistic strategies for those judges already persuaded that implicit bias is a legitimate concern, we also hope to provoke those who know less about it, or are more skeptical of its relevance, to consider these issues thoughtfully.

We are obviously not a random sample of researchers and practitioners; thus, we cannot claim any representative status. That said, the author team represents a broad array of experience, expertise, methodology, and viewpoints. In authoring this paper, the team engaged in careful deliberations across topics of both consensus and dissensus. We did not entirely agree on how to frame questions in this field or how to answer them. That said, we stand collectively behind what we have written. We also believe the final work product reveals the benefits of such cross-disciplinary and cross-professional collaboration.

Part I provides a succinct scientific introduction to implicit bias, with some important theoretical clarifications. Often the science can seem too abstract, especially to nonprofessional scientists. As a corrective, Part II applies the science to two trajectories of bias relevant to the courtroom. One story follows a criminal defendant path; the other story follows a civil employment discrimination path. Part III examines different intervention strategies to counter the implicit biases of key players in the justice system, such as the judge and jury.

I. Implicit Biases

A. Empirical Introduction

Over the past thirty years, cognitive and social psychologists have demonstrated that human beings think and act in ways that are often not rational. We suffer from a long litany of biases, most of them having nothing to do with gender, ethnicity, or race. For example, we have an oddly stubborn tendency to anchor to numbers, judgments, or assessments to which we have been exposed and to use them as a starting point for future judgments--even if those anchors are objectively wrong. We exhibit an endowment effect, with irrational attachments to arbitrary initial distributions of property, rights, and grants of other entitlements. We suffer from hindsight bias and believe that what turns out to be the case today should have been easily foreseen yesterday. The list of empirically revealed biases goes on and on. Indeed, many legal academics have become so familiar with such heuristics and biases that they refer to them in their analyses as casually as they refer to economic concepts such as transaction costs.

One type of bias is driven by attitudes and stereotypes that we have about social categories, such as genders and races. An attitude is an association between some concept (in this case a social group) and an evaluative valence, either positive or negative. A stereotype is an association between a concept (again, in this case a social group) and a trait. Although interconnected, attitudes and stereotypes should be distinguished because a positive attitude does not foreclose negative stereotypes and vice versa. For instance, one might have a positive overall attitude toward African Americans and yet still associate them with weapons. Or, one might have a positive stereotype of Asian Americans as mathematically able but still have an overall negative attitude towards them.

The conventional wisdom has been that these social cognitions--attitudes and stereotypes about social groups--are explicit, in the sense that they are both consciously accessible through introspection and endorsed as appropriate by the person who possesses them. Indeed, this understanding has shaped much of current antidiscrimination law. The conventional wisdom is also that the social cognitions that individuals hold are relatively stable, in the sense that they operate in the same way over time and across different situations.

However, recent findings in the mind sciences, especially implicit social cognition (ISC), have undermined these conventional beliefs. As detailed below, attitudes and stereotypes may also be

implicit, in the sense that they are not consciously accessible through introspection. Accordingly, their impact on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.

How have mind scientists discovered such findings on matters so latent or implicit? They have done so by innovating new techniques that measure implicit attitudes and stereotypes that by definition cannot be reliably self-reported. Some of these measures involve subliminal priming and other treatments that are not consciously detected within an experimental setting. Other instruments use reaction time differences between two types of tasks--one that seems consistent with some bias, the other inconsistent--as in the Implicit Association Test (IAT).

The well-known IAT is a sorting task that measures time differences between schema-consistent pairings and schema-inconsistent pairings of concepts, as represented by words or pictures. For example, suppose we want to test whether there is an implicit stereotype associating African Americans with weapons. In a schema-consistent run, the participant is instructed to hit one response key when she sees a White face or a harmless object, and another response key when she sees an African American face or a weapon. Notice that the same key is used for both White and harmless item; a different key is used for both African American and weapon. Most people perform this task quickly.

In a schema-inconsistent run, we reverse the pairings. In this iteration, the same key is used for both White and weapon; a different key is used for both African American and harmless item. Most people perform this task more slowly. Of course, the order in which these tasks are presented is always systematically varied to ensure that the speed of people's responses is not affected by practice. The time differential between these runs is defined as the implicit association effect and is statistically processed into standard units called an IAT D score.

Through the IAT, social psychologists from hundreds of laboratories have collected enormous amounts of data on reaction-time measures of "implicit biases," a term we use to denote implicit attitudes and implicit stereotypes. According to these measures, implicit bias is pervasive (widely held), large in magnitude (as compared to standardized measures of explicit bias), dissociated from explicit biases (which suggests that explicit biases and implicit biases, while related, are separate mental constructs), and predicts certain kinds of real-world behavior. What policymakers are now keen to understand are the size and scope of these behavioral effects and how to counter them--by altering the implicit biases themselves and by implementing strategies to attenuate their effects.

Useful and current summaries of the scientific evidence can be found in both the legal and psychological literatures. For example, in the last volume of this law review, Jerry Kang and

Kristin Lane provided a summary of the evidence demonstrating that we are not perceptually, cognitively, or behaviorally colorblind. Justin Levinson and Danielle Young have summarized studies focusing on jury decisionmaking. In the psychology journals, John Jost and colleagues responded to sharp criticism that the IAT studies lacked real-world consequences by providing a qualitative review of the literature, including ten studies that no manager should ignore. Further, they explained how the findings are entirely consistent with the major tenets of twentieth century social cognitive psychology. In a quantitative review, Anthony Greenwald conducted a meta-analysis of IAT studies--which synthesizes all the relevant scientific findings--and found that implicit attitudes as measured by the IAT predicted certain types of behavior, such as anti-Black discrimination or intergroup discrimination, substantially better than explicit bias measures.

Instead of duplicating these summaries, we offer research findings that are specific to implicit bias leading up to and in the courtroom. To do so, we chart out two case trajectories--one criminal, the other civil. That synthesis appears in Part II.

B. Theoretical Clarification

But before we leave our introduction to implicit bias, we seek to make some theoretical clarifications on the relationships between explicit biases, implicit biases, and structural processes that are all involved in producing unfairness in the courtroom. We do so because the legal literature has flagged this as an important issue. In addition, a competent diagnosis of unfairness in the courtroom requires disentangling these various processes. For instance, if the end is to counter discrimination caused by, say, explicit bias, it may be ineffective to adopt means that are better tailored to respond to implicit bias, and vice versa.

We start by clarifying terms. To repeat, explicit biases are attitudes and stereotypes that are consciously accessible through introspection and endorsed as appropriate. If no social norm against these biases exists within a given context, a person will freely broadcast them to others. But if such a norm exists, then explicit biases can be concealed to manage the impressions that others have of us. By contrast, implicit biases are attitudes and stereotypes that are not consciously accessible through introspection. If we find out that we have them, we may indeed reject them as inappropriate.

Above, we used the labels “explicit” and “implicit” as adjectives to describe mental constructs--attitudes and stereotypes. Readers should recognize that these adjectives can also apply to research procedures or instruments. An explicit instrument asks the respondent for a direct self-report with no attempt by researchers to disguise the mental construct that they are measuring. An example is a straightforward survey question. No instrument perfectly measures a mental construct. In fact, one can often easily conceal one’s explicit bias as measured through an explicit instrument. In this way, an explicit instrument can poorly measure an explicit bias, as the test subject may choose not

to be candid about the beliefs or attitudes at issue.

By contrast, an implicit instrument does not depend on the respondent's conscious knowledge of the mental constructs that the researcher is inferring from the measure. An example is a reaction-time measure, such as the IAT. This does not necessarily mean that the respondent is unaware that the IAT is measuring bias. It also does not mean that the respondent is actually unaware that he or she has implicit biases, for example because she has taken an IAT before or is generally aware of the research literature. To repeat, no instrument perfectly measures any mental construct, and this remains true for implicit instruments. One might, for instance, try to conceal implicit bias measured through an implicit instrument, but such faking is often much harder than faking explicit bias measured by an explicit instrument.

Finally, besides explicit and implicit biases, another set of processes that produce unfairness in the courtroom can be called "structural." Other names include "institutional" or "societal." These processes can lock in past inequalities, reproduce them, and indeed exacerbate them even without formally treating persons worse simply because of attitudes and stereotypes about the groups to which they belong. In other words, structural bias can produce unfairness even though no single individual is being treated worse right now because of his or her membership in a particular social category.

Because thinking through biases with respect to human beings evokes so much potential emotional resistance, sometimes it is easier to apply them to something less fraught than gender, race, religion, and the like. So, consider a vegetarian's biases against meat. He has a negative attitude (that is, prejudice) toward meat. He also believes that eating meat is bad for his health (a stereotype). He is aware of this attitude and stereotype. He also endorses them as appropriate. That is, he feels that it is okay to have a negative reaction to meat. He also believes it accurate enough to believe that meat is generally bad for human health and that there is no reason to avoid behaving in accordance with this belief. These are explicit biases.

Now, if this vegetarian is running for political office and campaigning in a region famous for barbecue, he will probably keep his views to himself. He could, for example, avoid showing disgust on his face or making critical comments when a plate of ribs is placed in front of him. Indeed, he might even take a bite and compliment the cook. This is an example of concealed bias (explicit bias that is hidden to manage impressions).

Consider, by contrast, another vegetarian who has recently converted for environmental reasons. She proclaims explicitly and sincerely a negative attitude toward meat. But it may well be that she has an implicit attitude that is still slightly positive. Suppose that she grew up enjoying weekend barbecues with family and friends, or still likes the taste of steak, or first learned to cook by making roasts. Whatever the sources and causes, she may still have an implicitly positive attitude toward

meat. This is an implicit bias.

Finally, consider some eating decision that she has to make at a local strip mall. She can buy a salad for \$10 or a cheeseburger for \$3. Unfortunately, she has only \$5 to spare and must eat. Neither explicit nor implicit biases much explain her decision to buy the cheeseburger. She simply lacks the funds to buy the salad, and her need to eat trumps her desire to avoid meat. The decision was not driven principally by an attitude or stereotype, explicit or implicit, but by the price. But what if a careful historical, economic, political, and cultural analysis revealed multifarious subsidies, political kickbacks, historical contingencies, and economies of scale that accumulated in mutually reinforcing ways to price the salad much higher than the cheeseburger? These various forces could make it more instrumentally rational for consumers to eat cheeseburgers. This would be an example of structural bias in favor of meat.

We disentangle these various mechanisms--explicit attitudes and stereotypes (sometimes concealed, sometimes revealed), implicit attitudes and stereotypes, and structural forces--because they pose different threats to fairness everywhere, including the courtroom. For instance, the threat to fairness posed by jurors with explicit negative attitudes toward Muslims but who conceal their prejudice to stay on the jury is quite different from the threat posed by jurors who perceive themselves as nonbiased but who nevertheless hold negative implicit stereotypes about Muslims. Where appropriate, we explain how certain studies provide evidence of one type of bias or the other. In addition, we want to underscore that these various mechanisms--explicit bias, implicit bias, and structural forces--are not mutually exclusive. To the contrary, they may often be mutually reinforcing. In focusing on implicit bias in the courtroom, we do not mean to suggest that implicit bias is the only or most important problem, or that explicit bias (revealed or concealed) and structural forces are unimportant or insignificant.

III. Interventions

Before we turn explicitly to interventions, we reiterate that there are many causes of unfairness in the courtroom, and our focus on implicit bias is not meant to deny other causes. In Part II, we laid out the empirical case for why we believe that implicit biases influence both criminal and civil case trajectories. We now identify interventions that build on an overlapping scientific and political consensus. If there are cost-effective interventions that are likely to decrease the impact of implicit bias in the courtroom, we believe they should be adopted at least as forms of experimentation.

We are mindful of potential costs, including implementation and even overcorrection costs. But we are hopeful that these costs can be safely minimized. Moreover, the potential benefits of these improvements are both substantive and expressive. Substantively, the improvements may increase actual fairness by decreasing the impact of implicit biases; expressively, they may increase the

appearance of fairness by signaling the judiciary's thoughtful attempts to go beyond cosmetic compliance. Effort is not always sufficient, but it ought to count for something.

A. Decrease the Implicit Bias

If implicit bias causes unfairness, one intervention strategy is to decrease the implicit bias itself. It would be delightful if explicit refutation would suffice. But abstract, global self-commands to "Be fair!" do not much change implicit social cognitions. How then might we alter implicit attitudes or stereotypes about various social groups? One potentially effective strategy is to expose ourselves to countertypical associations. In rough terms, if we have a negative attitude toward some group, we need exposure to members of that group to whom we would have a positive attitude. If we have a particular stereotype about some group, we need exposure to members of that group that do not feature those particular attributes.

These exposures can come through direct contact with countertypical people. For example, Nilanjana Dasgupta and Shaki Asgari tracked the implicit gender stereotypes held by female subjects both before and after a year of attending college. One group of women attended a year of coed college; the other group attended a single-sex college. At the start of their college careers, the two groups had comparable amounts of implicit stereotypes against women. However, one year later, those who attended the women's college on average expressed no gender bias, whereas the average bias of those who attended the coed school increased. By carefully examining differences in the two universities' environments, the researchers learned that it was exposure to countertypical women in the role of professors and university administrators that altered the implicit gender stereotypes of female college students.

Nilanjana Dasgupta and Luis Rivera also found correlations between participants' self-reported numbers of gay friends and their negative implicit attitudes toward gays. Such evidence gives further reason to encourage intergroup social contact by diversifying the bench, the courtroom (staff and law clerks), our residential neighborhoods, and friendship circles. That said, any serious diversification of the bench, the bar, and staff would take enormous resources, both economic and political. Moreover, these interventions might produce only modest results. For instance, Rachlinski et al. found that judges from an eastern district that featured approximately half White judges and half Black judges had "only slightly smaller" implicit biases than the judges of a western jurisdiction, which contained only two Black judges (out of forty-five total district court judges, thirty-six of them being White). In addition, debiasing exposures would have to compete against the other daily real-life exposures in the courtroom that rebias. For instance, Joshua Correll found that police officers who worked in areas with high minority demographics and violent crime showed more shooter bias.

If increasing direct contact with a diverse but countertypical population is not readily feasible,

what about vicarious contact, which is mediated by images, videos, simulations, or even imagination and which does not require direct face-to-face contact? Actually, the earliest studies on the malleability of implicit bias pursued just these strategies. For instance, Nilanjana Dasgupta and Anthony Greenwald showed that participants who were exposed vicariously to countertypical exemplars in a history questionnaire (for example, Black figures to whom we tend to have positive attitudes, such as Martin Luther King Jr., and White figures to whom we tend to have negative attitudes, such as Charles Manson) showed a substantial decrease in negative implicit attitudes toward African Americans. These findings are consistent with work done by Irene Blair, who has demonstrated that brief mental visualization exercises can also change scores on the IAT.

In addition to exposing people to famous countertypical exemplars, implicit biases may be decreased by juxtaposing ordinary people with countertypical settings. For instance, Bernard Wittenbrink, Charles Judd, and Bernadette Park examined the effects of watching videos of African Americans situated either at a convivial outdoor barbecue or at a gang-related incident. Situating African Americans in a positive setting produced lower implicit bias scores.

There are, to be sure, questions about whether this evidence directly translates into possible improvements for the courtroom. But even granting numerous caveats, might it not be valuable to engage in some experimentation? In chambers and the courtroom buildings, photographs, posters, screen savers, pamphlets, and decorations ought to be used that bring to mind countertypical exemplars or associations for participants in the trial process. Since judges and jurors are differently situated, we can expect both different effects and implementation strategies. For example, judges would be exposed to such vicarious displays regularly as a feature of their workplace environment. By contrast, jurors would be exposed only during their typically brief visit to the court. Especially for jurors, then, the goal is not anything as ambitious as fundamentally changing the underlying structure of their mental associations. Instead, the hope would be that by reminding them of countertypical associations, we might momentarily activate different mental patterns while in the courthouse and reduce the impact of implicit biases on their decisionmaking.

To repeat, we recognize the limitations of our recommendation. Recent research has found much smaller debiasing effects from vicarious exposure than originally estimated. Moreover, such exposures must compete against the flood of typical, schema-consistent exposures we are bombarded with from mass media. That said, we see little costs to these strategies even if they appear cosmetic. There is no evidence, for example, that these exposures will be so powerful that they will overcorrect and produce net bias against Whites.

B. Break the Link Between Bias and Behavior

Even if we cannot remove the bias, perhaps we can alter decisionmaking processes so that these biases are less likely to translate into behavior. In order to keep this Article's scope manageable,

we focus on the two key players in the courtroom: judges and jurors.

1. Judges

a. Doubt One's Objectivity

Most judges view themselves as objective and especially talented at fair decisionmaking. For instance, Rachlinski et al. found in one survey that 97 percent of judges (thirty-five out of thirty-six) believed that they were in the top quartile in “avoid[ing] racial prejudice in decisionmaking” relative to other judges attending the same conference. That is, obviously, mathematically impossible. (One is reminded of Lake Wobegon, where all of the children are above average.) In another survey, 97.2 percent of those administrative agency judges surveyed put themselves in the top half in terms of avoiding bias, again impossible. Unfortunately, there is evidence that believing ourselves to be objective puts us at particular risk for behaving in ways that belie our self-conception.

Eric Uhlmann and Geoffrey Cohen have demonstrated that when a person believes himself to be objective, such belief licenses him to act on his biases. In one study, they had participants choose either the candidate profile labeled “Gary” or the candidate profile labeled “Lisa” for the job of factory manager. Both candidate profiles, comparable on all traits, unambiguously showed strong organization skills but weak interpersonal skills. Half the participants were primed to view themselves as objective. The other half were left alone as control.

Those in the control condition gave the male and female candidates statistically indistinguishable hiring evaluations. But those who were manipulated to think of themselves as objective evaluated the male candidate higher. Interestingly, this was not due to a malleability of merit effect, in which the participants reweighted the importance of either organizational skills or interpersonal skills in order to favor the man. Instead, the discrimination was caused by straight-out disparate evaluation, in which the Gary profile was rated as more interpersonally skilled than the Lisa profile by those primed to think themselves objective. In short, thinking oneself to be objective seems ironically to lead one to be less objective and more susceptible to biases. Judges should therefore remind themselves that they are human and fallible, notwithstanding their status, their education, and the robe.

But is such a suggestion based on wishful thinking? Is there any evidence that education and reminders can actually help? There is some suggestive evidence from Emily Pronin, who has carefully studied the bias blindspot--the belief that others are biased but we ourselves are not. In one study, Emily Pronin and Matthew Kugler had a control group of Princeton students read an article from *Nature* about environmental pollution. By contrast, the treatment group read an article allegedly published in *Science* that described various nonconscious influences on attitudes and

behaviors. After reading an article, the participants were asked about their own objectivity as compared to their university peers. Those in the control group revealed the predictable bias blindspot and thought that they suffered from less bias than their peers. By contrast, those in the treatment group did not believe that they were more objective than their peers; moreover, their more modest self-assessments differed from those of the more confident control group. These results suggest that learning about nonconscious thought processes can lead people to be more skeptical about their own objectivity.

b. Increase Motivation

Tightly connected to doubting one's objectivity is the strategy of increasing one's motivation to be fair. Social psychologists generally agree that motivation is an important determinant of checking biased behavior. Specific to implicit bias, Nilanjana Dasgupta and Luis Rivera found that participants who were consciously motivated to be egalitarian did not allow their antigay implicit attitudes to translate into biased behavior toward a gay person. By contrast, for those lacking such motivation, strong antigay implicit attitudes predicted more biased behavior.

A powerful way to increase judicial motivation is for judges to gain actual scientific knowledge about implicit social cognitions. In other words, judges should be internally persuaded that a genuine problem exists. This education and awareness can be done through self-study as well as more official judicial education. Such education is already taking place, although mostly in an ad hoc fashion. The most organized intervention has come through the National Center for State Courts (NCSC). The NCSC organized a three-state pilot project in California, Minnesota, and North Dakota to teach judges and court staff about implicit bias. It used a combination of written materials, videos, resource websites, Implicit Association Tests, and online lectures from subject-matter experts to provide the knowledge. Questionnaires completed before and after each educational intervention provided an indication of program effectiveness.

Although increased knowledge of the underlying science is a basic objective of an implicit bias program, the goal is not to send judges back to college for a crash course in Implicit Psychology 101. Rather, it is to persuade judges, on the merits, to recognize implicit bias as a potential problem, which in turn should increase motivation to adopt sensible countermeasures. Did the NCSC projects increase recognition of the problem and encourage the right sorts of behavioral changes? The only evidence we have is limited: voluntary self-reports subject to obvious selection biases.

For example, in California, judicial training emphasized a documentary on the neuroscience of bias. Before and after watching the documentary, participants were asked to what extent they thought "a judge's decisions and court staff's interaction with the public can be unwittingly influenced by unconscious bias toward racial/ethnic groups." Before viewing the documentary, approximately 16 percent chose "rarely-never," 55 percent chose "occasionally," and 30 percent

chose “most-all.” After viewing the documentary, 1 percent chose “rarely-never,” 20 percent chose “occasionally,” and 79 percent chose “most-all.”

Relatedly, participants were asked whether they thought implicit bias could have an impact on behavior even if a person lacked explicit bias. Before viewing the documentary, approximately 9 percent chose “rarely-never,” 45 percent chose “occasionally,” and 45 percent chose “most-all.” After viewing the documentary, 1 percent chose “rarely-never,” 14 percent chose “occasionally,” and 84 percent chose “most-all.” These statistics provide some evidence that the California documentary increased awareness of the problem of implicit bias. The qualitative data, in the form of write-in comments support this interpretation.

What about the adoption of behavioral countermeasures? Because no specific reforms were recommended at the time of training, there was no attempt to measure behavioral changes. All that we have are self-reports that speak to the issue. For instance, participants were asked to agree or disagree with the statement, “I will apply the course content to my work.” In California, 90 percent (N=60) reported that they agreed or strongly agreed. In North Dakota (N=32), 97 percent reported that they agreed or strongly agreed. Three months later, there was a follow-up survey given to the North Dakota participants, but only fourteen participants replied. In that survey, 77 percent of those who responded stated that they had made efforts to reduce the potential impact of implicit bias. In sum, the findings across all three pilot programs suggest that education programs can increase motivation and encourage judges to engage in some behavioral modifications. Given the limitations of the data (for example, pilot projects with small numbers of participants, self-reports, self-selection, and limited follow-up results), additional research is needed to confirm these promising but preliminary results.

From our collective experience, we also recommend the following tactics. First, training should commence early, starting with new-judge orientation when individuals are likely to be most receptive. Second, training should not immediately put judges on the defensive, for instance, by accusing them of concealing explicit bias. Instead, trainers can start the conversation with other types of decisionmaking errors and cognitive biases, such as anchoring, or less-threatening biases, such as the widespread preference for the youth over the elderly that IATs reveal. Third, judges should be encouraged to take the IAT or other measures of implicit bias. Numerous personal accounts have reported how the discomfiting act of taking the IAT alone motivates action. And researchers are currently studying the specific behavioral and social cognitive changes that take place through such self-discovery. That said, we do not recommend that such tests be mandatory because the feeling of resentment and coercion is likely to counter the benefits of increased self-knowledge. Moreover, judges should never be expected to disclose their personal results.

c. Improve Conditions of Decisionmaking

Implicit biases function automatically. One way to counter them is to engage in effortful, deliberative processing. But when decisionmakers are short on time or under cognitive load, they lack the resources necessary to engage in such deliberation. Accordingly, we encourage judges to take special care when they must respond quickly and to try to avoid making snap judgments whenever possible. We recognize that judges are under enormous pressures to clear ever-growing dockets. That said, it is precisely under such work conditions that judges need to be especially on guard against their biases.

There is also evidence that certain elevated emotional states, either positive or negative, can prompt more biased decisionmaking. For example, a state of happiness seems to increase stereotypic thinking, which can be countered when individuals are held accountable for their judgments. Of greater concern might be feelings of anger, disgust, or resentment toward certain social categories. If the emotion is consistent with the stereotypes or anticipated threats associated with that social category, then those negative emotions are likely to exacerbate implicit biases. In sum, judges should try to achieve the conditions of decisionmaking that allow them to be mindful and deliberative and thus avoid huge emotional swings.

d. Count

Finally, we encourage judges and judicial institutions to count. Increasing accountability has been shown to decrease the influence of bias and thus has frequently been offered as a mechanism for reducing bias. But, how can the behavior of trial court judges be held accountable if biased decisionmaking is itself difficult to detect? If judges do not seek out the information that could help them see their own potential biases, those biases become more difficult to correct. Just as trying to lose or gain weight without a scale is challenging, judges should engage in more quantified self-analysis and seek out and assess patterns of behavior that cannot be recognized in single decisions. Judges need to count.

The comparison we want to draw is with professional umpires and referees. Statistical analyses by behavioral economists have discovered various biases, including ingroup racial biases, in the decisionmaking of professional sports judges. Joseph Price and Justin Wolfers found racial ingroup biases in National Basketball Association (NBA) referees' foul calling; Christopher Parsons and colleagues found ingroup racial bias in Major League Baseball (MLB) umpires' strike calling. These discoveries were only possible because professional sports leagues count performance, including referee performance, in a remarkably granular and comprehensive manner.

Although NBA referees and MLB umpires make more instantaneous calls than judges, judges do regularly make quick judgments on motions, objections, and the like. In these contexts, judges

often cannot slow down. So, it makes sense to count their performances in domains such as bail, probable cause, and preliminary hearings.

We recognize that such counting may be difficult for individual judges who lack both the quantitative training and the resources to track their own performance statistics. That said, even amateur, basic counting, with data collection methods never intended to make it into a peer-reviewed journal, might reveal surprising outcomes. Of course, the most useful information will require an institutional commitment to counting across multiple judges and will make use of appropriately sophisticated methodologies. The basic objective is to create a negative feedback loop in which individual judges and the judiciary writ large are given the corrective information necessary to know how they are doing and to be motivated to make changes if they find evidence of biased performances. It may be difficult to correct biases even when we do know about them, but it is virtually impossible to correct them if they remain invisible.

D. External Influences on Judicial Conduct³⁰

Judges shall not be influenced by public criticism or discussion of issues that the judges are required to decide. Nor may judges allow their personal interests or relationships to influence their judicial decisions. Judges must also refrain from suggesting that any person or organization is in a position to influence a judge's decisions.

E. Competence, Diligence, and Cooperation³¹

Judges are required to perform their responsibilities with competence and diligence. They are also required to cooperate with one another and with administrative personnel to the extent necessary effectively to carry out their judicial duties.

F. Judges Statements on Pending and Impending Cases³²

A judge is not permitted to make comments about pending cases that might affect the outcome or impair the fairness of any ongoing judicial proceeding. Judges are also prohibited from making comments about matters that might come before the judge at a future time that might call into question the judge's fairness or impartiality regarding the future proceeding. Judges may however, make public statements concerning court procedures that are pursuant to the judge's official duties,

³⁰ See ABA, Code of Judicial Conduct Rule 2.4.

³¹ See ABA Code of Judicial Conduct 2.5.

³² See ABA Code of Judicial Conduct 2.10.

and may comment on matters in which the judge him or herself is a party.

The following case represents an example of a judge who clearly crossed this line. It involves the antitrust case brought by the United States against Microsoft Corporation around the turn of the 21st Century. At the time, Microsoft was the largest software company in the nation, dominating that lucrative and growing market. Its founder, Bill Gates, was the richest person in the world. The case was hotly contested, had an extremely high profile, and the federal judge assigned to the case, Thomas Penfield Jackson, became an instant celebrity. Apparently, he could not resist the spotlight that went along with this newfound celebrity status. Consider the following opinion:

United States v. Microsoft Corporation
U.S. Court of Appeals for the D.C. Circuit

253 F.3d 34 (2001)

VI. JUDICIAL MISCONDUCT

Canon 3A(6) of the Code of Conduct for United States Judges requires federal judges to “avoid public comment on the merits of [] pending or impending” cases. Canon 2 tells judges to “avoid impropriety and the appearance of impropriety in all activities,” on the bench and off. Canon 3A(4) forbids judges to initiate or consider *ex parte* communications on the merits of pending or impending proceedings. Section 455(a) of the Judicial Code requires judges to recuse themselves when their “impartiality might reasonably be questioned.” 28 U.S.C. § 455(a).

All indications are that the District Judge violated each of these ethical precepts by talking about the case with reporters. The violations were deliberate, repeated, egregious, and flagrant. The only serious question is what consequences should follow. Microsoft urges us to disqualify the District Judge, vacate the judgment in its entirety and toss out the findings of fact, and remand for a new trial before a different District Judge. At the other extreme, plaintiffs ask us to do nothing. We agree with neither position.

A. The District Judge’s Communications with the Press

Immediately after the District Judge entered final judgment on June 7, 2000, accounts of interviews with him began appearing in the press. Some of the interviews were held after he entered final judgment. The District Judge also aired his views about the case to larger audiences, giving speeches at a college and at an antitrust seminar.

From the published accounts, it is apparent that the Judge also had been giving secret interviews to select reporters before entering final judgment—in some instances long before. The earliest

interviews we know of began in September 1999, shortly after the parties finished presenting evidence but two months before the court issued its Findings of Fact. Interviews with reporters from the *New York Times* and Ken Auletta, another reporter who later wrote a book on the Microsoft case, continued throughout late 1999 and the first half of 2000, during which time the Judge issued his Findings of Fact, Conclusions of Law, and Final Judgment. The Judge “embargoed” these interviews; that is, he insisted that the fact and content of the interviews remain secret until he issued the Final Judgment.

Before we recount the statements attributed to the District Judge, we need to say a few words about the state of the record. All we have are the published accounts and what the reporters say the Judge said. Those accounts were not admitted in evidence. They may be hearsay.

We are of course concerned about granting a request to disqualify a federal judge when the material supporting it has not been admitted in evidence. Disqualification is never taken lightly. In the wrong hands, a disqualification motion is a procedural weapon to harass opponents and delay proceedings. If supported only by rumor, speculation, or innuendo, it is also a means to tarnish the reputation of a federal judge.

But the circumstances of this case are most unusual. By placing an embargo on the interviews, the District Judge ensured that the full extent of his actions would not be revealed until this case was on appeal. Plaintiffs, in defending the judgment, do not dispute the statements attributed to him in the press; they do not request an evidentiary hearing; and they do not argue that Microsoft should have filed a motion in the District Court before raising the matter on appeal. At oral argument, plaintiffs all but conceded that the Judge violated ethical restrictions by discussing the case in public: “On behalf of the governments, I have no brief to defend the District Judge’s decision to discuss this case publicly while it was pending on appeal, and I have no brief to defend the judge’s decision to discuss the case with reporters while the trial was proceeding, even given the embargo on any reporting concerning those conversations until after the trial.”

We must consider too that the federal disqualification provisions reflect a strong federal policy to preserve the actual and apparent impartiality of the federal judiciary. Judicial misconduct may implicate that policy regardless of the means by which it is disclosed to the public. Also, in our analysis of the arguments presented by the parties, the specifics of particular conversations are less important than their cumulative effect.

For these reasons we have decided to adjudicate Microsoft’s disqualification request notwithstanding the state of the record. The same reasons also warrant a departure from our usual practice of declining to address issues raised for the first time on appeal: the “matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.” [Citations

omitted.] We will assume the truth of the press accounts and not send the case back for an evidentiary hearing on this subject. We reach no judgment on whether the details of the interviews were accurately recounted.

The published accounts indicate that the District Judge discussed numerous topics relating to the case. Among them was his distaste for the defense of technological integration—one of the central issues in the lawsuit. In September 1999, two months before his Findings of Fact and six months before his Conclusions of Law, and in remarks that were kept secret until after the Final Judgment, the Judge told reporters from the *New York Times* that he questioned Microsoft’s integration of a web browser into Windows. Stating that he was “not a fan of integration,” he drew an analogy to a 35–millimeter camera with an integrated light meter that in his view should also be offered separately: “You like the convenience of having a light meter built in, integrated, so all you have to do is press a button to get a reading. But do you think camera makers should also serve photographers who want to use a separate light meter, so they can hold it up, move it around?” [Citation omitted.] In other remarks, the Judge commented on the integration at the heart of the case: “[I]t was quite clear to me that the motive of Microsoft in bundling the Internet browser was not one of consumer convenience. The evidence that this was done for the consumer was not credible.... The evidence was so compelling that there was an ulterior motive.” [Citation omitted.] As for tying law in general, he criticized this court’s ruling in the consent decree case, saying it “was wrongheaded on several counts” and would exempt the software industry from the antitrust laws. [Citation omitted.]

Reports of the interviews have the District Judge describing Microsoft’s conduct, with particular emphasis on what he regarded as the company’s prevarication, hubris, and impenitence. In some of his secret meetings with reporters, the Judge offered his contemporaneous impressions of testimony. He permitted at least one reporter to see an entry concerning Bill Gates in his “oversized green notebook.” [Citation omitted.] He also provided numerous after-the-fact credibility assessments. He told reporters that Bill Gates’ “testimony is inherently without credibility” and “[i]f you can’t believe this guy, who else can you believe?” [Citation omitted.] As for the company’s other witnesses, the Judge is reported as saying that there “were times when I became impatient with Microsoft witnesses who were giving speeches.” [Citation omitted.] “[T]hey were telling me things I just flatly could not credit.” [Citation omitted.] In an interview given the day he entered the break-up order, he summed things up: “Falsus in uno, falsus in omnibus”: “Untrue in one thing, untrue in everything.” “I don’t subscribe to that as absolutely true. But it does lead one to suspicion. It’s a universal human experience. If someone lies to you once, how much else can you credit as the truth?” [Citation omitted.]

According to reporter Auletta, the District Judge told him in private that, “I thought they [Microsoft and its executives] didn’t think they were regarded as adult members of the community. I thought they would learn.” [Citation omitted.] The Judge told a college audience that “Bill Gates is an

ingenious engineer, but I don't think he is that adept at business ethics. He has not yet come to realize things he did (when Microsoft was smaller) he should not have done when he became a monopoly." [Citation omitted.] Characterizing Gates' and his company's "crime" as hubris, the Judge stated that "[i]f I were able to propose a remedy of my devising, I'd require Mr. Gates to write a book report" on Napoleon Bonaparte, "[b]ecause I think [Gates] has a Napoleonic concept of himself and his company, an arrogance that derives from power and unalloyed success, with no leavening hard experience, no reverses." [Citations omitted.] The Judge apparently became, in Auletta's words, "increasingly troubled by what he learned about Bill Gates and couldn't get out of his mind the group picture he had seen of Bill Gates and Paul Allen and their shaggy-haired first employees at Microsoft." The reporter wrote that the Judge said he saw in the picture "a smart-mouthed young kid who has extraordinary ability and needs a little discipline. I've often said to colleagues that Gates would be better off if he had finished Harvard." [Citations omitted.]

The District Judge likened Microsoft's writing of incriminating documents to drug traffickers who "never figure out that they shouldn't be saying certain things on the phone." [Citation omitted.] He invoked the drug trafficker analogy again to denounce Microsoft's protestations of innocence, this time with a reference to the notorious Newton Street Crew that terrorized parts of Washington, D.C. Reporter Auletta wrote in *The New Yorker* that the Judge

went as far as to compare the company's declaration of innocence to the protestations of gangland killers. He was referring to five gang members in a racketeering, drug-dealing, and murder trial that he had presided over four years earlier. In that case, the three victims had had their heads bound with duct tape before they were riddled with bullets from semi-automatic weapons. "On the day of the sentencing, the gang members maintained that they had done nothing wrong, saying that the whole case was a conspiracy by the white power structure to destroy them," Jackson recalled. "I am now under no illusions that miscreants will realize that other parts of society will view them that way."

[Citations omitted.]

The District Judge also secretly divulged to reporters his views on the remedy for Microsoft's antitrust violations. On the question whether Microsoft was entitled to any process at the remedy stage, the Judge told reporters in May 2000 that he was "not aware of any case authority that says I have to give them any due process at all. The case is over. They lost." [Citation omitted.] Another reporter has the Judge asking "[w]ere the Japanese allowed to propose terms of their surrender?" [Citation omitted.] The District Judge also told reporters the month before he issued his break-up order that "[a]ssuming, as I think they are, [] the Justice Department and the states are genuinely concerned about the public interest," "I know they have carefully studied all the possible options. This isn't a bunch of amateurs. They have consulted with some of the best minds in America over a long period of time." "I am not in a position to duplicate that and re-engineer their work. There's no way I can equip myself to do a better job than they have done." [Citation omitted.]

In February 2000, four months before his final order splitting the company in two, the District Judge reportedly told *New York Times* reporters that he was “not at all comfortable with restructuring the company,” because he was unsure whether he was “competent to do that.” [Citations omitted.] A few months later, he had a change of heart. He told the same reporters that “with what looks like Microsoft intransigence, a breakup is inevitable.” [Citations omitted.] The Judge recited a “North Carolina mule trainer” story to explain his change in thinking from “[i]f it ain’t broken, don’t try to fix it” and “I just don’t think that [restructuring the company] is something I want to try to do on my own” to ordering Microsoft broken in two:

He had a trained mule who could do all kinds of wonderful tricks. One day somebody asked him: “How do you do it? How do you train the mule to do all these amazing things?” “Well,” he answered, “I’ll show you.” He took a 2-by-4 and whopped him upside the head. The mule was reeling and fell to his knees, and the trainer said: “You just have to get his attention.”

[Citation omitted.] The Judge added: “I hope I’ve got Microsoft’s attention.” [Citation omitted.]

B. Violations of the Code of Conduct for United States Judges

The Code of Conduct for United States Judges was adopted by the Judicial Conference of the United States in 1973. It prescribes ethical norms for federal judges as a means to preserve the actual and apparent integrity of the federal judiciary. Every federal judge receives a copy of the Code, the Commentary to the Code, the Advisory Opinions of the Judicial Conference’s Committee on Codes of Conduct, and digests of the Committee’s informal, unpublished opinions. The material is periodically updated. Judges who have questions about whether their conduct would be consistent with Code may write to the Codes of Conduct Committee for a written, confidential opinion. The Committee traditionally responds promptly. A judge may also seek informal advice from the Committee’s circuit representative.

While some of the Code’s Canons frequently generate questions about their application, others are straightforward and easily understood. Canon 3A(6) is an example of the latter. In forbidding federal judges to comment publicly “on the merits of a pending or impending action,” Canon 3A(6) applies to cases pending before any court, state or federal, trial or appellate. As “impending” indicates, the prohibition begins even before a case enters the court system, when there is reason to believe a case may be filed. An action remains “pending” until “completion of the appellate process.”

The Microsoft case was “pending” during every one of the District Judge’s meetings with reporters; the case is “pending” now; and even after our decision issues, it will remain pending for some time. The District Judge breached his ethical duty under Canon 3A(6) each time he spoke to a reporter about the merits of the case. Although the reporters interviewed him in private, his comments were public. Court was not in session and his discussion of the case took place outside

the presence of the parties. He provided his views not to court personnel assisting him in the case, but to members of the public. And these were not just any members of the public. Because he was talking to reporters, the Judge knew his comments would eventually receive widespread dissemination.

It is clear that the District Judge was not discussing purely procedural matters, which are a permissible subject of public comment under one of the Canon's three narrowly drawn exceptions. He disclosed his views on the factual and legal matters at the heart of the case. His opinions about the credibility of witnesses, the validity of legal theories, the culpability of the defendant, the choice of remedy, and so forth all dealt with the merits of the action. It is no excuse that the Judge may have intended to "educate" the public about the case or to rebut "public misperceptions" purportedly caused by the parties. If those were his intentions, he could have addressed the factual and legal issues as he saw them—and thought the public should see them—in his Findings of Fact, Conclusions of Law, Final Judgment, or in a written opinion. Or he could have held his tongue until all appeals were concluded.

Far from mitigating his conduct, the District Judge's insistence on secrecy—his embargo—made matters worse. Concealment of the interviews suggests knowledge of their impropriety. Concealment also prevented the parties from nipping his improprieties in the bud. Without any knowledge of the interviews, neither the plaintiffs nor the defendant had a chance to object or to seek the Judge's removal before he issued his Final Judgment.

Other federal judges have been disqualified for making limited public comments about cases pending before them. Given the extent of the Judge's transgressions in this case, we have little doubt that if the parties had discovered his secret liaisons with the press, he would have been disqualified, voluntarily or by court order.

In addition to violating the rule prohibiting public comment, the District Judge's reported conduct raises serious questions under Canon 3A(4). That Canon states that a "judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." [Citation omitted.]

What did the reporters convey to the District Judge during their secret sessions? By one account, the Judge spent a total of ten hours giving taped interviews to one reporter. [Citation omitted.] We do not know whether he spent even more time in untaped conversations with the same reporter, nor do we know how much time he spent with others. But we think it safe to assume that these interviews were not monologues. Interviews often become conversations. When reporters pose questions or make assertions, they may be furnishing information, information that may reflect

their personal views of the case. The published accounts indicate this happened on at least one occasion. Ken Auletta reported, for example, that he told the Judge “that Microsoft employees professed shock that he thought they had violated the law and behaved unethically,” at which time the Judge became “agitated” by “Microsoft’s ‘obstinacy’.” [Citation omitted.] It is clear that Auletta had views of the case. As he wrote in a *Washington Post* editorial, “[a]nyone who sat in [the District Judge’s] courtroom during the trial had seen ample evidence of Microsoft’s sometimes thuggish tactics.” [Citation omitted.]

The District Judge’s repeated violations of Canons 3A(6) and 3A(4) also violated Canon 2, which provides that “a judge should avoid impropriety and the appearance of impropriety in all activities.” [Citation omitted.] Canon 2A requires federal judges to “respect and comply with the law” and to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” [Citation omitted.] The Code of Conduct is the law with respect to the ethical obligations of federal judges, and it is clear the District Judge violated it on multiple occasions in this case. The rampant disregard for the judiciary’s ethical obligations that the public witnessed in this case undoubtedly jeopardizes “public confidence in the integrity” of the District Court proceedings.

Another point needs to be stressed. Rulings in this case have potentially huge financial consequences for one of the nation’s largest publicly-traded companies and its investors. The District Judge’s secret interviews during the trial provided a select few with inside information about the case, information that enabled them and anyone they shared it with to anticipate rulings before the Judge announced them to the world. Although he “embargoed” his comments, the Judge had no way of policing the reporters. For all he knew there may have been trading on the basis of the information he secretly conveyed. The public cannot be expected to maintain confidence in the integrity and impartiality of the federal judiciary in the face of such conduct.

C. Appearance of Partiality

The Code of Conduct contains no enforcement mechanism. The Canons, including the one that requires a judge to disqualify himself in certain circumstances, *see* CODE OF CONDUCT Canon 3C, are self-enforcing. There are, however, remedies extrinsic to the Code. One is an internal disciplinary proceeding, begun with the filing of a complaint with the clerk of the court of appeals pursuant to 28 U.S.C. § 372(c). Another is disqualification of the offending judge under either 28 U.S.C. § 144, which requires the filing of an affidavit while the case is in the District Court, or 28 U.S.C. § 455, which does not. Microsoft urges the District Judge’s disqualification under § 455(a): a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). The standard for disqualification under § 455(a) is an objective one. The question is whether a reasonable and informed observer would question the judge’s impartiality.

“The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible.” [Citation omitted.] As such, violations of the Code of Conduct may give rise to a violation of § 455(a) if doubt is cast on the integrity of the judicial process. It has been argued that any “public comment by a judge concerning the facts, applicable law, or merits of a case that is *sub judice* in his court or any comment concerning the parties or their attorneys would raise grave doubts about the judge’s objectivity and his willingness to reserve judgment until the close of the proceeding.” [Citation omitted.] Some courts of appeals have taken a hard line on public comments, finding violations of § 455(a) for judicial commentary on pending cases that seems mild in comparison to what we are confronting in this case. [Citation omitted.]

While § 455(a) is concerned with actual and apparent impropriety, the statute requires disqualification only when a judge’s “impartiality might reasonably be questioned.” 28 U.S.C. § 455(a). Although this court has condemned public judicial comments on pending cases, we have not gone so far as to hold that every violation of Canon 3A(6) or every impropriety under the Code of Conduct inevitably destroys the appearance of impartiality and thus violates § 455(a).

In this case, however, we believe the line has been crossed. The public comments were not only improper, but also would lead a reasonable, informed observer to question the District Judge’s impartiality. Public confidence in the integrity and impartiality of the judiciary is seriously jeopardized when judges secretly share their thoughts about the merits of pending cases with the press. Judges who covet publicity, or convey the appearance that they do, lead any objective observer to wonder whether their judgments are being influenced by the prospect of favorable coverage in the media. Discreet and limited public comments may not compromise a judge’s apparent impartiality, but we have little doubt that the District Judge’s conduct had that effect. Appearance may be all there is, but that is enough to invoke the Canons and § 455(a).

Judge Learned Hand spoke of “this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire....” LEARNED HAND, *THE SPIRIT OF LIBERTY* 132–33 (2d ed.1953). Judges are obligated to resist this passion. Indulging it compromises what Edmund Burke justly regarded as the “cold neutrality of an impartial judge.” Cold or not, federal judges must maintain the appearance of impartiality. What was true two centuries ago is true today: “Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges.” CODE OF CONDUCT Canon 1 cmt. Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, pander to the press.

We recognize that it would be extraordinary to disqualify a judge for bias or appearance of partiality when his remarks arguably reflected what he learned, or what he thought he learned, during the proceedings. But this “extrajudicial source” rule has no bearing on the case before us. The problem here is not just what the District Judge said, but to whom he said it and when. His

crude characterizations of Microsoft, his frequent denigrations of Bill Gates, his mule trainer analogy as a reason for his remedy—all of these remarks and others might not have given rise to a violation of the Canons or of § 455(a) had he uttered them from the bench. But then Microsoft would have had an opportunity to object, perhaps even to persuade, and the Judge would have made a record for review on appeal. It is an altogether different matter when the statements are made outside the courtroom, in private meetings unknown to the parties, in anticipation that ultimately the Judge’s remarks would be reported. Rather than manifesting neutrality and impartiality, the reports of the interviews with the District Judge convey the impression of a judge posturing for posterity, trying to please the reporters with colorful analogies and observations bound to wind up in the stories they write. Members of the public may reasonably question whether the District Judge’s desire for press coverage influenced his judgments, indeed whether a publicity-seeking judge might consciously or subconsciously seek the publicity-maximizing outcome. We believe, therefore, that the District Judge’s interviews with reporters created an appearance that he was not acting impartially, as the Code of Conduct and § 455(a) require.

D. Remedies for Judicial Misconduct and Appearance of Partiality

1. Disqualification

Disqualification is mandatory for conduct that calls a judge’s impartiality into question. *See* 28 U.S.C. § 455(a). Section 455 does not prescribe the scope of disqualification. Rather, Congress “delegated to the judiciary the task of fashioning the remedies that will best serve the purpose” of the disqualification statute.

At a minimum, § 455(a) requires prospective disqualification of the offending judge, that is, disqualification from the judge’s hearing any further proceedings in the case. Microsoft urges retroactive disqualification of the District Judge, which would entail disqualification antedated to an earlier part of the proceedings and vacatur of all subsequent acts.

“There need not be a draconian remedy for every violation of § 455(a).” *Liljeberg*, 486 U.S. at 862. *Liljeberg* held that a district judge could be disqualified under § 455(a) *after* entering final judgment in a case, even though the judge was not (but should have been) aware of the grounds for disqualification before final judgment. The Court identified three factors relevant to the question whether vacatur is appropriate: “in determining whether a judgment should be vacated for a violation of § 455(a), it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public’s confidence in the judicial process.” *Id.* at 864. Although the Court was discussing § 455(a) in a slightly different context (the judgment there had become final after appeal and the movant sought to have it vacated under Rule 60(b)), we believe the test it propounded applies as well to cases such as this in which the full extent of the disqualifying circumstances came to light only while the appeal was pending.

Our application of *Liljeberg* leads us to conclude that the appropriate remedy for the violations of § 455(a) is disqualification of the District Judge retroactive only to the date he entered the order breaking up Microsoft. We therefore will vacate that order in its entirety and remand this case to a different District Judge, but will not set aside the existing Findings of Fact or Conclusions of Law (except insofar as specific findings are clearly erroneous or legal conclusions are incorrect).

This partially retroactive disqualification minimizes the risk of injustice to the parties and the damage to public confidence in the judicial process. Although the violations of the Code of Conduct and § 455(a) were serious, full retroactive disqualification is unnecessary. It would unduly penalize plaintiffs, who were innocent and unaware of the misconduct, and would have only slight marginal deterrent effect.

Most important, full retroactive disqualification is unnecessary to protect Microsoft's right to an impartial adjudication. The District Judge's conduct destroyed the appearance of impartiality. Microsoft neither alleged nor demonstrated that it rose to the level of actual bias or prejudice. There is no reason to presume that everything the District Judge did is suspect. Although Microsoft challenged very few of the findings as clearly erroneous, we have carefully reviewed the entire record and discern no basis to suppose that actual bias infected his factual findings.

The most serious judicial misconduct occurred near or during the remedial stage. It is therefore commensurate that our remedy focus on that stage of the case. The District Judge's impatience with what he viewed as intransigence on the part of the company; his refusal to allow an evidentiary hearing; his analogizing Microsoft to Japan at the end of World War II; his story about the mule—all of these out-of-court remarks and others, plus the Judge's evident efforts to please the press, would give a reasonable, informed observer cause to question his impartiality in ordering the company split in two.

To repeat, we disqualify the District Judge retroactive only to the imposition of the remedy, and thus vacate the remedy order for the reasons given in Section V and because of the appearance of partiality created by the District Judge's misconduct.

2. Review of Findings of Fact and Conclusions of Law

Given the limited scope of our disqualification of the District Judge, we have let stand for review his Findings of Fact and Conclusions of Law. The severity of the District Judge's misconduct and the appearance of partiality it created have led us to consider whether we can and should subject his factfindings to greater scrutiny. For a number of reasons we have rejected any such approach.

The Federal Rules require that district court findings of fact not be set aside unless they are clearly erroneous. *See* FED.R.CIV.P. 52(a). Ordinarily, there is no basis for doubting that the District

Court's factual findings are entitled to the substantial deference the clearly erroneous standard entails. But of course this is no ordinary case. Deference to a district court's factfindings presumes impartiality on the lower court's part. When impartiality is called into question, how much deference is due?

The question implies that there is some middle ground, but we believe there is none. As the rules are written, district court factfindings receive either full deference under the clearly erroneous standard or they must be vacated. There is no *de novo* appellate review of factfindings and no intermediate level between *de novo* and clear error, not even for findings the court of appeals may consider sub-par.

Rule 52(a) mandates clearly erroneous review of all district court factfindings: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." FED.R.CIV.P. 52(a). The rule "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous." [Citation omitted.] The Supreme Court has emphasized on multiple occasions that "[i]n applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." [Citation omitted.]

The mandatory nature of Rule 52(a) does not compel us to accept factfindings that result from the District Court's misapplication of governing law or that otherwise do not permit meaningful appellate review. Nor must we accept findings that are utterly deficient in other ways. In such a case, we vacate and remand for further factfinding.

When there is fair room for argument that the District Court's factfindings should be vacated *in toto*, the court of appeals should be especially careful in determining that the findings are worthy of the deference Rule 52(a) prescribes. Thus, although Microsoft alleged only appearance of bias, not actual bias, we have reviewed the record with painstaking care and have discerned no evidence of actual bias.

In light of this conclusion, the District Judge's factual findings both warrant deference under the clear error standard of review and, though exceedingly sparing in citations to the record, permit meaningful appellate review. In reaching these conclusions, we have not ignored the District Judge's reported intention to craft his factfindings and Conclusions of Law to minimize the breadth of our review. The Judge reportedly told Ken Auletta that "[w]hat I want to do is confront the Court of Appeals with an established factual record which is a fait accompli." [Citation omitted.] He explained: "part of the inspiration for doing that is that I take mild offense at their reversal of my preliminary injunction in the consent-decree case, where they went ahead and made up about

ninety percent of the facts on their own.” *Id.* Whether the District Judge takes offense, mild or severe, is beside the point. Appellate decisions command compliance, not agreement. We do not view the District Judge’s remarks as anything other than his expression of disagreement with this court’s decision, and his desire to provide extensive factual findings in this case, which he did.

G. Supervisory Duties³³

Judges must require that court staff, or other personnel under the judge’s authority, including any other judges who are supervised, comply with all of the requirements of the judicial conduct code.

H. Administrative Appointments³⁴

To the extent a judge has the authority to make administrative appointments the judge shall do so fairly and impartially, without favoritism, nepotism, or based upon significant contributions to the judge’s campaign fund.

I. Disability or Impairment³⁵

Where a judge becomes aware that another judge or a lawyer’s ability to perform their responsibilities is impaired due to alcohol, drugs, a mental or physical impairment, the judge shall take appropriate actions, including a confidential referral to a lawyer or judicial assistance program.

J. Responding to Judicial or Lawyer Misconduct³⁶

Judges are required to report known violations of the Code of Judicial Conduct by other judges, and known violations of the Rules of Professional Conduct by lawyers to the appropriate disciplinary authority.

³³ ABA, Model Code of Judicial Conduct Rule 2.12.

³⁴ ABA, Model Code of Judicial Conduct Rule 2.13.

³⁵ ABA, Model Code of Judicial Conduct Rule 2.14.

³⁶ ABA, Model Code of Judicial Conduct Rule 2.15.

K. Cooperation with Disciplinary Authorities³⁷

Judges are required to cooperate with and be candid with all judicial and lawyer disciplinary agencies. They may not act in retaliation against a person known or believed to have reported the judge or another lawyer to a disciplinary agency.

III. Review Questions

There is a [CALI Lesson](#) available with multiple choice questions that review the materials covered in this chapter.

³⁷ ABA, Model Code of Judicial Conduct Rule 2.16.

Chapter 4 – Ex Parte Communications

I. Introduction

The basic understanding of the way our adversary system of justice works is that each side in a case has an opportunity to make their best argument possible to a neutral decision maker, who then renders a decision based upon the arguments presented by the parties. Each party also has an opportunity to respond to any arguments presented to the decision maker by the other side. With this understanding in mind, it is easy to see why ex parte contacts between one side of the case and the judge undermine the very foundations of our adversary system. One side is deprived of the opportunity to respond to the other side's arguments, and the decision maker's impartiality may be jeopardized by receiving unbalanced information regarding the case. Thus, not surprisingly it is unethical for a lawyer to communicate ex parte with a judge, except in very limited circumstances. *See* ABA Model Rules of Professional Conduct Rule 3.5(b). Moreover, it is also the case that a judge may be subject to discipline for initiating, permitting, or receiving ex parte communications about a pending or impending matter outside the presence of the parties or their lawyers, except in very limited circumstances. *See* Model Code of Judicial Conduct Rule 2.9.

II. The Basic Prohibition of Ex Parte Communications

Even benign communications between a judge and only one side of a case can run afoul of this prohibition. Consider the following case.

Rose v. State

Florida Supreme Court

601 So. 2d 1181 (Fla. 1992)

Barkett, Justice.

James Franklin Rose appeals the trial court's denial of his motion for relief pursuant to Florida Rule of Criminal Procedure 3.850. We reverse the trial court's order.

Rose was tried for the first-degree murder and kidnapping of eight-year-old Lisa Berry. The facts of the case are fully set forth in the direct appeal. Briefly stated, on October 22, 1976, Lisa Berry and her mother, Barbara, were at a bowling alley with family and friends, including Rose. Shortly after 9:30 p.m. Rose and Lisa went to the poolroom area of the bowling alley. Rose and Lisa were seen at the exit of the bowling alley by Lisa's sister, Tracy, between 9:30 and 10:00 p.m. At approximately 10:23 p.m. Rose called Barbara at the bowling alley to ask when she would be finished bowling; she said 11:30 p.m. Rose returned to the bowling alley at that time. The State argued that Rose killed Lisa sometime after 9:30 p.m. and before he returned to the bowling alley.

The jury found Rose guilty and recommended the death penalty. The trial judge imposed a sentence of death for the murder and a life sentence for the kidnapping. This Court affirmed the convictions and the life sentence, but vacated the death sentence and remanded for resentencing. On remand, the jury recommended death. The court found no mitigating circumstances. In aggravation, the court found that Rose was under sentence of imprisonment when he committed the murder because he was on parole at the time, that he had previously been convicted of a felony involving the use or threat of violence, and that the murder was committed during the commission of a kidnapping. The death sentence was affirmed by this Court. Thereafter, Rose filed a petition for a writ of habeas corpus which this Court ultimately denied. Rose then filed a motion for postconviction relief pursuant to rule 3.850 which was denied without hearing by the trial court. Rose now appeals the trial court's denial of that motion.

We confine our review to two issues. First, Rose argues that he was denied due process of law because the trial court, without a hearing and as a result of an ex parte communication, adopted the State's proposed order denying relief without providing counsel notice of receipt of the order, a chance to review the order, or an opportunity to object to its contents. Second, Rose asserts that he is entitled to an evidentiary hearing on the allegations contained in his motion.

Rose's 3.850 motion was originally filed by an assistant public defender who was later allowed to withdraw as counsel by the trial court. The State responded to Rose's motion and in its response agreed that an evidentiary hearing was required. Subsequently, the State submitted a proposed order, adopted in its entirety by the trial court, denying all relief. Rose's new counsel was not served with a copy of the proposed order or provided an opportunity to file objections. Under these facts we must assume that the trial court, in an ex parte communication, had requested the State to prepare the proposed order.

The judicial practice of requesting one party to prepare a proposed order for consideration is a practice born of the limitations of time. Normally, any such request is made in the presence of both parties or by a written communication to both parties. We are not unmindful that in the past, on some occasions, judges, on an ex parte basis, called only one party to direct that party to prepare an order for the judge's signature. The judiciary, however, has come to realize that such a practice is fraught with danger and gives the appearance of impropriety. *See generally* Steven Lubet, *Ex Parte Communications: An Issue in Judicial Conduct*, 74 *Judicature* 96, 96-101 (1990).

Canon 3 A(4) of Florida's Code of Judicial Conduct states clearly that

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 communications concerning a pending or impending proceeding.*

Fla.Bar Code of Jud.Conduct, Canon 3 A(4) (emphasis added). Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts. No matter how pure the intent of the party who engages in such contacts, without the benefit of a reply, a judge is placed in the position of possibly receiving inaccurate information or being unduly swayed by unrebutted remarks about the other side's case. The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments. As Justice Overton has said for this Court:

[C]anon [3 A(4)] implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties. This canon was written with the clear intent of excluding all ex parte communications except when they are expressly authorized by statutes or rules.

[Citation omitted].

We are not here concerned with whether an ex parte communication *actually* prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell:

This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge.... The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.

... The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

[Citation omitted]. Thus, a judge should not engage in *any* conversation about a pending case with only one of the parties participating in that conversation. Obviously, we understand that this would not include *strictly* administrative matters not dealing in any way with the merits of the case.

In this case, the issue was compounded by the State's concession that an evidentiary hearing was required on some of the factual matters alleged. For example, the motion states that the case was tried based on the State's theory that Rose killed Lisa Berry between the hours of 9:30 and 10:23 p.m. Rose claims that there were five witnesses who saw Lisa at the bowling alley between 10:30 and 11:50 p.m.-*after* Rose had, under the State's theory at trial, committed the murder and returned

to the bowling alley. The motion alleges that the statements and/or testimony of these witnesses were available to defense counsel but were not used at trial. We agree that this issue merits an evidentiary hearing.

Thus, we reverse the order denying Rose's motion for postconviction relief. We direct the trial court to reconsider Rose's motion and to hold an evidentiary hearing on the ineffective assistance of counsel claims and any other appropriate factual issues presented in the motion.

It is so ordered.

Harding, Justice, concurring.

I concur with the majority opinion and write only to emphasize that, in my experience as a trial judge, where more than one attorney or party has made an appearance in a case, I found that there were few administrative matters which would require or justify an *ex parte* communication with a judge. The most obvious administrative matter would relate to setting hearings on motions and other matters. Care should be exercised even in this regard.

In maintaining calendar control, many judges deem it appropriate to personally screen and approve the setting of cases which require more than a set period of time, that is, thirty minutes. If the judge must become personally involved, in any way, in the setting of a hearing, care should be given that all parties have equal opportunity to participate in the setting of that hearing. Judge's calendars and dockets are generally very crowded. Time on them is a precious commodity which should be distributed in a fair manner. It probably will be common knowledge that an explanation to the judge is required to set a hearing lasting longer than a set time. Thus, if all parties are not involved in setting the case, it will be assumed that there was an *ex parte* communication with the judge in order to obtain the time. *Ex parte* communications with a judge, even when related to such matters as scheduling, can often damage the perception of fairness and should be avoided where at all possible.

The number of lawyers has grown significantly in recent years in most locations. It is impossible for lawyers to know each other and the judges with the same degree of familiarity that they did in the past. It is also more common for lawyers to appear in courts "away from home" than it was in the past. This growth in numbers and mobility places a greater burden on the judge to ensure that neutrality continues to exist. Judges should be ever vigilant that every litigant gets that to which he or she is entitled: "the cold neutrality of an impartial judge." [Citation omitted].

Note that the above case did not involve the question of whether the judge should be disciplined for his error. However, the reversal of the decision below demonstrates that *ex parte* communications may result in other adverse consequences besides discipline of the judge and/or lawyers involved in the communication.

Further note that the prohibition only applies to matters that are “pending” or “impending.” Consider the following case.

Hovelson v. U.S. Swim & Fitness, Inc.

Minnesota Court of Appeals

450 N.W.2d 137 (Minn. Ct. App. 2009)

Appellants Scandinavian U.S. Swim & Fitness, Inc., an Ohio corporation (Scandinavian USSF), and U.S. Swim & Fitness Minnesota Inc., a Minnesota corporation (USSF Minnesota), appeal from an order denying their motions to vacate a default judgment and to dismiss USSF Minnesota from the judgment. The default judgment was initially entered against U.S. Swim & Fitness, Inc., a name which Scandinavian USSF uses when transacting business.

Appellants claim they are entitled to vacation of the default judgment pursuant to Minn.R.Civ.P. 60.02(a) (excusable neglect) or Rule 60.02(f) (any other reason justifying relief). USSF Minnesota further contends it should be dismissed from the judgment for lack of jurisdiction because it was never served with process.

The court found appellants had no excuse for failing to answer and there were no other grounds which justified reopening the default judgment. The court refused to dismiss USSF Minnesota, finding it was correctly added to the judgment as an alias of the defaulting defendant entity. We affirm in part and vacate in part.

II

USSF contends it was wrongfully prejudiced by Hovelson when she presented an *ex parte* motion to amend the name of the defendant on the judgment after Scandinavian USSF’s attorney contacted her attorney. Appellants claim the trial court wrongfully heard the *ex parte* motion after it had knowledge that Hovelson had been contacted by their attorney.

We find no rule precluding an *ex parte* motion after final judgment where there is no appeal pending. The Minnesota Rules of Professional Conduct provide:

In an adversary proceeding a lawyer shall not communicate as to the merits of a case with the judge * * *:

Id., Rule 3.5(g).

A judge should * * * neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding.

Code of Judicial Conduct, Canon 3(A)(4).

The record shows that Hovelson informed the trial court that her lawyer had been contacted by an attorney who said he represented USSF. Because there was a final judgment and no appeal had been taken from it, there was no case pending. The trial court assessed the evidence presented and did not err in amending the judgment to correct a misnomer upon Hovelson's *ex parte* motion.

III. Exceptions to the Rule

Some of the exceptions to the prohibition on *ex parte* communications with judges are as follows.

A. Scheduling, Administrative or Emergency Purposes

A judge may communicate on an *ex parte* basis with one of the parties to the case if the communication solely concerns scheduling or administrative matters, and does not involve any discussion of the merits or substance of the underlying case. Emergency communications will be addressed below.

B. Advice of a Disinterested Expert on the Relevant Law

In seeking outside expert legal advice, the judge must give advance notice to the parties and give them an opportunity to be heard in order to object to the judge seeking such advice if the parties wish. Judges must be careful in seeking outside advice that the experts consulted are completely neutral, unbiased, and have no stake in the underlying case. Where such care is not taken, conflicts may arise. Consider the following case.

In Re Kensington Intern. Ltd.

United States Court of Appeals for the Third Circuit

368 F.3d 289 (3d Cir. 2004)

Approximately six months ago, two emergency petitions were filed in this Court asking us to issue Writs of Mandamus disqualifying Senior District Court Judge Alfred M. Wolin of the District of New Jersey from continuing to preside over two of five asbestos-related bankruptcies that this Court had assigned to him in December 2001 for coordinated case management. The five companies in bankruptcy are Owens Corning, W.R. Grace & Co., USG Corporation, Armstrong World Industries, Inc., and Federal-Mogul Global, Inc. (collectively, the “Five Asbestos Cases”).

The Petitions, which were brought by creditors of Owens Coming and W.R. Grace & Co., alleged that Judge Wolin had, through his association with certain consulting Advisors which he had appointed, created a perception that his impartiality “might reasonably be questioned” under 28 U.S.C. § 455(a). The Petitions asserted that disqualification was also warranted under 28 U.S.C. § 455(b)(1) as a result of *ex parte* communications among Judge Wolin and his advisors, the parties, and the attorneys.

Following a hearing on December 12, 2003, we concluded that we should not reach the merits of the Mandamus Petitions. Our decision was “prompted by our overarching concern that we [did] not have an adequately developed evidentiary record before us.” “[R]eluctant to act in a complex situation such as this one, where so many vital interests are at stake, without a developed evidentiary record,” we remanded the proceedings to Judge Wolin while retaining jurisdiction. We instructed Judge Wolin to vacate his order staying discovery and allow expedited discovery to proceed. We also directed that he issue an expedited ruling on all of the recusal motions pending before him. *Id.* USG Corp. by this time had also filed a recusal motion.

On remand, Judge Wolin and the parties faithfully followed our instructions. Under stringent time restrictions and Judge Wolin’s effective oversight, the parties conducted extensive discovery into the facts surrounding the recusal motions. Following an additional round of briefing, Judge Wolin issued a comprehensive written opinion and order on February 2, 2004 denying the recusal motions both on the merits and on timeliness grounds.

As noted, we retained jurisdiction over the Mandamus Petitions. These Petitions were joined by USG Corp., the debtor in the USG Corp. bankruptcy. The Official Committee of Unsecured Creditors in the Armstrong World Industries, Inc. bankruptcy filed a fourth Petition, but due to its late filing we did not consolidate it with the other Petitions.

The Petitions filed in the Owens Corning and W.R. Grace & Co. bankruptcies seek Judge Wolin's disqualification primarily pursuant to 28 U.S.C. § 455(a), which reads: "*Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.*" As we stated in our earlier opinion, "[t]he test for recusal under § 455(a) is whether a reasonable person, with knowledge of all the facts, would conclude that the judge's impartiality might reasonably be questioned." While this test is acknowledged to be the standard for disqualification under § 455(a), the interpretation of what constitutes a reasonable person has been contested here. We will discuss that issue later in this opinion.

After we scheduled the briefing and hearing dates for the Owens Corning and W.R. Grace & Co. Petitions, USG Corp. filed a third Petition for Mandamus. That Petition, while also seeking disqualification pursuant to § 455(a), focused primarily on the standard of disqualification found in § 455(b)(1). That particular subsection requires a justice, judge, or magistrate judge to disqualify himself only if "*he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.*" 28 U.S.C. § 455(b)(1). The thrust of USG Corp.'s Petition is that Judge Wolin acquired personal knowledge of disputed evidentiary facts by conducting *ex parte* meetings with the Advisors, parties, and attorneys.

II. BACKGROUND

On December 20, 2001, Judge Wolin held a case management conference for the Five Asbestos Cases. Although there is no official record of what was said at that conference, Judge Wolin produced a script ("talking points") which reflects what he said to the parties. According to the script, Judge Wolin announced that "*[i]n order to effectively case manage complex litigation, it is necessary for the judge to speak and/or meet with attorneys on an ex parte basis, without permission of adversary attorneys.*" Judge Wolin further announced that "*[a]ny objection to such ex parte communications is deemed waived,*" but he assured the parties and attorneys that he would use his power to meet *ex parte* "sparingly." None of the parties objected at that time.

A week later, Judge Wolin named five "Court Appointed Consultants" (the "Advisors") to assist him in the Five Asbestos Cases. The five individuals he named were David Gross, Judson Hamlin, William Dreier, John Keefe, and Francis McGovern, all of whom had prior experience with asbestos or mass tort litigation either as state court judges, private practitioners, or academics. Pursuant to Judge Wolin's order, the Advisors were to "advise the Court and to undertake such

responsibilities, including ... mediation of disputes, holding case management conferences, and consultation with counsel, as the Court may delegate to them individually.” The Advisors could also be delegated “certain authority to hear matters and to advise the Court on issues that may arise in these five large Chapter 11 cases.” Judge Wolin’s order provided that he could, “without further notice, appoint any of the Court-Appointed Consultants to act as a Special Master to hear any disputed matter and to make a report and recommendation to the Court on the disposition of such matter.”

Over the next two years, Judge Wolin met repeatedly, on an *ex parte* basis, with the parties and their attorneys. Despite his prior assurance that he would do so “sparingly,” he acknowledged more recently that he met *ex parte* with interested parties “on innumerable occasions.” This is supported by the fee applications filed by the Advisors, which reveal more than 325 hours of *ex parte* meetings with the attorneys for various parties in the Five Asbestos Cases. Many of these meetings took place at restaurants over lunch or dinner or at law firms. During the proceedings on remand, Judge Wolin acknowledged that he received extra-judicial information at the *ex parte* conferences.

The *ex parte* meetings were not limited to the parties and their attorneys. In the first half of 2002, Judge Wolin and the Advisors held a series of four *ex parte* meetings at which they discussed, in Advisor McGovern’s words, “[j]ust whatever issue you can think of,” including claims bar dates, the chrysotile defense, proof of claim forms, pleural plaques, the pros and cons of various approaches to estimation under 11 U.S.C. § 502(c), the tensions between various creditor classes, and Rule 706 panels. These issues are highly relevant concerns in asbestos litigation. The primary purpose of these meetings was to educate Judge Wolin on the issues likely to arise in the Five Asbestos Cases or, as Advisor Gross put it, “to assist Judge Wolin ... in becoming more conversant with the details of the asbestos litigation.”

V. DISCUSSION

Before we can decide whether the reasonable person might question Judge Wolin’s impartiality, we must determine if his Advisors had a conflict of interest. If not, then our inquiry comes to an end because the Petitioners will have failed to show that they have a clear and indisputable right to disqualification. On the other hand, if there was a conflict, then we must reach the question of whether that conflict might be perceived by the reasonable person as having tainted Judge Wolin.

Aside from the timeliness of the recusal motions, the existence of a conflict of interest by the Advisors may be the most sharply contested issue in these proceedings. Judge Wolin explained in his written opinion that he was an asbestos “neophyte” when he assumed control of the Five

Asbestos Cases, and that he brought the Advisors on board to “inform the Court of the vast landscape of asbestos related issues that would permit the Court to make reasoned case management decisions.”

We conclude that two of the Advisors, Gross and Hamlin, did, in fact, operate under a structural conflict of interests at the same time that they served as Judge Wolin’s Advisors. This conflict arose from the dual roles they played in the Five Asbestos Cases and the *G-I Holdings* bankruptcy.

On the one hand, Gross and Hamlin clearly had a duty to remain neutral in the Five Asbestos Cases and to provide objective, unbiased information to Judge Wolin. As Judge Wolin stated in his original appointment order, the Advisors’ role “was to advise the Court and to undertake [certain] responsibilities, including by way of example and not limitation, mediation of disputes, holding case management conference, and consultation with counsel....”

We would be hard pressed to overstate the importance of the Advisors’ role in the Five Asbestos Cases. As a result of their appointment, the Advisors had a unique level of access to Judge Wolin. Indeed, Judge Wolin himself acknowledged in a fee allowance order that the Advisors “occup[ied] a unique position in the [Five Asbestos] cases not shared by other persons” and that they “function[ed] in a manner in all respects similar to examiners as provided in the Bankruptcy Code.” The Advisors also had a unique level of influence over Judge Wolin, given the role they played at the outset of the Five Asbestos Cases in educating Judge Wolin (a self-admitted neophyte) on all of the key asbestos-related issues.

On the other hand, Advisors Gross and Hamlin also had a duty to act as zealous advocates for the future asbestos claimants in the *G-I Holdings* bankruptcy. Hamlin was at all relevant times the legal representative of the present and future asbestos personal injury claimants in *G-I Holdings* and Gross served as his local counsel. In those roles, Gross and Hamlin owed the future asbestos claimants in *G-I Holdings* a fiduciary duty to advance their interests and to see that they received the greatest possible share of the bankruptcy estate. To achieve that end, the very Advisors who were advising Judge Wolin had to take positions in *G-I Holdings* and the Five Asbestos Cases that favored the future asbestos claimants. By their very position as representatives of the future asbestos claimants in *G-I Holdings*, Gross and Hamlin signaled to all that they could not be non-partisan, benign, or neutral.

We turn now to the question of whether Gross’s and Hamlin’s conflict of interest irreversibly tainted Judge Wolin. We obviously do not equate this “taint” of Judge Wolin with any wrongdoing or bias on his part. We are fully aware that the § 455(a) standard asks only if a reasonable person knowing all the circumstances might question Judge Wolin’s impartiality.

Judge Wolin stated in his opinion that he met with the Advisors as a group on only four occasions for a total of eighteen hours and that, after May 2002, “the Advisors as a group became functionally obsolete despite their *de jure* existence.” Judge Wolin also emphasized that his meetings with the Advisors consisted merely of discussions, which he defined as “consideration of a subject by a group; an earnest conversation,” and that he never received any advice, which he defined as an “opinion about what could or should be done about a situation or problem.”

Judge Wolin’s distinction between discussions and advice cuts too fine a line. As Kensington points out, “[i]t is hard to fathom why Judge Wolin wanted [a] crash course in asbestos litigation if *not* to assist him in deciding ‘the merits’ of ‘disputed’ issues that he could expect to face.” Indeed, the four meetings in early 2002 between Judge Wolin and the Advisors covered almost all of the major issues in asbestos litigation, including the Rule 706 panel, claims bar date, claim forms, pleural registries, fraudulent conveyance claims, various defenses, claims estimation, trust distribution procedures, tensions among the creditor classes, and the asbestos claimants’ veto power under 11 U.S.C. § 524(g).

The extensive *ex parte* communications between Judge Wolin, on the one hand, and the Advisors and parties, on the other, further support disqualification under § 455(a). One leading reason is that *ex parte* meetings are often, as they were here, unrecorded. Consequently, there is no official record of what was said during those meetings. Of even greater concern is the argument urged upon us by the Petitioners who, without knowledge of what was discussed at these meetings, contended that they could not respond to these “silent” facts.

The other problem is that *ex parte* communications run contrary to our adversarial trial system. The adversary process plays an indispensable role in our system of justice because a debate between adversaries is often essential to the truth-seeking function of trials. If judges engage in *ex parte* conversations with the parties or outside experts, the adversary process is not allowed to function properly and there is an increased risk of an incorrect result.

Discussion Questions

Because the Court concluded that Judge Wolin's impartiality might reasonably be questioned pursuant to Section 455(a), it did not find it necessary to reach the question of whether his disqualification was also warranted under the "personal knowledge of disputed evidentiary facts" provision of Section 455(b)(1). Do you agree with the majority's conclusion that Judge Wolin's disqualification was required? Justice Fuentes wrote a dissenting opinion in which he concluded that Judge Wolin did not violate Section 455 on the grounds that no conflict of interest affected the Advisors.

C. Court Staff

A judge may consult with court personal whose job it is to assist the judge in doing their work, as well as other judges, provided the judge makes reasonable efforts to avoid disclosing any factual information that is not part of the record.

D. Settlement Discussions

A judge may, with the parties' consent, confer separately with either side in a case in an effort to resolve the matter by agreement of the parties. However, judges must be careful not to go too far in encouraging parties to settle their differences. Consider the following case.

Dutton v. Dutton

Ohio Court of Appeals

713 N.E.2d 14 (Ohio Ct. App. 1998)

This timely appeal arises out of the trial court's denial of appellant's motions to set aside the separation agreement and for a new trial.

The facts indicate that appellant Rhoda Jo Dutton and appellee Paul M. Dutton were married on May 23, 1967 and had three children born as issue of the marriage.

On November 15, 1993, appellant filed a complaint for divorce, property division, alimony, and restraining order in Mahoning County Domestic Relations Court, at which time only the parties' youngest child had not been emancipated under Ohio law. After an answer and counterclaim were filed by appellee, both parties filed numerous motions for contempt.

Trial of this matter commenced on February 6, 1995 and continued on February 7 and 8. Trial continued on March 6, 1995 and the morning of March 7, 1995. At this point in time, prior to the noon recess, the trial judge noticed the parties conversing with each other in the courtroom and asked them whether they would go to lunch together and see whether they could work out a

settlement. The court was adjourned, and the appellant and appellee went to lunch together.

Upon their return to the courthouse after lunch, the parties were met by the trial court judge, who took the parties into his chambers, at about 1:30 p.m. on March 7, 1995, to continue settlement negotiations. The trial judge was in the chambers with the parties, but neither of the parties' attorneys was present. The conference continued until about 5:00 p.m., at which time the judge indicated that a settlement had been reached between the parties. At the conclusion of the meeting with the judge, the parties met with their respective counsel to discuss the settlement terms, and court was adjourned for the evening.

The next day, March 8, 1995, the parties met at the court, where a conference relative to the terms of the proposed settlement was held in the judge's chambers with counsel and the parties. After a discussion of some of the terms of the settlement, the parties entered the courtroom, and the terms of the settlement agreement were read into the record by the appellant's counsel. Thereafter, both parties signed the court reporter's notes.

Counsel for appellant then inquired of his client whether she had any questions concerning the agreement and whether she agreed with it. Appellant responded in the affirmative. Then, the court inquired of the appellant whether she had an opportunity to counsel with her attorney, whether she had gone over the questions that she had about the agreement, and whether she was in agreement with it and wanted to proceed to settle the case, to which she responded in the affirmative.

On April 14, 1995, appellant filed a motion to set aside the settlement of March 8, 1995. Appellee filed a brief in opposition on April 24, 1995. The trial court overruled appellant's motion on May 1, 1995 without a hearing. Appellant then, on June 1, 1995, requested written findings of fact and conclusions of law, which was denied on June 7, 1995. The judgment entry covering the terms of the settlement agreement was also journalized on June 7, 1995.

On June 19, 1995, appellant filed a motion for a new trial and a motion to have the trial court judge recuse himself. On June 20, 1995, the motion to recuse was granted. After a new judge was assigned, a hearing on the motion for a new trial was held on August 8, 1995. On August 22, 1995, the trial court overruled appellant's motion to set aside the separation agreement and to grant a new trial. This instant appeal followed on September 21, 1995.

Appellant alleges two assignments of error:

Appellant's Assignment of Error No. 1:

"The separation agreement dictated into the record herein and later journalized as the trial court's judgment entry dated June 7, 1995, is void as against public policy, collusive, obtained under

duress and the result of an improper settlement conference conducted in violation of Canon 3(A)(4) of the Code of Judicial Conduct.”

Appellant’s Assignment of Error No. 2:

“The trial court abused its discretion to the prejudice of plaintiff-appellant by overruling her motion to set aside the separation agreement and motion for a new trial when the record on appeal evidences appellant did not knowingly and voluntarily enter into said separation agreement, but was induced, coerced and under duress when she consented to the terms therein based upon the actions of the trial court judge and the appellee.”

In Assignment of Error No. 1, appellant alleges that the separation agreement was void as against public policy, collusive, obtained under duress, and obtained in violation of Canon 3(A)(4) of the Code of Judicial Conduct.

This first assignment of error is without merit.

Clearly, this separation agreement would have been void and against public policy if the settlement had been arrived at due to collusion and duress of appellant if the trial court violated Canon 3(A)(4) of the Code of Judicial Ethics. But note:

“A contract will not be held to be void as against public policy unless the public injury is clear; it is not sufficient that the public injury is a matter of opinion. When judges come to apply the doctrine, they must take care not to infringe on the rights of parties to make contracts which are not clearly opposed to some principle or policy of the law. Agreements voluntarily and fairly made between competent persons are usually valid and enforceable, and the principle that agreements opposed to public policy are not enforceable should be cautiously and only in circumstances patently within the reasons on which that doctrine rests.” 17 Ohio Jurisprudence 3d (1980) 529, Contracts, Section 94.

Canon 3(A)(4) of the Code of Judicial Conduct states in part:

“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 prescribe by law. In the performance of these duties, the following standards apply:

“* * *

“(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 communications concerning a pending or impending proceeding.

“* * *

“Nothing contained herein, however, shall preclude a judge from nonsubstantive ex parte communications on procedural matters and matters affecting prompt disposal of the business of the court.”

While it certainly might have been more appropriate if the trial court had not personally involved itself with these settlement negotiations without the parties’ attorneys present, he did not participate in ex parte communication concerning this matter. In fact, at all times he met with the parties together. “Ex parte communication” is defined as:

“Ex parte. On one side only; by or for one party; done for, in behalf of, or on the application of, one party only.

“A judicial proceeding, order, injunction, etc., is said to be *ex parte* when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested.” Black’s Law Dictionary (6 Ed.1990) 576.

This court now must address the allegation of collusion between the trial court judge and the appellee. “Collusion” is defined as:

“Collusion. An agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose.” Black’s Law Dictionary (6 Ed.1990) 264.

There is no evidence before this court nor is there any indication in the docket, or in the transcript of proceedings, or hearings of any type of collusion by the trial court judge against the appellant in this case.

The allegations of duress by the appellant are also without merit. “Duress” is defined as:

“Duress. * * * A condition where one is induced by wrongful act or threat of another to make a contract * * * under circumstances which deprive him of exercise of his free will.” Black’s Law Dictionary (6 Ed.1990) 504.

A bare allegation of a story by the trial court of “other cases where the court had attempted to negotiate settlement but was unable to get the parties to agree and subsequently the court’s decision resulted in a substantially lesser award to the party who objected to the settlement terms” (appellant’s brief, at 9, item 6) is not, in and of itself, evidence of undue influence of the appellant.

After the terms of the settlement agreement being read into the record, the court made inquiry of the appellant and asked:

“THE COURT: Do you have any questions to ask about it?

“MRS. DUTTON: I don’t think so, no.

“* * *

“THE COURT: * * * Are you entering in this agreement of your own free will and mind?

“MRS. DUTTON: Yes.”

Later, appellant was questioned by her attorney and the following ensued:

“Q. And did I in any way pressure you?

“A. Absolutely not.

“Q. Or force you or intimidate you in any manner to accept these terms?

“A. Absolutely not.

* * *

“THE COURT: Did anyone force you?

“THE WITNESS: No one forced me.

“Q. And you went into this on your own free will and volition?

“A. Yes, I did.”

It is further evidenced that the acceptance of this settlement by the appellant was a counseled acceptance. During the hearing before Judge Mary Cacioppo, attorney Eugene Fox testified.

Attorney Fox represented the appellant during the proceedings before the trial court. Attorney Fox testified that at the end of the day during which the discussions were held between the two parties and the judge in chambers, he and the appellant retired to his office. He went on to testify that the appellant explained to him from her notes the conditions and issues involved in the potential settlement. Attorney Fox did not agree with some of the conditions and he felt that the agreement was unfair. Attorney Fox advised his client as to her choices:

“I told her she had three choices, in my opinion. One was to ask the judge to recuse himself and terminate the trial because I felt the judge’s conduct would have prejudiced him from completing the case impartially at this time. So that was number one. Second was to continue with the trial with Judge Leskovansky. The third option was to accept the settlement.”

After lunch, on March 8, 1995, attorney Fox met with his client in his office:

“* * * At this time she said in effect that she was going to go through with the settlement. I again reviewed her options.”

On the afternoon of March 8, 1995, the parties entered the courtroom and, with the trial judge present, entered into the record conditions of the settlement agreement:

“* * * Mrs. Dutton was questioned and she acknowledged that I [attorney Fox] had reservations about the agreement. The record states that she is pleased with the terms.”

As noted by the trial court in its August 22, 1995 judgment entry, the appellant is a forty-eight-year-old well-educated individual. She is a *summa cum laude* college graduate with a bachelor’s degree and a few hours away from a master’s degree. Appellant had ample opportunity to think over the settlement terms and also to discuss any possible duress with her attorney, who was a very experienced practitioner. Appellant did not take advantage of that and there is no indication that she was under duress at that time.

For all the reasons cited above, appellant’s Assignment of Error No. 1 is without merit.

In Assignment of Error No. 2 appellant alleges that the trial court abused its discretion by overruling appellant’s motion to set aside the settlement agreement and motion for a new trial, since appellant was induced, coerced and under duress by the trial court judge.

The term “abuse of discretion” connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.

Having addressed the allegations of appellant that she was induced, coerced, and under duress at the time that the settlement agreement was agreed to by appellant and appellee, and, having found nothing in the record to indicate such behavior by the trial court judge, we hold that the trial court's decision was not unreasonable, arbitrary, or unconscionable and, thus, that the trial court had not abused its discretion.

Another issue raised by appellant in her reply brief to support her contention of coercion and undue influence is that the final settlement agreement valuations of certain assets were the same valuations that were in the appellee's pretrial statement. The fact that some of the assets' valuations ended up the same is not evidence of coercion and undue influence.

"The fact that a separation agreement does not equally divide the property of the parties does not require a finding that the agreement is unenforceable. There is no presumption that marital property should be divided equally upon divorce.

Thus, even if it might seem that the settlement agreement was to the benefit of the appellee, that in and of itself is not evidence of an abuse of discretion by the trial court. In effect, while the separation agreement executed by appellant and appellee appears to be generous to appellee, the record does not support by clear and convincing evidence appellant's contention that she signed the agreement under undue influence or duress.

Ethically, a lawyer should exert his best efforts to ensure that decisions of his client are made only after the client has been informed of relevant considerations. The lawyer should advise his client of the possible effect of each legal alternative:

"The lawyer's job is not merely to supply whatever means are needed to achieve the client's goals but also to deliberate with the client and on his behalf about these goals."

The appellant in this matter was thoroughly advised by her attorney. She was given her options and, of her own free will and outside of any court rule, duress, or coercion, she exercised the option that she desired of her own free will.

Thus, for all of the reasons cited above, appellant's Assignment of Error No. 2 is also without merit.

The judgment of the trial court is affirmed.

Judgment affirmed.

COX, Judge, concurring.

I reluctantly concur in the opinion in this case.

This writer has consistently held that where there is a dispute between the parties as to the meaning of the terms or conditions contained within a separation agreement, the court must hold an evidentiary hearing prior to entering judgment.

Here the court failed to hold the hearing, and on that basis I would have reversed.

However, the error was cured when a visiting judge was appointed and the same matters were inquired into on hearing upon a motion for a new trial.

It is bad practice for a domestic relations trial judge to hold a private settlement conference with the parties for a four-hour period excluding the parties' counsel. This is especially odorous when one of the parties is, in fact, an attorney.

This being said, the visiting trial judge did make extensive inquiry into the matter and did not find duress or collusion.

WAITE, Judge, concurring.

It can be readily discerned from the opinion and concurrences in this matter that the court is dismayed by the procedural history of this matter. It is important not only that a judge avoid direct violations of the judicial canons, but also that he or she avoid even the appearance of impropriety. This is an imperative if we are to uphold public confidence in the fairness and impartiality of the bench. Like my colleagues, I do not believe that this matter was handled in all respects in a manner befitting the dignity of the bench and bar. I must, however, agree with the other members of this panel that appellant's claims here are without merit for two reasons.

First, appellant cannot claim that the initial agreement was the product of collusion or duress. The majority opinion clearly outlines that the record is devoid of any such evidence. While appellant's ex-husband was a lawyer and she did meet with him in chambers without benefit of counsel, the record reflects that she did so willingly. In fact, appellant may not possess a law degree, but she is a highly educated woman and is apparently able to speak for herself. The record reflects that after she met for this settlement conference, she had ample opportunity to meet with and did meet with her own attorney afterward. Her attorney counseled her against certain portions of the proposed settlement. Nonetheless, the next day, after benefit of several hours of reflection on the matter and counsel from her own attorney, the record shows that appellant unhesitantly entered into the settlement agreement. In fact, she swore in open court that she was agreeing to the settlement terms of her own free will and was not under any type of coercion.

The second reason that appellant's claims are meritless is that all of these claims have been fully heard before a second, impartial finder of fact on appellant's motion for a new trial. Appellant asked that the original trial judge recuse himself from hearing her motion. Her request was granted. There are no claims that the new judge who was assigned was not fair, impartial, and unbiased. This judge held a hearing on the matter and after reviewing both the record and the demeanor of the witnesses and credibility of the evidence presented at this hearing concluded in her fairly exhaustive findings of fact and conclusions of law that appellant was not entitled to a new trial in the matter and that the original settlement agreement that was journalized by the court was valid.

In order for this court to overturn the judge's decision, we must find that she abused her discretion. As there is no allegation of impropriety on the part of the judge who heard the motion for new trial and that judge was thorough and meticulous in her handling of the matter, if there was once a question of the accuracy and completeness of the record there can be none now.

Based on the above, I concur with the majority and affirm the judgment of the trial court.

Discussion Question

Do you agree with the majority here that the trial judge did not go too far in encouraging the parties to settle their case?

E. Where Expressly Permitted by Law

There are in fact a wide range of statutes and court rules that permit judges to have ex parte contact with one side of the case for specific purposes. Many such rules track other exceptions to the prohibition mentioned already, such as routine scheduling matters. Specific types of emergencies have also spawned specific provisions that allow for ex parte communications. Perhaps the best known of these are provisions that allow victims of domestic violence to obtain at least temporary court orders in an effort to protect them from further abuse. However, such orders generally last for a short period of time, and can only be extended through proceedings in which the restrained party does receive notice and have an opportunity to be heard.

IV. Other Considerations

A. Inadvertent Receipt of Ex parte Communications

Where a judge has inadvertently received information from one side of a case outside of the presence of the other that relates to the substance of the case, the judge must notify both sides of this fact and give the parties an opportunity to address the issue with the court.

B. Independent Investigation

Judges shall not conduct an independent investigation of the facts of any case, and shall only make decisions based upon evidence which is properly presented to them or of which proper judicial notice is taken. This prohibition extends to a variety of means by which a judge may become educated regarding the facts relating to the case. Consider the following decision.

Edgar v. K.L.

United States Court of Appeals for the Seventh Circuit

93 F.3d 256 (7th Cir. 1996)

Plaintiffs in this class action contend that the mental health care system of Illinois violates the Constitution of the United States. With the consent of the parties, the district judge appointed a panel of three experts to investigate the state's institutions and programs. The panel's charge permits its members and aides to meet with patients and state employees outside the presence of counsel, for otherwise they could not collect reliable data. Later the panel began to meet in private with the judge, without such a compelling reason. When defendants learned that one of these meetings, which lasted 3 ½ hours on September 7, 1994, was dedicated to giving the judge a preview of the panel's conclusions, and to persuading the judge that the panel's methodology was sound, defendants asked the judge to disqualify himself under 28 U.S.C. § 455. The judge declined, and this petition for a writ of mandamus followed.

Plaintiffs believe that the defendants waited too long (trial is set for next month) to seek disqualification. Delay can be fatal, although after *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), passage of time is not conclusive if the justification for disqualification is compelling. Although the defendants have known for at least a year that the experts met from time to time with the judge, the judge described these occasions as administrative and "social". Not until two weeks before seeking disqualification did the defendants learn—by acquiring a detailed agenda prepared by one of the panel members—that at least one meeting had covered the merits of the case, rather than casual chitchat and details such as reimbursement of expenses. Defendants sought to learn more about what had happened at the September 7 meeting, but the judge forbade inquiry. He quashed subpoenas issued to the participants, and he invoked what he called a "judicial privilege" to shield what had been said. Thus all we have are possibilities. But these possibilities justify a request for emergency relief. Indeed, we have held, parties who know of a problem under § 455 but permit the trial to occur may not seek relief later. Defendants' request is timely.

Whether the meeting was a disqualifying event depends on what transpired. Canon 3A(4) of the Code of Conduct for United States Judges provides: "A judge should ... except as authorized by law, neither initiate nor consider *ex parte* communications on the merits, or procedures affecting the merits, of a pending or impending proceeding." Did any meeting between judge and experts touch the merits, or procedures affecting the merits? We cannot know, because the district judge

has blocked discovery from other participants and has declined to state on the record his own memories of what happened. The judge did not elaborate on the nature, extent, or legal support for his claim of “judicial privilege,” but a phrase of that kind usually refers to the deliberative process. No privilege covers arrangement of administrative details, such as where an expert witness will stay while doing research or who will provide computer time to analyze the data. To invoke a privilege is therefore to confess that the discussions covered the substance of potential testimony and the conduct of the litigation—and if this is not so in fact, it is nonetheless what we must assume, because no evidence in the record undermines the inferences naturally to be drawn from the outline for the September 7 meeting. The outline enumerates “three irreducible obligations of the modern state hospital” and ticks off (in a section captioned “General Findings”) numerous ways in which the panel believes Illinois falls short. This outline covers subjects at the core of the litigation; indeed, it served the panel as the draft outline for its final report.

Defendants believe that a private briefing on the merits leads to disqualification under 28 U.S.C. § 455(b), which provides that a judge must “disqualify himself in the following circumstances: (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding”. Defendants contend that the experts imparted to the judge “personal knowledge of disputed evidentiary facts”. Plaintiffs have two replies: first, that the private meetings were authorized by the parties’ consent reflected in the agreed order appointing the panel; second, that disclosures in chambers are not “personal” knowledge. Neither of these is sound.

Let us suppose that the parties consented to private investigation by the judge. That consent would be ineffectual under 28 U.S.C. § 455(e): “No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).” What is more, there was no such consent. Early drafts of the order appointing the experts and a professor of law who was called “the Manager” provided that “[t]he Panel and Manager may communicate with the Court at any time without the inclusion of counsel.” This language was deleted before the order was entered. According to plaintiffs, it was deleted as redundant in light of ¶ 3 of the order, which reads:

(a) The Manager and the [Manager’s] Assistant shall coordinate and facilitate the investigation and reports of the Panel. In addition to the other duties specifically stated in this Order, the Manager and the Assistant will obtain and coordinate access for the Panel to DMHDD [Department of Mental Health and Developmental Disabilities] mental health centers and other facilities, programs and agencies, facilitate the Panel’s collection of other information, facilitate communication between Panel members, as requested, make travel and lodging arrangements for the Panel, and report to the Court and the parties as to the progress and status of the Panel’s investigation.

(b) By appointing the Manager, the Court is not relinquishing its exclusive prerogative to instruct

the Panel regarding the applicable law or the appropriate focus of or limits to either the Panel's investigation or the opinions to be expressed in its report.

Paragraph 3(a) permits the Manager to “report to the Court and the parties”, not to report to the judge in secret, and it does not even hint that the experts (who were likely to become witnesses) may meet privately with the judge. Paragraph 3(b), on which plaintiffs lay principal stress, states that the judge may direct the experts, but again it does not say or imply that the judge may receive information and deliver instructions in secret. Rule 706(a) of the Federal Rules of Evidence specifies the right way: “A witness so appointed [by the court] shall be informed of the witness’ duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate.” This places the substance of the instructions on the record and ensures that the parties know what is happening and can make appropriate suggestions, motions, and objections. The judge has not attempted to reconcile with Canon 3A(4) or Rule 706(a) the procedure he used in this case.

As for the question whether information secured in chambers can be “personal” knowledge: although § 455 is principally concerned with knowledge that is “extrajudicial” in the sense that the judge acquires it outside a courthouse, the Court rejected the argument that *only* such information can lead to disqualification. The point of distinguishing between “personal knowledge” and knowledge gained in a judicial capacity is that information from the latter source enters the record and may be controverted or tested by the tools of the adversary process. Knowledge received in other ways, which can be neither accurately stated nor fully tested, is “extrajudicial.” Thus information a judge learns at a workshop devoted to a subject is extrajudicial, even though the workshop is open to other persons, and evidence could be taken about the proceedings. Off-the-record briefings in chambers, by contrast, leave no trace in the record—and in this case the judge has forbidden any attempt at reconstruction. What information passed to the judge, and how reliable it may have been, are now unknowable. This is “personal” knowledge no less than if the judge had decided to take an undercover tour of a mental institution to see how the patients were treated. Instead of going himself, this judge appointed agents, who made a private report of how they investigated and what they had learned. Mandatory disqualification under § 455(b)(1) follows.

Although an over-strict reading of § 455(b)(1) could lead to injustice by disqualifying a judge for learning a trivial fact in mid-trial of an extended case, the activities here do not present that specter. The discussions in chambers were calculated, material, and wholly unnecessary. Indeed, we believe that disqualification is independently required by 28 U.S.C. § 455(a), which provides: “Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” A thoughtful observer aware of all the facts (the standard under § 455(a), would conclude that a preview of evidence by a panel of experts

who had become partisans carries an unacceptable potential for compromising impartiality.

By September 1994 the panel's two remaining experts were loudly denouncing Illinois' mental health system. By their own admission, the members of the panel decided to use an unorthodox approach, potentially open to challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Methodology was among the subjects of the private meetings, and an objective observer would be concerned that the judge had given the panel's procedure his blessing, in secret and without adversarial input. After defendants filed their motion for disqualification, the judge justified his meetings with the panel precisely on the ground that the meetings would enable him to ensure that the panel's report was admissible—that is to say, the judge offered as justification for an *ex parte* meeting the need to anticipate and preempt an important legal question. Although in open court the judge assured defendants that he would have an open mind if they later pressed a *Daubert* objection, an objective observer would doubt that this opportunity was adequate—for defendants would be challenging the judge as well as the panel.

Other proceedings lend credence to a concern that the judge and the experts became excessively cozy as a result of these meetings. For example, the judge has expressed confidence that the panel's report is invulnerable to challenge. When defendants asserted that the panel's report contains conclusions about which reasonable persons could differ, the judge replied: "There are no conclusions in that report" and gave some examples, including this one:

Then [the report] says: "(1) An ubiquitous lack of sophisticated clinical leadership that could have assisted the staff in addressing the internal issues that were torturing their patients and that often led to repeated hospitalizations." That's an assertion of fact.

Although the judge saw only "fact" in this passage, we see one conclusion piled on another. Was the clinical leadership "unsophisticated"? Could "sophisticated clinical leadership" have done anything about the "internal issues that were torturing [the] patients"? Would better treatment have reduced the number of repeated hospitalizations? These propositions, and the methodology that led to them, may be contested at trial. But the judge has announced that they are incontestable.

Additional statements by the judge also would cause a reasonable observer to be seriously concerned about the court's ability to conduct the trial impartially. For example, in July 1995 the Mental Health Association of Illinois (MHAI), an advocacy group, sent the judge a letter expressing its opinion that the state's facilities and programs needed immediate improvement, and asking the judge to release the panel's report to the public so that it could be used in lobbying efforts. MHAI sent a copy of this letter to plaintiffs' counsel, but not to defendants' counsel. After consulting the Manager, the judge replied with a letter that reads, in part: "In due time, we hope we will achieve some significant results." A reasonable observer would hear this as an assertion—long in advance of trial—that the state's institutions and programs violate the Constitution, and that a remedial order is forthcoming. The judge sent his letter to MHAI, to plaintiffs' counsel, and

to a lobbyist; defendants' counsel was left in the dark.

So convinced was the judge of the merit of plaintiffs' case that he demanded significant concessions in settlement negotiations. The judge was dismayed that the persons negotiating on behalf of the defendants did not include the Governor of Illinois. The judge told counsel for defendants that they had to produce high executive officials, because even the Director of the DMHDD does not "really know how bad things are." The judge assured counsel that the Governor would be well received although "when the Governor knew me, he was a gofer in the [state] Legislature and I was a very active and vocal legislator." When the Governor declined to attend the settlement negotiations, the judge inquired:

Do you know how many cases that I have in this courtroom right now that the Governor is very, very concerned with? Do you?

[Counsel]: I imagine a few.

The Court: Well, you're supposed to be responsible for everyone who wants to talk to the Governor. You should know that the recent revenue bill is up here for a preliminary injunction within weeks, including hundreds of millions of dollars, they tell me, or many millions of dollars of revenue to the state of Illinois. Does that mean that I'm not important to the Governor or that somehow or other I'm being pretentious?

A month later, court and counsel had this exchange:

[Counsel]: Your Honor, the governor cannot afford to set a precedent of getting involved personally in every case in which he is named in his official capacity. He told me, and I have never counted it up, that there are hundreds, if not thousands, of such cases.

The Court: I know that counsel, and I don't think there are three that are more important than this one, and I probably have the other two. Maybe there are other judges that have them. But the point is this is a massively important case to the people of Illinois, okay? Now, the governor is the governor of Illinois and he is being sued. You say it's only in his official capacity. Okay, in his official capacity I want to talk to him. Now, if I have to, I'll subpoena him and I'll set a precedent, okay? And if nothing else, I'll insist that he be a witness in this courtroom if I don't get to talk to him, and then I will ask him questions under oath in the courtroom.

The judge relented after recognizing that he lacks authority to hale the Governor into court. (No one contends that the Governor is a fact witness.) But a reasonable observer could read these exchanges as veiled threats to decide not only this case, but also other pending cases, against the State of Illinois as a penalty for the Governor's unwillingness to appear. An inclination to retaliate when crossed also is manifest in the comment that defendants would be in "deep doo" if the motion for disqualification failed. The impartiality of a judge who makes such statements may reasonably be questioned, whether or not the judge planned to carry through.

What we have seen in this record persuades us not only that the district judge is disqualified, but also that the panel can no longer claim the mantle of judicial appointment. The panel has been influenced by secret submissions from advocacy groups and counsel supporting plaintiffs in other litigation against Illinois. One of the two remaining experts on the panel, Dr. Robert L. Okin, has shed any pretense that he is playing a scientific role. In a letter to the district judge dated December 7, 1995, Okin asked the judge to release the panel's report so that it could serve as a "flag for advocacy groups to rally around to assert [political] pressure." (Copies of this letter were not sent to counsel.) Okin urged the judge to delay release of the report for a short time, however, because "[i]f the report is released immediately, we won't have time to meet with key editorial boards before it hits the street. Imparting an understanding of this Report to these boards is crucially important. This fight needs to be won on the street, not just in court." The letter continued:

By the way, the legislatures' anger about consent decrees is standard fare. No legislature likes them but with the right approaches, even the most reluctant legislatures have put up the money. How loudly they gnash their teeth is irrelevant. Whether they pay is the only relevant issue. If the system is viewed as deficient and this is highly publicized, legislatures will pay, whatever the niceties of the balanced [sic] of powers.

Okin may be an expert on mental health, but he is no expert on the difference between judges and legislators, the proper relation between national and state governments, or the "niceties of the balanced of powers." Experts appointed and supervised by a court carry special weight because of their presumed neutrality. Okin is no neutral, and neither is the panel. We leave to the discretion of the replacement judge whether plaintiffs may call members of the panel as their own witnesses, and introduce its report as their evidence, or whether the behind-the-scenes machinations make even that use imprudent.

A writ of mandamus will issue today removing the current district judge from the case and requiring its assignment to a different judge. Ancillary questions, such as whether we should stay proceedings pending the disposition of the petition for mandamus, need not be resolved.

C. Supervisory Responsibility

Judges shall take reasonable steps to ensure that court personnel abide by the rule against ex parte communications in addition to the judge herself.

V. Review Questions

There is a [CALI Lesson](#) available with multiple choice questions that review the materials covered in this chapter.

Chapter 5 – Disqualification

I. Introduction

Because impartiality is so critical to the legitimacy of the judicial function, a judge is required to disqualify himself or herself from participating in any case in which his or her impartiality might reasonably be questioned.³⁸ While the duty to disqualify applies broadly to any situation in which the judge's impartiality might reasonably be questioned, Rule 2.11 goes on to identify a number of specific situations where disqualification is required. These include where the judge has a personal bias or prejudice concerning a party to a case or their lawyer, or has personal knowledge of disputed facts relating to the matter; a relative of the judge is a party, lawyer, person interested in the outcome of the proceeding; the judge or a family member has an economic interest in the outcome of the proceeding; the judge has received campaign contributions above a designated amount from a party to the proceeding or their lawyer; the judge made public statements while a candidate for judicial office that commit or appear to commit the judge to a particular outcome in the case; and where the judge's prior employment involved them in the present case. The following sections consider cases involving some of these reasons for possible disqualification.

II. Reasons for Disqualification

A. Personal Bias

Under Rule 2.11(A)(1), a judge must disqualify himself from hearing a case when they have a personal bias in favor of or against one of the parties to the case. In the below well-known case, U.S. Supreme Court Justice Antonin Scalia addresses a request that he disqualify himself from a case in which then Vice President Dick Cheney was a party. Scalia and Cheney were personal acquaintances. Consider the Justice's response to the request below.

Cheney v. U.S. Dist. Ct. for the District of Columbia

U.S. Supreme Court

541 U.S. 913 (2004)

Memorandum of Justice Scalia.

I have before me a motion to recuse in these cases consolidated below. The motion is filed on behalf of respondent Sierra Club. The other private respondent, Judicial Watch, Inc., does not join the motion and has publicly stated that it “does not believe the presently-known facts about the

³⁸ ABA Model Code of Judicial Conduct Rule 2.11(A).

hunting trip satisfy the legal standards requiring recusal.” Since the cases have been consolidated, however, recusal in the one would entail recusal in the other.

I

The decision whether a judge’s impartiality can “ ‘reasonably be questioned’ ” is to be made in light of the facts as they existed, and not as they were surmised or reported. The facts here were as follows:

For five years or so, I have been going to Louisiana during the Court’s long December-January recess, to the duck-hunting camp of a friend whom I met through two hunting companions from Baton Rouge, one a dentist and the other a worker in the field of handicapped rehabilitation. The last three years, I have been accompanied on this trip by a son-in-law who lives near me. Our friend and host, Wallace Carline, has never, as far as I know, had business before this Court. He is not, as some reports have described him, an “energy industry executive” in the sense that summons up boardrooms of ExxonMobil or Con Edison. He runs his own company that provides services and equipment rental to oil rigs in the Gulf of Mexico.

During my December 2002 visit, I learned that Mr. Carline was an admirer of Vice President Cheney. Knowing that the Vice President, with whom I am well acquainted (from our years serving together in the Ford administration), is an enthusiastic duck hunter, I asked whether Mr. Carline would like to invite him to our next year’s hunt. The answer was yes; I conveyed the invitation (with my own warm recommendation) in the spring of 2003 and received an acceptance (subject, of course, to any superseding demands on the Vice President’s time) in the summer. The Vice President said that if he did go, I would be welcome to fly down to Louisiana with him. (Because of national security requirements, of course, he must fly in a Government plane.) That invitation was later extended-if space was available-to my son-in-law and to a son who was joining the hunt for the first time; they accepted. The trip was set long before the Court granted certiorari in the present case, and indeed before the petition for certiorari had even been filed.

We departed from Andrews Air Force Base at about 10 a.m. on Monday, January 5, flying in a Gulfstream jet owned by the Government. We landed in Patterson, Louisiana, and went by car to a dock where Mr. Carline met us, to take us on the 20-minute boat trip to his hunting camp. We arrived at about 2 p.m., the 5 of us joining about 8 other hunters, making about 13 hunters in all; also present during our time there were about 3 members of Mr. Carline’s staff, and, of course, the Vice President’s staff and security detail. It was not an intimate setting. The group hunted that afternoon and Tuesday and Wednesday mornings; it fished (in two boats) Tuesday afternoon. All meals were in common. Sleeping was in rooms of two or three, except for the Vice President, who had his own quarters. Hunting was in two- or three-man blinds. As it turned out, I never hunted in

the same blind with the Vice President. Nor was I alone with him at any time during the trip, except, perhaps, for instances so brief and unintentional that I would not recall them-walking to or from a boat, perhaps, or going to or from dinner. Of course we said not a word about the present case. The Vice President left the camp Wednesday afternoon, about two days after our arrival. I stayed on to hunt (with my son and son-in-law) until late Friday morning, when the three of us returned to Washington on a commercial flight from New Orleans.

II

Let me respond, at the outset, to Sierra Club's suggestion that I should "resolve any doubts in favor of recusal." Motion to Recuse 8. That might be sound advice if I were sitting on a Court of Appeals. There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case. Thus, as Justices stated in their 1993 Statement of Recusal Policy: "We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court." (Available in Clerk of Court's case file.) Moreover, granting the motion is (insofar as the outcome of the particular case is concerned) effectively the same as casting a vote against the petitioner. The petitioner needs five votes to overturn the judgment below, and it makes no difference whether the needed fifth vote is missing because it has been cast for the other side, or because it has not been cast at all.

Even so, recusal is the course I must take-and will take-when, on the basis of established principles and practices, I have said or done something which requires that course. I have recused for such a reason this very Term. I believe, however, that established principles and practices do not require (and thus do not permit) recusal in the present case.

A

My recusal is required if, by reason of the actions described above, my "impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Why would that result follow from my being in a sizable group of persons, in a hunting camp with the Vice President, where I never hunted with him in the same blind or had other opportunity for private conversation? The only possibility is that it would suggest I am a friend of his. But while friendship is a ground for recusal of a Justice where the personal fortune or the personal freedom of the friend is at issue, it has traditionally *not* been a ground for recusal where *official action* is at issue, no matter how important the official action was to the ambitions or the reputation of the Government officer.

A rule that required Members of this Court to remove themselves from cases in which the official actions of friends were at issue would be utterly disabling. Many Justices have reached this Court precisely because they were friends of the incumbent President or other senior officials-and from the earliest days down to modern times Justices have had close personal relationships with the President and other officers of the Executive. John Quincy Adams hosted dinner parties featuring such luminaries as Chief Justice Marshall, Justices Johnson, Story, and Todd, Attorney General Wirt, and Daniel Webster. Justice Harlan and his wife often “ ‘stopped in’ ” at the White House to see the Hayes family and pass a Sunday evening in a small group, visiting and singing hymns. Justice Stone tossed around a medicine ball with members of the Hoover administration mornings outside the White House. Justice Douglas was a regular at President Franklin Roosevelt’s poker parties; Chief Justice Vinson played poker with President Truman. A no-friends rule would have disqualified much of the Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the case that challenged President Truman’s seizure of the steel mills. Most of the Justices knew Truman well, and four had been appointed by him. A no-friends rule would surely have required Justice Holmes’s recusal in *Northern Securities Co. v. United States*, 193 U.S. 197 (1904), the case that challenged President Theodore Roosevelt’s trust-busting initiative.

It is said, however, that this case is different because the federal officer (Vice President Cheney) is actually a *named party*. That is by no means a rarity. At the beginning of the current Term, there were before the Court (excluding habeas actions) no fewer than 83 cases in which high-level federal Executive officers were named in their official capacity-more than 1 in every 10 federal civil cases then pending. That an officer is named has traditionally made no difference to the proposition that friendship is not considered to affect impartiality in official-action suits. Regardless of whom they name, such suits, when the officer is the plaintiff, seek relief not for him personally but for the Government; and, when the officer is the defendant, seek relief not against him personally, but against the Government. That is why federal law provides for *automatic substitution* of the new officer when the originally named officer has been replaced. The caption of Sierra Club’s complaint in this action designates as a defendant “Vice President Richard Cheney, *in his official capacity* as Vice President of the United States and Chairman of the National Energy Policy Development Group.” The body of the complaint repeats (in paragraph 6) that “Defendant Richard Cheney is sued *in his official capacity* as the Vice President of the United States and Chairman of the Cheney Energy Task Force.” Sierra Club has *relied* upon the fact that this is an official-action rather than a personal suit as a basis for denying the petition. It asserted in its brief in opposition that if there was no Presidential immunity from discovery in *Clinton v. Jones*, 520 U.S. 681 (1997), which was a private suit, “[s]urely ... the Vice President and subordinate White House officials have no greater immunity claim here, especially when the lawsuit relates to their official actions while in office and the primary relief sought is a declaratory judgment.” Brief in Opposition 13.

Richard Cheney’s name appears in this suit only because he was the head of a Government

committee that allegedly did not comply with the Federal Advisory Committee Act (FACA) and because he may, by reason of his office, have custody of some or all of the Government documents that the plaintiffs seek. If some other person were to become head of that committee or to obtain custody of those documents, the plaintiffs would name that person and Cheney would be dismissed. Unlike the defendant in *United States v. Nixon*, 418 U.S. 683 (1974), or *Clinton v. Jones*, *supra*, Cheney is represented here, not by his personal attorney, but by the United States Department of Justice in the person of the Solicitor General. And the courts at all levels have referred to his arguments as (what they are) the arguments of “the government.”

The recusal motion, however, asserts the following:

“Critical to the issue of Justice Scalia’s recusal is understanding that this is not a run-of-the-mill legal dispute about an administrative decision.... Because his own conduct is central to this case, the Vice President’s ‘reputation and his integrity are on the line.’

I think not. Certainly as far as the legal issues immediately presented to me are concerned, this *is* “a run-of-the-mill legal dispute about an administrative decision.” I am asked to determine what powers the District Court possessed under FACA, and whether the Court of Appeals should have asserted mandamus or appellate jurisdiction over the District Court. Nothing this Court says on those subjects will have any bearing upon the reputation and integrity of Richard Cheney. Moreover, even if this Court affirms the decision below and allows discovery to proceed in the District Court, the issue that would ultimately present itself *still* would have no bearing upon the reputation and integrity of Richard Cheney. That issue would be, quite simply, whether some private individuals were *de facto* members of the National Energy Policy Development Group (NEPDG). It matters not whether they were caused to be so by Cheney or someone else, or whether Cheney was even aware of their *de facto* status; if they *were de facto* members, then (according to D.C. Circuit law) the records and minutes of NEPDG must be made public.

The recusal motion asserts, however, that Richard Cheney’s “ ‘reputation and his integrity are on the line’ ” because

“respondents have alleged, *inter alia*, that the Vice President, as the head of the Task Force and its subgroups, was responsible for the involvement of energy industry executives in the operations of the Task Force, as a result of which the Task Force and its subgroups became subject to FACA.”

As far as Sierra Club’s *complaint* is concerned, it simply is not true that Vice President Cheney is singled out as having caused the involvement of energy executives. But even if the allegation had been made, it would be irrelevant to the case. FACA assertedly requires disclosure if there were private members of the task force, *no matter who* they were-“energy industry executives” or Ralph Nader; and *no matter who* was responsible for their membership-the Vice President or no one in particular. I do not see how the Vice President’s “ ‘reputation and ... integrity are on the line’ ” any

more than the agency head's reputation and integrity are on the line in virtually all official-action suits, which accuse his agency of acting (to quote the Administrative Procedure Act) "arbitrar[ily], capricious[ly], [with] an abuse of discretion, or otherwise not in accordance with law." Beyond that always-present accusation, there is nothing illegal or immoral about making "energy industry executives" members of a task force on energy; some people probably think it would be a good idea. If, in doing so, or in allowing it to happen, the Vice President went beyond his assigned powers, that is no worse than what every agency head has done when his action is judicially set aside.

To be sure, there could be political consequences from disclosure of the fact (if it be so) that the Vice President favored business interests, and especially a sector of business with which he was formerly connected. But political consequences are not my concern, and the possibility of them does not convert an official suit into a private one. That possibility exists to a greater or lesser degree in virtually all suits involving agency action. To expect judges to take account of political consequences-and to assess the high or low degree of them-is to ask judges to do precisely what they should not do. It seems to me quite wrong (and quite impossible) to make recusal depend upon what degree of political damage a particular case can be expected to inflict.

In sum, I see nothing about this case which takes it out of the category of normal official-action litigation, where my friendship, or the appearance of my friendship, with one of the named officers does not require recusal.

B

The recusal motion claims that "the fact that Justice Scalia and his daughter *[sic]* were the Vice President's guest on Air Force Two on the flight down to Louisiana" means that I "accepted a sizable gift from a party in a pending case," a gift "measured in the thousands of dollars." Motion to Recuse 6 (footnote omitted).

Let me speak first to the value, though that is not the principal point. Our flight down cost the Government nothing, since space-available was the condition of our invitation. And, though our flight down on the Vice President's plane was indeed free, since we were not returning with him we purchased (because they were least expensive) round-trip tickets that cost precisely what we would have paid if we had gone both down and back on commercial flights. In other words, none of us saved a cent by flying on the Vice President's plane. The purpose of going with him was not saving money, but avoiding some inconvenience to ourselves (being taken by car from New Orleans to Morgan City) and considerable inconvenience to our friends, who would have had to meet our plane in New Orleans, and schedule separate boat trips to the hunting camp, for us and for the Vice President's party. (To be sure, flying on the Vice President's jet was more comfortable and more convenient than flying commercially; that accommodation is a matter I address in the

next paragraph.)

The principal point, however, is that social courtesies, provided at Government expense by officials whose only business before the Court is business in their official capacity, have not hitherto been thought prohibited. Members of Congress and others are frequently invited to accompany Executive Branch officials on Government planes, where space is available. That this is not the sort of gift thought likely to affect a judge's impartiality is suggested by the fact that the Ethics in Government Act of 1978, which requires annual reporting of transportation provided or reimbursed, excludes from this requirement transportation provided by the United States. I daresay that, at a hypothetical charity auction, much more would be bid for dinner for two at the White House than for a one-way flight to Louisiana on the Vice President's jet. Justices accept the former with regularity. While this matter was pending, Justices and their spouses were invited (*all* of them, I believe) to a December 11, 2003, Christmas reception at the residence of the Vice President—which included an opportunity for a photograph with the Vice President and Mrs. Cheney. Several of the Justices attended, and in doing so they were fully in accord with the proprieties.

III

When I learned that Sierra Club had filed a recusal motion in this case, I assumed that the motion would be replete with citations of legal authority, and would provide some instances of cases in which, because of activity similar to what occurred here, Justices have recused themselves or at least have been asked to do so. In fact, however, the motion cites only two Supreme Court cases assertedly relevant to the issue here discussed, and nine Court of Appeals cases. Not a single one of these even involves an official-action suit. And the motion gives not a single instance in which, under even remotely similar circumstances, a Justice has recused or been asked to recuse. Instead, the argument section of the motion consists almost entirely of references to, and quotations from, newspaper editorials.

The core of Sierra Club's argument is as follows:

“Sierra Club makes this motion because ... damage [to the integrity of the system] is being done right now. As of today, 8 of the 10 newspapers with the largest circulation in the United States, 14 of the largest 20, and 20 of the 30 largest have called on Justice Scalia to step aside.... Of equal import, there is no counterbalance or controversy: not a single newspaper has argued against recusal. Because the American public, as reflected in the nation's newspaper editorials, has unanimously concluded that there is an appearance of favoritism, any objective observer would be compelled to conclude that Justice Scalia's impartiality has been questioned. These facts more than satisfy Section 455(a), which mandates recusal merely when a Justice's

impartiality ‘might reasonably be questioned.’

The implications of this argument are staggering. I must recuse because a significant portion of the press, which is deemed to be the American public, demands it.

The motion attaches as exhibits the press editorials on which it relies. Many of them do not even have the facts right. The length of our hunting trip together was said to be several days (San Francisco Chronicle), four days (Boston Globe), or nine days (San Antonio Express-News). We spent about 48 hours together at the hunting camp. It was asserted that the Vice President and I “spent time alone in the rushes,” “huddled together in a Louisiana marsh,” where we had “plenty of time ... to talk privately” (Los Angeles Times); that we “spent ... quality time bonding [together] in a duck blind” (Atlanta Journal-Constitution); and that “[t]here is simply no reason to think these two did not discuss the pending case” (Buffalo News). As I have described, the Vice President and I were never in the same blind, and never discussed the case. (Washington officials know the rules, and know that discussing with judges pending cases-their own or anyone else’s-is forbidden.) The Palm Beach Post stated that our “transportation [was] provided, appropriately, by an oil services company,” and Newsday that a “private jet ... whisked Scalia to Louisiana.” The Vice President and I flew in a Government plane. The Cincinnati Enquirer said that “Scalia was Cheney’s guest at a private duck-hunting camp in Louisiana.” Cheney and I were Wallace Carline’s guests. Various newspapers described Mr. Carline as “an energy company official” (Atlanta Journal-Constitution), an “oil industrialist” (Cincinnati Enquirer), an “oil company executive” (Contra Costa Times), an “oilman” (Minneapolis Star Tribune), and an “energy industry executive” (Washington Post). All of these descriptions are misleading.

And these are just the inaccuracies pertaining to the *facts*. With regard to the *law*, the vast majority of the editorials display no recognition of the central proposition that a federal officer is not ordinarily regarded to be a personal party in interest in an official-action suit. And those that do display such recognition facilely assume, contrary to all precedent, that in such suits mere political damage (which they characterize as a destruction of Cheney’s reputation and integrity) is ground for recusal. Such a blast of largely inaccurate and uninformed opinion cannot determine the recusal question. It is well established that the recusal inquiry must be “made from the perspective of a *reasonable* observer who is *informed of all the surrounding facts and circumstances*.”

IV

While Sierra Club was apparently unable to summon forth a single example of a Justice’s recusal (or even motion for a Justice’s recusal) under circumstances similar to those here, I have been able to accomplish the seemingly more difficult task of finding a couple of examples establishing the negative: that recusal or motion for recusal did *not* occur under circumstances similar to those here.

Justice White and Robert Kennedy

The first example pertains to a Justice with whom I have sat, and who retired from the Court only 11 years ago, Byron R. White. Justice White was close friends with Attorney General Robert Kennedy from the days when White had served as Kennedy's Deputy Attorney General. In January 1963, the Justice went on a skiing vacation in Colorado with Robert Kennedy and his family, Secretary of Defense Robert McNamara and his family, and other members of the Kennedy family. At the time of this skiing vacation there were pending before the Court at least two cases in which Robert Kennedy, in his official capacity as Attorney General, was a party. In the first of these, moreover, the press might have said, as plausibly as it has said here, that the reputation and integrity of the Attorney General were at issue. There the Department of Justice had decreed deportation of a resident alien on grounds that he had been a member of the Communist Party. (The Court found that the evidence adduced by the Department was inadequate.)

Besides these cases naming Kennedy, another case pending at the time of the skiing vacation was argued to the Court *by Kennedy* about two weeks later. See *Gray v. Sanders*, 372 U.S. 368 (1963). That case was important to the Kennedy administration, because by the time of its argument everybody knew that the apportionment cases were not far behind, and *Gray* was a significant step in the march toward *Reynolds v. Sims*, 377 U.S. 533 (1964). When the decision was announced, it was front-page news. See High Court Voids County Unit Vote, N.Y. Times, Mar. 19, 1963, p. 1, col. 2; Georgia's Unit Voting Voided, Washington Post, Mar. 19, 1963, p. A 1, col. 5. Attorney General Kennedy argued for affirmance of a three-judge District Court's ruling that the Georgia Democratic Party's county-unit voting system violated the one-person, one-vote principle. This was Kennedy's only argument before the Court, and it certainly put "on the line" his reputation as a lawyer, as well as an important policy of his brother's administration.

Justice Jackson and Franklin Roosevelt

The second example pertains to a Justice who was one of the most distinguished occupants of the seat to which I was appointed, Robert Jackson. Justice Jackson took the recusal obligation particularly seriously. Nonetheless, he saw nothing wrong with maintaining a close personal relationship, and engaging in " 'quite frequen[t]' " socializing with the President whose administration's acts came before him regularly.

In April 1942, the two "spent a weekend on a very delightful house party down at General Watson's in Charlottesville, Virginia. I had been invited to ride down with the President and to ride back with him." Pending at the time, and argued the next month, was one of the most important cases concerning the scope of permissible federal action under the Commerce Clause, *Wickard v. Filburn*, 317 U.S. 111 (1942). Justice Jackson wrote the opinion for the Court. Roosevelt's Secretary of Agriculture, rather than Roosevelt himself, was the named federal officer in the case, but there is no doubt that it was important to the President.

I see nothing wrong about Justice White's and Justice Jackson's socializing-including vacationing and accepting rides-with their friends. Nor, seemingly, did anyone else at the time. (The Denver Post, which has been critical of me, reported the White-Kennedy-McNamara skiing vacation with nothing but enthusiasm.) If friendship is basis for recusal (as it assuredly is when friends are sued personally) then activity which suggests close friendship must be avoided. But if friendship is *no* basis for recusal (as it is not in official-capacity suits) social contacts that do no more than evidence that friendship suggest no impropriety whatever.

Of course it can be claimed (as some editorials have claimed) that "times have changed," and what was once considered proper-even as recently as Byron White's day-is no longer so. That may be true with regard to the earlier rare phenomenon of a Supreme Court Justice's serving as advisor and confidant to the President-though that activity, so incompatible with the separation of powers, was not widely known when it was occurring, and can hardly be said to have been generally approved before it was properly abandoned. But the well-known and constant practice of Justices' enjoying friendship and social intercourse with Members of Congress and officers of the Executive Branch has *not* been abandoned, and ought not to be.

V

Since I do not believe my impartiality can reasonably be questioned, I do not think it would be proper for me to recuse. That alone is conclusive; but another consideration moves me in the same direction: Recusal would in my judgment harm the Court. If I were to withdraw from this case, it would be because some of the press has argued that the Vice President would suffer political damage *if* he should lose this appeal, and *if*, on remand, discovery should establish that energy industry representatives were *de facto* members of NEPDG-and because some of the press has elevated that possible political damage to the status of an impending stain on the reputation and integrity of the Vice President. But since political damage often comes from the Government's losing official-action suits; and since political damage can readily be characterized as a stain on reputation and integrity; recusing in the face of such charges would give elements of the press a veto over participation of any Justices who had social contacts with, or were even known to be friends of, a named official. That is intolerable.

My recusal would also encourage so-called investigative journalists to suggest improprieties, and demand recusals, for other inappropriate (and increasingly silly) reasons. The Los Angeles Times has already suggested that it was improper for me to sit on a case argued by a law school dean whose school I had visited several weeks before-visited not at his invitation, but at his predecessor's. The same paper has asserted that it was improper for me to speak at a dinner honoring Cardinal Bevilacqua given by the Urban Family Council of Philadelphia because (according to the Times's false report) that organization was engaged in litigation seeking to prevent same-sex civil unions, and I had before me a case presenting the question (whether same-

sex civil unions were lawful?-no) whether homosexual sodomy could constitutionally be *criminalized*. See *Lawrence v. Texas*, 539 U.S. 558 (2003). While the political branches can perhaps survive the constant baseless allegations of impropriety that have become the staple of Washington reportage, this Court cannot. The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot-faults.

* * *

As I noted at the outset, one of the private respondents in this case has not called for my recusal, and has expressed confidence that I will rule impartially, as indeed I will. Counsel for the other private respondent seek to impose, it seems to me, a standard regarding friendship, the appearance of friendship, and the acceptance of social favors, that is more stringent than what they themselves observe. Two days before the brief in opposition to the petition in this case was filed, lead counsel for Sierra Club, a friend, wrote me a warm note inviting me to come to Stanford Law School to speak to one of his classes. (Available in Clerk of Court's case file.) (Judges teaching classes at law schools normally have their transportation and expenses paid.) I saw nothing amiss in that friendly letter and invitation. I surely would have thought otherwise if I had applied the standards urged in the present motion.

There are, I am sure, those who believe that my friendship with persons in the current administration might cause me to favor the Government in cases brought against it. That is not the issue here. Nor is the issue whether personal friendship with the Vice President might cause me to favor the Government in cases in which *he* is named. None of those suspicions regarding my impartiality (erroneous suspicions, I hasten to protest) bears upon recusal here. The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I *cannot* decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.

As the newspaper editorials appended to the motion make clear, I have received a good deal of embarrassing criticism and adverse publicity in connection with the matters at issue here-even to the point of becoming (as the motion cruelly but accurately states) "fodder for late-night comedians." If I could have done so in good conscience, I would have been pleased to demonstrate my integrity, and immediately silence the criticism, by getting off the case. Since I believe there is no basis for recusal, I cannot. The motion is

Denied.

Discussion Questions

Do you agree with Justice Scalia's decision to reject the Sierra Club's request to disqualify him from participating in the Cheney decision?

Note that the Sierra Club's motion was made pursuant to 28 U.S.C. § 455, which is the federal statute that specifically governs disqualification of judges in the federal courts. However, as is specifically noted in the *Laird v. Tatum* opinion which is set forth below, the federal statute does not appear to differ in a material way from the provisions of Rule 2.11. Therefore, the federal statute will not be discussed separately here.

Justice Scalia notes some of the particular complications caused by recusal of a Supreme Court Justice, as compared to justices from different courts. In the case of a Supreme Court Justice, there is no mechanism to replace the disqualified justice, and the prospect of a 4-4 tie decision looms. However, even in situations where a disqualified judge can easily be replaced by another judge, judges should be hesitant to grant too easily motions to recuse. Indeed, Rule 2.7 of the Model Code embodies the flip side of the disqualification rule – “responsibility to decide,” which has also sometimes been described as a “duty to sit.” Every time a judge is disqualified from a case, the burden of deciding the case falls upon another judge, whose workload correspondingly increases. Moreover, judges who are too willing to disqualify themselves from cases encourage “judge-shopping” by parties, and may even be accused of shirking their responsibilities. Thus, disqualification should generally be a disfavored remedy among judges.

B. Disqualification versus Recusal

Note that while the ABA's Model Code uses the term “disqualification,” many jurisdictions use the term “recusal” to describe a decision to remove a judge from responsibility for deciding a case. In some jurisdictions, a voluntary, or *sua sponte* decision by a judge to remove herself from a case is referred to as recusal, whereas a decision to remove a judge from a case in response to a request or motion by one of the parties is referred to as disqualification. Increasingly though, the terms are seen as being interchangeable.

C. Relative of the Judge is a Party, Lawyer or Interested Person

Another ground for disqualification is that a family member of the judge is one of the lawyers in the case. Consider the following opinion from another high profile Supreme Court case.

Microsoft Corp. v. United States
United States Supreme Court

530 U.S. 1301 (2000)

Statement of Chief Justice Rehnquist.

Microsoft Corporation has retained the law firm of Goodwin, Procter & Hoar in Boston as local counsel in private antitrust litigation. My son James C. Rehnquist is a partner in that firm and is one of the attorneys working on those cases. I have therefore considered at length whether his representation requires me to disqualify myself on the Microsoft matters currently before this Court. I have reviewed the relevant legal authorities and consulted with my colleagues. I have decided that I ought not to disqualify myself from these cases.

Title 28 U.S.C. § 455 sets forth the legal criteria for disqualification of federal magistrates, judges, and Supreme Court Justices. This statute is divided into two subsections, both of which are relevant to the present situation. Section 455(b) lists specific instances in which disqualification is required, including those instances where the child of a Justice “[i]s known ... to have an interest that could be substantially affected by the outcome of the proceeding.” § 455(b)(5)(iii). As that provision has been interpreted in relevant case law, there is no reasonable basis to conclude that the interests of my son or his law firm will be substantially affected by the proceedings currently before the Supreme Court. It is my understanding that Microsoft has retained Goodwin, Procter & Hoar on an hourly basis at the firm’s usual rates. Even assuming that my son’s nonpecuniary interests are relevant under the statute, it would be unreasonable and speculative to conclude that the outcome of any Microsoft proceeding in this Court would have an impact on those interests when neither he nor his firm would have done any work on the matters here. Thus, I believe my continued participation is consistent with § 455(b)(5)(iii).

Section 455(a) contains the more general declaration that a Justice “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” As this Court has stated, what matters under § 455(a) “is not the reality of bias or prejudice but its appearance.” This inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances. I have already explained that my son’s personal and financial concerns will not be affected by our disposition of the Supreme Court’s Microsoft matters. Therefore, I do not believe that a well-informed individual would conclude that an appearance of impropriety exists simply because my son represents, in another case, a party that is also a party to litigation pending in this Court.

It is true that both my son’s representation and the matters before this Court relate to Microsoft’s potential antitrust liability. A decision by this Court as to Microsoft’s antitrust liability could have a significant effect on Microsoft’s exposure to antitrust suits in other courts. But, by virtue of this Court’s position atop the Federal Judiciary, the impact of many of our decisions is often quite

broad. The fact that our disposition of the pending Microsoft litigation could potentially affect Microsoft's exposure to antitrust liability in other litigation does not, to my mind, significantly distinguish the present situation from other cases that this Court decides. Even our most unremarkable decision interpreting an obscure federal regulation might have a significant impact on the clients of our children who practice law. Giving such a broad sweep to § 455(a) seems contrary to the "reasonable person" standard which it embraces. I think that an objective observer, informed of these facts, would not conclude that my participation in the pending Microsoft matters gives rise to an appearance of partiality.

Finally, it is important to note the negative impact that the unnecessary disqualification of even one Justice may have upon our Court. Here-unlike the situation in a District Court or a Court of Appeals-there is no way to replace a recused Justice. Not only is the Court deprived of the participation of one of its nine Members, but the even number of those remaining creates a risk of affirmance of a lower court decision by an equally divided court.

D. Judge's Prior Employment Involved Them in the Case

According to Rule 2.11(A)(6)(b), where a judge expressed an opinion concerning the merits of a particular matter during their previous employment in a governmental position, there is grounds for recusal. This issue came up with regard to then-Supreme Court Justice (and future Chief Justice) William Rehnquist, whose Congressional testimony while serving as a lawyer in the U.S. Department of Justice relating to the issue of the Army's data collection practices relating to civilian protesters made reference to the case of *Laird v. Tatum*, which was eventually litigated in the Supreme Court. When lawyers for the plaintiffs in that case moved for Justice Rehnquist to disqualify himself, the Justice took the admittedly unusual step of publishing an opinion stating his reasons for denying the motion.

Laird v. Tatum

United States Supreme Court

409 U.S. 824 (1972)

Memorandum of Mr. Justice Rehnquist.

Respondents in this case have moved that I disqualify myself from participation. While neither the Court nor any Justice individually appears ever to have done so, I have determined that it would be appropriate for me to state the reasons which have led to my decision with respect to respondents' motion. In so doing, I do not wish to suggest that I believe such a course would be desirable or even appropriate in any but the peculiar circumstances present here.

Respondents contend that because of testimony which I gave on behalf of the Department of Justice before the Subcommittee on Constitutional Rights of the Judiciary Committee of the United

States Senate at its hearings on 'Federal Data Banks, Computers and the Bill of Rights,' and because of other statements I made in speeches related to this general subject, I should have disqualified myself from participating in the Court's consideration or decision of this case. The governing statute is 28 U.S.C. s 455 which provides:

'Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.'

Respondents also cite various draft provisions of Standards of Judicial Conduct prepared by a distinguished committee of the American Bar Association, and adopted by that body at its recent annual meeting. Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute, there is no occasion for me to give them separate consideration.

Respondents in their motions summarize their factual contentions as follows:

'Under the circumstances of the instant case, Mr. Justice Rehnquist's impartiality is clearly questionable because of his appearance as an expert witness for the Justice Department and Senate hearings inquiring into the subject matter of the case, because of his intimate knowledge of the evidence underlying the respondents' allegations, and because of his public statements about the lack of merit in respondents' claims.'

Respondents are substantially correct in characterizing my appearance before the Ervin Subcommittee as an 'expert witness for the Justice Department' on the subject of statutory and constitutional law dealing with the authority of the Executive Branch to gather information. They are also correct in stating that during the course of my testimony at that hearing, and on other occasions, I expressed an understanding of the law, as established by decided cases of this Court and of other courts, which was contrary to the contentions of respondents in this case.

Respondents' reference, however, to my 'intimate knowledge of the evidence underlying the respondents' allegations' seems to me to make a great deal of very little. When one of the Cabinet departments of the Executive Branch is requested to supply a witness for the congressional committee hearing devoted to a particular subject, it is generally confronted with a minor dilemma. If it is to send a witness with personal knowledge of every phase of the inquiry, there will be not one spokesman but a dozen. If it is to send one spokesman to testify as to the Department's position with respect to the matter under inquiry, that spokesman will frequently be called upon to deal not only with matters within his own particular bailiwick in the Department, but with those in other areas of the Department with respect to which his familiarity may be slight. I commented on this fact in my testimony before Senator Ervin's Subcommittee:

‘As you might imagine, the Justice Department, in selecting a witness to respond to your inquiries, had to pick someone who did not have personal knowledge in every field. So I can simply give you my understanding . . .’ Hearings, p. 619.

There is one reference to the case of *Tatum v. Laird* in my prepared statement to the Subcommittee, and one reference to it in my subsequent appearance during a colloquy with Senator Ervin. The former appears as follows in the reported hearings:

‘However, in connection with the case of *Tatum v. Laird*, now pending in the U.S. Court of Appeals for the District of Columbia Circuit, one print-out from the Army computer has been retained for the inspection of the court. It will thereafter be destroyed.’

The second comment respecting the case was in a discussion of the applicable law with Senator Ervin, the chairman of the Subcommittee, during my second appearance.

My recollection is that the first time I learned of the existence of the case of *Laird v. Tatum*, other than having probably seen press accounts of it, was at the time I was preparing to testify as a witness before the Subcommittee in March 1971. I believe the case was then being appealed to the Court of Appeals by respondents. The Office of the Deputy Attorney General, which is customarily responsible for collecting material from the various divisions to be used in preparing the Department’s statement, advised me or one of my staff as to the arrangement with respect to the computer print-out from the Army Data Bank, and it was incorporated into the prepared statement which I read to the Subcommittee. I had then and have now no personal knowledge of the arrangement, nor so far as I know have I ever seen or been apprised of the contents of this particular print-out. Since the print-out had been lodged with the Justice Department by the Department of the Army, I later authorized its transmittal to the staff of the subcommittee at the request of the latter.

At the request of Senator Hruska, one of the members of the Subcommittee, I supervised the preparation of a memorandum of law which the record of the hearings indicates was filed on September 20, 1971. Respondents refer to it in their petition, but no copy is attached, and the hearing records do not contain a copy. I would expect such a memorandum to have commented on the decision of the Court of Appeals in *Laird v. Tatum*, treating it along with other applicable precedents in attempting to state what the Department thought the law to be in this general area.

Finally, I never participated, either of record or in any advisory capacity, in the District Court, in the Court of Appeals, or in this Court, in the government’s conduct of the case of *Laird v. Tatum*.

Respondents in their motion do not explicitly relate their factual contentions to the applicable provisions of 28 U.S.C. s 455. The so-called ‘mandatory’ provisions of that section require

disqualification of a Justice or judge ‘in any case in which he has a substantial interest, has been of counsel, (or) has been a material witness . . .’

Since I have neither been of counsel nor have I been a material witness in *Laird v. Tatum*, these provisions are not applicable. Respondents refer to a memorandum prepared in the Office of Legal Counsel for the benefit of Mr. Justice White shortly before he came on the Court, relating to disqualification. I reviewed it at the time of my confirmation hearings and found myself in substantial agreement with it. Its principal thrust is that a Justice Department official is disqualified if he either signs a pleading or brief or ‘if he actively participated in any case even though he did not sign a pleading or brief.’ I agree. In both *United States v. United States District Court for Eastern District of Michigan*, 407 U.S. 297 (1972), for which I was not officially responsible in the Department but with respect to which I assisted in drafting the brief, and in *S & E Contractors v. United States*, 406 U.S. 1 (1972), in which I had only an advisory role which terminated immediately prior to the commencement of the litigation, I disqualified myself. Since I did not have even an advisory role in the conduct of the case of *Laird v. Tatum*, the application of such a role would not require or authorize disqualification here.

This leaves remaining the so-called discretionary portion of the section, requiring disqualification where the judge ‘is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.’ The interpretation and application of this section by the various Justices who have sat on this Court seem to have varied widely. The leading commentator on the subject is John P. Frank, whose two articles, *Disqualification of Judges*, 56 Yale Law Journal 605 (1947), and *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law and Contemporary Problems 43 (1970), contain the principal commentary on the subject. For a Justice of this Court who has come from the Justice Department, Mr. Frank explains disqualification practices as follows:

‘Other relationships between the Court and the Department of Justice, however, might well be different. The Department’s problem is special because it is the largest law office in the world and has cases by the hundreds of thousands and lawyers by the thousands. For the most part, the relationship of the Attorney General to most of those matters is purely formal. As between the Assistant Attorneys General for the various departmental divisions, there is almost no connection.’ Frank, *supra*, 35 Law & Contemporary Problems, at 47.

Indeed, different Justices who have come from the Department of Justice have treated the same or very similar situations differently. In *Schneiderman v. United States*, 320 U.S. 118 (1943), a case brought and tried during the time Mr. Justice Murphy was Attorney General, but defended on appeal during the time that Mr. Justice Jackson was Attorney General, the latter disqualified himself but the former did not.

I have no hesitation in concluding that my total lack of connection while in the Department of

Justice with the defense of the case of *Laird v. Tatum* does not suggest discretionary disqualification here because of my previous relationship with the Justice Department.

However, respondents also contend that I should disqualify myself because I have previously expressed in public an understanding of the law on the question of the constitutionality of governmental surveillance. While no provision of the statute sets out such a provision for disqualification in so many words, it could conceivably be embraced within the general language of the discretionary clause. Such a contention raises rather squarely the question of whether a member of this Court, who prior to his taking that office has expressed a public view as to what the law is or ought to be should later sit as a judge in a case raising that particular question. The present disqualification statute applying to Justices of the Supreme Court has been on the books only since 1948, but its predecessor, applying by its terms only to district court judges, was enacted in 1911. Chief Justice Stone, testifying before the Judiciary Committee in 1943, stated:

‘And it has always seemed to the Court that when a district judge could not sit in a case because of his previous association with it, or a circuit court of appeals judge, it was our manifest duty to take the same position.’ Hearings Before Committee on the Judiciary on H.R. 2808, 78th Cong., 1st Sess. (1943), quoted in Frank, *supra*, 56 Yale Law Journal, at 612.

My impression is that none of the former Justices of this Court since 1911 have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench.

Mr. Justice Black while in the Senate was one of the principal authors of the Fair Labor Standards Act; indeed, it is cited in the 1970 edition of the United States Code as the ‘Black-Connery Fair Labor Standards Act.’ Not only did he introduce one of the early versions of the Act, but as Chairman of the Senate Labor and Education Committee he presided over lengthy hearings on the subject of the bill and presented the favorable report of that Committee to the Senate. Nonetheless, he sat in the case which upheld the constitutionality of that Act, *United States v. Darby*, 312 U.S. 100 (1941), and in later cases construing it, including *Jewel Ridge Coal Corp. v. Local 6167, UMW*, 325 U.S. 161 (1945). In the latter case, a petition for rehearing requested that he disqualify himself because one of his former law partners argued the case, and Justices Jackson and Frankfurter may be said to have implicitly criticized him for failing to do so. But to my knowledge his Senate role with respect to the Act was never a source of criticism for his participation in the above cases.

Justice Frankfurter had, prior to coming to this Court, written extensively in the field of labor law. ‘The Labor Injunction’ which he and Nathan Green co-authored was considered a classical critique of the abuses by the federal courts of their equitable jurisdiction in the area of labor relations. Professor Sanford H. Kadish has stated:

‘The book was in no sense a disinterested inquiry. Its authors’ commitment to the judgment that the labor injunction should be neutralized as a legal weapon against unions gives the book its

energy and direction. It is, then, a brief, even a ‘downright brief’ as a critical reviewer would have it.’ Kadish, *Labor and the Law*, in Felix Frankfurter *The Judge* 165 (W. Mendelson ed. 1964).

Justice Frankfurter had not only publicly expressed his views, but had when a law professor played an important, perhaps dominant, part in the drafting of the Norris-LaGuardia Act. This Act was designed by its proponents to correct the abusive use by the federal courts of their injunctive powers in labor disputes. Yet in addition to sitting in one of the leading cases interpreting the scope of the Act, *United States v. Hutcheson*, 312 U.S. 219 (1941), Justice Frankfurter wrote the Court’s opinion.

Justice Jackson in *McGrath v. Kristensen*, 340 U.S. 162 (1950), participated in a case raising exactly the same issue which he had decided as Attorney General (in a way opposite to that in which the Court decided it). Mr. Frank notes that Chief Justice Vinson, who had been active in drafting and preparing tax legislation while a member of the House of Representatives, never hesitated to sit in cases involving that legislation when he was Chief Justice.

Two years before he was appointed Chief Justice of this Court, Charles Evans Hughes wrote a book entitled *The Supreme Court of the United States* (Columbia University Press, 1928). In a chapter entitled ‘Liberty, Property, and Social Justice’ he discussed at some length the doctrine expounded in the case of *Adkins v. Children’s Hospital*, 261 U.S. 525 (1922). I think that one would be warranted in saying that he implied some reservations about the holding of that case. See pp. 205, 209—211. Nine years later, Chief Justice Hughes authored the Court’s opinion in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), in which a closely divided Court overruled *Adkins*. I have never heard any suggestion that because of his discussion of the subject in his book he should have recused himself.

Mr. Frank summarizes his view of Supreme Court practice as to disqualification in the following words:

‘In short, Supreme Court Justices disqualify when they have a dollar interest; when they are related to a party and more recently, when they are related to counsel; and when the particular matter was in one of their former law offices during their association; or, when in the government, they dealt with the precise matter and particularly with the precise case; otherwise, generally no.’ Frank, *supra*, 35 *Law & Contemporary Problems*, at 50.

Not only is the sort of public statement disqualification upon which respondents rely not covered by the terms of the applicable statute, then, but it does not appear to me to be supported by the practice of previous Justices of this Court. Since there is little controlling authority on the subject, and since under the existing practice of the Court disqualification has been a matter of individual decision, I suppose that one who felt very strongly that public statement disqualification is a highly desirable thing might find a way to read it into the discretionary portion of the statute by

implication. I find little to commend the concept on its merits, however, and I am, therefore, not disposed to construe the statutory language to embrace it.

I do not doubt that a litigant in the position of respondents would much prefer to argue his case before a Court none of whose members had expressed the views that I expressed about the relationship between surveillance and First Amendment rights while serving as an Assistant Attorney General. I would think it likewise true that counsel for Darby would have preferred not to have to argue before Mr. Justice Black; that counsel for Kristensen would have preferred not to argue before Mr. Justice Jackson; that counsel for the United States would have preferred not to argue before Mr. Justice Frankfurter; and that counsel for West Coast Hotel Co. would have preferred a Court which did not include Chief Justice Hughes.

The Term of this Court just past bears eloquent witness to the fact that the Justices of this Court, each seeking to resolve close and difficult questions of constitutional interpretation, do not reach identical results. The differences must be at least in some part due to differing jurisprudential or philosophical propensities.

Mr. Justice Douglas' statement about federal district judges in his dissenting opinion in *Chandler v. Judicial Council*, 398 U.S. 74 (1970), strikes me as being equally true of the Justices of this Court:

‘Judges are not fungible; they cover the constitutional spectrum; and a particular judge’s emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about ‘shopping’ for a judge; Senators recognize this when they are asked to give their ‘advice and consent’ to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.’

Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions which would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice’s mind at the time he joined the Court was a complete tabula rasa in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias.

Yet whether these opinions have become at all widely known may depend entirely on happenstance. With respect to those who come here directly from private life, such comments or opinions may never have been publicly uttered. But it would be unusual if those coming from policy making divisions in the Executive Branch, from the Senate or House of Representatives, or

from positions in state government had not divulged at least some hint of their general approach to public affairs, if not as to particular issues of law. Indeed, the clearest case of all is that of a Justice who comes to this Court from a lower court, and has, while sitting as a judge of the lower court, had occasion to pass on an issue which later comes before this Court. No more compelling example could be found of a situation in which a Justice had previously committed himself. Yet it is not and could not rationally be suggested that, so long as the cases be different, a Justice of this Court should disqualify himself for that reason. Indeed, there is weighty authority for this proposition even when the cases are the same. Justice Holmes, after his appointment to this Court, sat in several cases which reviewed decisions of the Supreme Judicial Court of Massachusetts rendered, with his participation, while he was Chief Justice of that court.

Mr. Frank sums the matter up this way:

‘Supreme Court Justices are strong minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way.’ Frank, *supra*, 35 Law & Contemporary Problems, at 48.

The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance which should not by itself form a basis for disqualification.

Based upon the foregoing analysis, I conclude that the applicable statute does not warrant my disqualification in this case. Having so said, I would certainly concede that fair minded judges might disagree about the matter. If all doubts were to be resolved in favor of disqualification, it may be that I should disqualify myself simply because I do regard the question as a fairly debatable one, even though upon analysis I would resolve it in favor of sitting.

Here again, one’s course of action may well depend upon the view he takes of the process of disqualification. Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified. These cases dealt with disqualification on the part of judges of the district courts and of the courts of appeals. I think that the policy in favor of the ‘equal duty’ concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts. There is no higher court of appeal which may review an equally divided decision of this Court and thereby establish the law for our jurisdiction. While it can seldom be predicted with confidence at the time that a Justice addresses himself to the issue of disqualification whether or not the Court in a particular case will be closely divided, the disqualification of one Justice of this Court raises the possibility of an affirmance of the judgment below by an equally divided Court. The consequence attending such a result is, of course, that the principle of law presented by the case is left unsettled. The undesirability of such a disposition is obviously not a reason for refusing to disqualify oneself where in fact one deems himself

disqualified, but I believe it is a reason for not ‘bending over backwards’ in order to deem one’s self disqualified.

The prospect of affirmance by an equally divided Court, unsatisfactory enough in a single case, presents even more serious problems where companion cases reaching opposite results are heard together here. During the six months in which I have sat as a Justice of this Court, there were at least three such instances. Since one of the stated reasons for granting certiorari is to resolve a conflict among other federal courts or state courts, the frequency of such instance is not surprising. Yet affirmance of each of such conflicting results by an equally divided Court would lay down ‘one rule in Athens, and another rule in Rome’ with a vengeance. And since the notion of ‘public statement’ disqualification which I understand respondents to advance appears to have no ascertainable time limit, it is questionable when or if such an unsettled state of the law could be resolved.

The oath prescribed by 28 U.S.C. s 453 which is taken by each person upon becoming a member of the federal judiciary requires that he ‘administer justice without respect to persons, and do equal right to the poor and to the rich,’ that he ‘faithfully and impartially discharge and perform all the duties incumbent upon (him) . . . agreeably to the Constitution and laws of the United States.’ Every litigant is entitled to have his case heard by a judge mindful of this oath. But neither the oath, the disqualification statute, nor the practice of the former Justices of this Court guarantee a litigant that each judge will start off from dead center in his willingness or ability to reconcile the opposing arguments of counsel with his understanding of the Constitution and the law. That being the case, it is not a ground for disqualification that a judge has prior to his nomination expressed his then understanding of the meaning of some particular provision of the Constitution.

Based on the foregoing considerations, I conclude that respondents’ motion that I disqualify myself in this case should be, and it hereby is denied.

Motion denied.

Discussion Questions

Do you agree with Justice Rehnquist’s decision to deny the request for his disqualification in *Laird*? Do you think a reasonable person might have concluded that his prior testimony regarding the case might have caused him to be less than completely impartial in the case itself?

As to the underlying case, Justice Rehnquist joined the majority in a 5-4 decision holding that the plaintiffs lacked standing to challenge the constitutionality of the Army’s domestic surveillance

program. *See Laird v. Tatum*, 408 U.S. 1 (1972). Had Rehnquist recused himself, and the case ended in a 4-4 tie, the Court of Appeals' decision, reversing the District Court's decision dismissing the case, and ordering a trial on the merits of the case would have stood as the final decision on the matter.

III. Waiver of Disqualification

Note that under Model Rule 2.11, *except* for disqualification under the first provision of the Rule (disqualification for personal bias or prejudice on the part of the judge), the judge may, after disclosing the basis for disqualification, ask the parties and their lawyers to consider, outside the presence of the judge, waiving the disqualification. See Model Rule 2.11(C).

IV. The Rule of Necessity

An exception to the principles of judicial disqualification lies in the so-called "rule of necessity." Under this principle, a judge may be required to hear a case where they might otherwise be subject to disqualification if there is no other judge available to hear the case. An example might be a case involving the question of judicial salaries. If virtually every judge in the jurisdiction would be disqualified due to a personal interest in the case, at least one judge would have to hear the case despite the presence of grounds for disqualification.

V. Review Questions

There is a [CALI Lesson](#) available with multiple choice questions that review the materials covered in this chapter.

Chapter 6 – Extrajudicial Activities

I. Introduction

It is not desirable for judges to live lives that are hermetically sealed off from the very activities that underlie the cases the judges will need to decide in their courtrooms. Nor would many prospective judges be willing to sacrifice a full and well-rounded life in exchange for service on the bench. Moreover, based upon their professional experience and expertise, judges have a lot to contribute to a number of areas of public policy decision making, particularly those relating to law and the legal justice system. On the other hand, it is easy to see how certain extra-judicial activities might call into question a judge's ability to be fair, neutral, and impartial in all of the matters that come before her. Thus, the Model Code of Judicial Conduct attempts to strike a balance between allowing judges to have robust lives off the bench, which allow them to contribute to their communities in a variety of ways, while still allowing judges to maintain the independence and impartiality necessary to effective service in the judicial role.

Therefore, Canon 3 of the Model Code requires judges to conduct their personal and extrajudicial activities so as to minimize the risk of a conflict between those activities and the obligations of their office. Canon 4 of the Code specifically addresses campaign and political activities by a judge and seeks to minimize any actual or potential conflict between those and a judge's duties while on the bench. Each of these Canons, and the specific rules enacted to implement the broad policies set forth in these Canons will be discussed in the following sections.

II. Judges' Personal and Extrajudicial Activities

A. Extrajudicial Activities in General

Model Rule 3.1 sets forth the general policy that judges are permitted, and in some cases encouraged to participate in extrajudicial activities as long as such activities do not interfere with the judge's actual ability to serve in their official capacity in an impartial and unbiased way, nor do they create a perception of any limitation on the judge's ability to do so.

Technological developments have introduced new ways in which a judge's extrajudicial activities might interfere with their judicial responsibilities. Consider the following opinions.

Fla. Jud. Ethics Adv. Comm. Op. 2009-20

Whether a judge may post comments and other material on the judge's page on a social networking site, if the publication of such material does not otherwise violate the Code of Judicial Conduct.

ANSWER: Yes.

Whether a judge may add lawyers who may appear before the judge as "friends" on a social

networking site, and permit such lawyers to add the judge as their “friend.”

ANSWER: No.

Whether a committee of responsible persons, which is conducting an election campaign on behalf of a judge’s candidacy, may post material on the committee’s page on a social networking site, if the publication of the material does not otherwise violate the Code of Judicial Conduct.

ANSWER: Yes.

FACTS

Social networking sites, such as Facebook, MySpace, and LinkedIn, generally serve two functions, as exemplified by the questions posed by the inquiring judge. First, the site can be used by the member simply to post pictures, comments, and other material that visitors to the site can view. Second, the site can also be used to identify a member’s “friends”. The member of the social network must approve a person who requests to be identified as the member’s “friend”.

When used simply to post materials, social networking sites are similar to an internet webpage where information is posted and made accessible for the public to view. Certain social networking sites permit the member to set levels of privacy permitting the member to restrict information, including the identification of the member’s “friends”, to certain visitors to the member’s page. For example, the member might be permitted to set the privacy settings in a manner such that only the member’s “friends” could see the names of the member’s other “friends”.

In the social network, a “friend” may post comments and links to other websites on the member’s home site, known as the member’s “wall.” The member may reply to these postings or delete them, but they will remain on the member’s site until deleted. The “friend’s” comments will be visible to anyone the member permits to view the site.

The Facebook website contains the following explanations about “friends” and privacy concerns:

- Your friends on Facebook are the same friends, acquaintances and family members that you communicate with in the real world.
- We built Facebook to make it easy to share information with your friends and people around you.
- We understand you may not want everyone in the world to have the information you share on Facebook; that is why we give you control of your information. Our

default privacy settings limit the information displayed in your profile to your networks and other reasonable community limitations that we tell you about.

· Facebook is about sharing information with others — friends and people in your networks — while providing you with privacy settings that restrict other users from accessing your information. We allow you to choose the information you provide to friends and networks through Facebook. Our network architecture and your privacy settings allow you to make informed choices about who has access to your information.

Political campaigns may also establish pages on social networking sites which allow users to list themselves as “fans” or supporters of the candidate. However, as the practice exists on Facebook, the campaign is not required to accept or reject a “fan” in order for their name to appear on the campaign’s Facebook page. Anyone desiring to be listed as a “fan” may do so unilaterally, without the campaign’s knowledge or consent.

DISCUSSION

The first and third questions above, relating to the posting of materials by either the judge or the campaign committee are answered in the affirmative because they relate only to the method of publication. The Code of Judicial Conduct does not address or restrict a judge’s or campaign committee’s method of communication but rather addresses its substance. Therefore, this proposed conduct, whether by the judge or the campaign committee, does not violate the Code of Judicial Conduct. Of course, the substance of what is posted may constitute a violation. The Committee has previously concluded that campaign committees may establish websites for otherwise permitted campaign purposes.

However, the second question poses a fundamentally different issue because the inquiring judge proposes to permit lawyers who may appear before the judge to be identified as “friends” on the judge’s social networking page. Similarly, the inquiring judge contemplates the lawyers who may appear before the judge will list the judge as a “friend” on their pages, such listing requiring the consent of the judge in order to take effect.

The inquiring judge proposes to identify lawyers who may appear in front of the judge as “friends” on the judge’s page and to permit those lawyers to identify the judge as a “friend” on their pages. To the extent that such identification is available for any other person to view, the Committee concludes that this practice would violate Canon 2B.

Canon 2B states: “A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression

that they are in a special position to influence the judge.”

With regard to a social networking site, in order to fall within the prohibition of Canon 2B, the Committee believes that three elements must be present. First, the judge must establish the social networking page. Second, the site must afford the judge the right to accept or reject contacts or “friends” on the judge’s page, or denominate the judge as a “friend” on another member’s page. Third, the identity of the “friends” or contacts selected by the judge, and the judge’s having denominated himself or herself as a “friend” on another’s page, must then be communicated to others. Typically, this third element is fulfilled because each of a judge’s “friends” may see on the judge’s page who the judge’s other “friends” are. Similarly, all “friends” of another user may see that the judge is also a “friend” of that user. It is this selection and communication process, the Committee believes, that violates Canon 2B, because the judge, by so doing, conveys or permits others to convey the impression that they are in a special position to influence the judge.

While judges cannot isolate themselves entirely from the real world and cannot be expected to avoid all friendships outside of their judicial responsibilities, some restrictions upon a judge’s conduct are inherent in the office. Thus, the Commentary to Canon 2A states:

“Irresponsible or improper conduct by judges erodes public confidence in the judiciary. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.”

A judge’s participation in a social networking site must also conform to the limitations imposed by Canon 5A, which provides:

“A. Extrajudicial Activities in General. A judge shall conduct all of the judge’s extra-judicial activities so that they do not:

1. cast reasonable doubt on the judge’s capacity to act impartially as a judge;
2. undermine the judge’s independence, integrity, or impartiality;
3. demean the judicial office;
4. interfere with the proper performance of judicial duties;
5. lead to frequent disqualification of the judge; or
6. appear to a reasonable person to be coercive.”

The Committee believes that listing lawyers who may appear before the judge as “friends” on a judge’s social networking page reasonably conveys to others the impression that these lawyer “friends” are in a special position to influence the judge. This is not to say, of course, that simply because a lawyer is listed as a “friend” on a social networking site or because a lawyer is a friend of the judge, as the term friend is used in its traditional sense, means that this lawyer is, in fact, in a special position to influence the judge. The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a “friend” on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.

The Committee notes, in coming to this conclusion, that social networking sites are broadly available for viewing on the internet. Thus, it is clear that many persons viewing the site will not be judges and will not be familiar with the Code, its recusal provisions, and other requirements which seek to assure the judge’s impartiality. However, the test for Canon 2B is not whether the judge intends to convey the impression that another person is in a position to influence the judge, but rather whether the message conveyed to others, as viewed by the recipient, conveys the impression that someone is in a special position to influence the judge. Viewed in this way, the Committee concludes that identifying lawyers who may appear before a judge as “friends” on a social networking site, if that relationship is disclosed to anyone other than the judge by virtue of the information being available for viewing on the internet, violates Canon 2(B).

The inquiring judge has asked about the possibility of identifying lawyers who may appear before the judge as “friends” on the social networking site and has not asked about the identification of others who do not fall into that category as “friends”. This opinion should not be interpreted to mean that the inquiring judge is prohibited from identifying any person as a “friend” on a social networking site. Instead, it is limited to the facts presented by the inquiring judge, related to lawyers who may appear before the judge. Therefore, this opinion does not apply to the practice of listing as “friends” persons other than lawyers, or to listing as “friends” lawyers who do not appear before the judge, either because they do not practice in the judge’s area or court or because the judge has listed them on the judge’s recusal list so that their cases are not assigned to the judge.

A minority of the committee would answer all the inquiring judge’s questions in the affirmative. The minority believes that the listing of lawyers who may appear before the judge as “friends” on a judge’s social networking page does not reasonably convey to others the impression that these lawyers are in a special position to influence the judge. The minority concludes that social networking sites have become so ubiquitous that the term “friend” on these pages does not convey the same meaning that it did in the pre-internet age; that today, the term “friend” on social

networking sites merely conveys the message that a person so identified is a contact or acquaintance; and that such an identification does not convey that a person is a “friend” in the traditional sense, i.e., a person attached to another person by feelings of affection or personal regard. In this sense, the minority concludes that identification of a lawyer who may appear before a judge as a “friend” on a social networking site does not convey the impression that the person is in a position to influence the judge and does not violate Canon 2B.

Although Facebook has been used as an example in this opinion, the holding of the opinion would apply to any social networking site which requires the member of the site to approve the listing of a “friend” or contact on the member’s site, if (1) that person is a lawyer who appears before the judge, and (2) identification of the lawyer as the judge’s “friend” is thereafter displayed to the public or the judge’s or lawyer’s other “friends” on the judge’s or the lawyer’s page.

Fla. Jud. Ethics Adv. Comm. Op. 2012-07

ISSUE

May a judge publish a blog that reports on Florida Supreme Court and District Court of Appeal cases as they are released, where the entries are intended to be neutral, nonjudgmental, brief summaries of the facts and holdings, with a link to the full opinion of each case?

ANSWER: Yes.

FACTS

The inquiring judge proposes to publish a blog where the judge will be reporting on cases as they are released by the Florida Supreme Court and the District Courts of Appeal. It is not the inquiring judge’s intent to editorialize, criticize, or otherwise evaluate any of the opinions. Instead, the blog would only alert the reader to the release of the opinion and briefly describe what the opinion states. The blog would also alert the reader to changes in the rules of procedure and the Evidence Code.

DISCUSSION

In general, Canon 4 of the Code of Judicial Conduct authorizes judges to engage in activities to improve the law, the legal system, and the administration of justice. Canon 4B specifically provides, “the judge may speak, write, lecture, teach and participate in other quasi-judicial activities concerning the law, the legal system, and administration of justice ... subject to the

requirements of this Code.” While Canon 4 permits a judge to engage in various quasi-judicial activities involving the law, the Code requires that the activities not cast reasonable doubt on the judge’s capacity to act impartially. *See* Canon 4A(1). (Whether this is a Canon 4 activity or a Canon 5 activity is of little concern because each Canon contains similar language regulating this type of activity.)

This Committee has consistently advised that judges may teach: on a law-related subject at a community college’s police academy; at a religious university; and at a seminar sponsored by the Academy of Florida Trial Lawyers and the University of West Florida.

Likewise, in [citations omitted], the Committee concluded that various teaching activities were not prohibited by the Code. In those opinions the Committee relied upon Canon 4 and cautioned however that the activity would be permitted only if it did not cast reasonable doubt on the judge’s capacity to act impartially.

The Code makes no distinctions among the activities of speaking, writing, lecturing, or teaching, or the technology used to engage in those activities. Nor does the Committee perceive any such distinction. In [citation omitted], the Committee advised that a judge may create and privately maintain a website designed primarily to focus high school students on college or trade school preparation, as long as the judge’s website complies with all provisions of the Code. We advised the inquiring judge to carefully examine all provisions of the Code that relate to the site and its topics, to insure that the judge is not doing on the web something the judge could not ethically do in person.

In [citation omitted], however, the inquiring judge proposed to contract with a national television production company to tape the judge’s arraignments and a subsequent teaching segment by the judge. The judge would be paid and would explain the law, sentencing choices, and interview different “players” in the court system. The Committee advised that because the judge would be discussing the law and sentencing choices, this could lead to frequent disqualification of the judge and could cast reasonable doubt on the judge’s capacity to act impartially in cases discussed publicly by the judge. We emphasized that no judge should make public comments on pending or impending cases.

Likewise, in [citation omitted], the Committee advised that the Code of Judicial Conduct prevented a judge from entering into an arrangement with a television station, for compensation, to “comment about, explain to, and educate the public concerning diverse legal matters including explaining and clarifying the proceedings during high publicity trials such as the O.J. Simpson civil trial.” The Committee concluded that the proposed arrangement with the local television station would lend judicial prestige to the commercial interests of the television station in violation of Canon 2B; the activity would involve improper public comment upon a pending or impending proceeding in

violation of Canon 3B; and the activity would cast reasonable doubt on the judge's capacity to act impartially as a judge, demean the judicial office, and interfere with the proper performance of judicial duties in violation of Canon 5.

If all cases to be included in the present inquiring judge's blog were final (*i.e.* no discussion of pending or impending cases would be included) nothing in the present inquiry suggests the inquiring judge would be placing on the proposed blog anything that could not be included in any other teaching activity.

It is not practicable to list all the provisions of the Code that could apply to a judge's blog, and a judge must expect to be the subject of constant public scrutiny. Moreover, the Committee does not screen, comment on or approve the content of written material or speech, and likewise will not review in advance the content of any blog. So, before publishing material on the blog, the judge should carefully examine all provisions of the Code that relate to the blog and its topics, to insure that the judge is not publishing on the blog something the judge could not ethically say in person. The Committee also advises that an interactive blog may invite inappropriate comment by the judge and therefore the judge would be well-advised to exercise caution in engaging in such activity. Additionally, the judge may consider adding a disclaimer to the blog that clarifies the judge does not endorse or vouch for the comments of others on the blog, and that such comments do not represent the views of the judge.

B. Appearances Before Government Bodies and Consultation with Government Officials

Judges are basically prohibited from appearing or testifying before government bodies, except to the extent the appearance relates to matters involving law, the legal system, or the administration of justice.³⁹

C. Testifying as a Character Witness

A judge is generally prohibited from testifying as a character witness in any judicial proceeding.⁴⁰

³⁹ ABA, Model Code of Judicial Conduct Rule 3.2.

⁴⁰ *Id.* at Rule 3.3.

D. Appointments to Government Positions

Judges are generally prohibited from accepting appointments to government positions unless those appointments relate to the law, the legal system or the administration of justice.⁴¹

E. Use of Non-Public Information

Judges are prohibited from using any non-public information obtained in their judicial capacity for any purpose unrelated to their judicial duties.⁴²

F. Affiliation with Discriminatory Organizations

A judge is not permitted to belong to, or use the facilities of an organization that discriminates invidiously on grounds of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.⁴³ It is not necessary that such discriminatory policies be express. Nor is it necessary that the judge personally endorse these policies. Consider the following case.

In Re: Complaint of Judicial Misconduct

Committee on Judicial Conduct and Disability of the Judicial Conference of the United States

C.C.D. No. 11-01 (2011)

This matter is before the Judicial Conduct and Disability Committee on the complainant's petition for review of an April 8, 2011 order of the Sixth Circuit Judicial Council dismissing a complaint that she filed under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-64 (the "Act"). The complaint alleges that Judge George C. Paine, II, Chief Judge of the United States Bankruptcy Court for the Middle District of Tennessee, has committed misconduct by holding membership in an organization that practices invidious discrimination on the bases of race and sex. The Sixth Circuit Judicial Council, citing Judge Paine's efforts to change the practices of the organization, found no misconduct. We disagree and conclude that Judge Paine's club membership violates Canons 2A and 2C of the Code of Conduct for United States Judges and constitutes misconduct under the Act.

BACKGROUND

A. Facts

Belle Meade Country Club ("Belle Meade" or the "Club") is a 110 year-old private social club located in Nashville, Tennessee. The Club's Constitution sets forth six membership categories: Resident, Non-resident, Lady, Associate Resident, Ministers of Gospel, and Honorary Resident.

⁴¹ *Id.* at Rule 3.4.

⁴² *Id.* at Rule 3.5.

⁴³ *Id.* at Rule 3.6.

Management of the Club is vested exclusively in Resident Members, who alone have the right to vote, hold office, and propose new members. To become a member, a candidate must be proposed by two Resident Members and unanimously approved by the Club's Board of Directors and Membership Committee. Judge Paine has been a Resident Member of Belle Meade since 1978.

Belle Meade has never had and presently has no female Resident Members – all female members are Lady Members. Lady Members, who pay lower fees than Resident Members, are defined as “unmarried females” who “have attained 18 years of age,” and historically have been widows of Resident, Honorary, Associate, and Non-resident Members. At any time there can be no more than 175 Lady Members. Although the Constitution and Bylaws do not prohibit women from becoming Resident Members, there is conflicting evidence as to whether women unofficially are barred from such membership. Two members have stated (one under oath) that women are so barred. Others have testified that there is no such prohibition. Additionally, there is evidence that at least two women have been approached about seeking Resident Membership but have declined.

Nor does Belle Meade have any African American Resident Members but, as with women, there is no express prohibition. The Club has one African American Non-resident Member who lives and works in Atlanta, Georgia, more than two hundred miles outside of Nashville. Membership proposals for two African American Resident Member candidates, one of whom Judge Paine sponsored, have been pending for at least four years. Several African Americans have declined requests to seek Resident Member status.

To his considerable credit, Judge Paine wrote a strong letter in August 1990 to the Club's Board of Directors in response to other letters “received [by the Board] in regards to the perceived exclusionary policies of Belle Meade.” Judge Paine considered it “long overdue that the Club have Jewish and black associate and resident members” and thought it “patently preposterous that there are not persons in these racial and religious groups who would not be excellent participating members of the Club.” Given his impression that adverse publicity could diminish the value of Club membership, Judge Paine suggested that the Board members' fiduciary duty required that they “protect[] [the Club's] interests on this issue.”

B. Procedural History

This complaint, filed in May 2008, alleges that Judge Paine's membership in Belle Meade constitutes judicial misconduct. In particular, it alleges violations of Canons 2A and 2C of the Code of Conduct for United States Judges. Canon 2A states that “[a] judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Under Canon 2C, “[a] judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.”

The complaint initially was reviewed by then-Chief Judge Boggs of the Sixth Circuit Court of Appeals, as required by 28 U.S.C. § 352. After conducting a limited investigation, Judge Boggs dismissed the complaint for failure to make an adequate showing of misconduct.

The complainant petitioned the Sixth Circuit Judicial Council for review of Judge Boggs's dismissal. The Council, under Chief Judge Batchelder, tasked its Standing Special Committee with investigating the complaint. With the help of outside counsel, the Special Committee interviewed the complainant, as well as a Mr. Alex Friedmann, who apparently has assisted the complainant in the pursuit of these charges, and several members of Belle Meade including Judge Paine. Based on its investigation, the Special Committee made findings of fact (most of which are summarized above) and concluded that Judge Paine's membership at Belle Meade does not violate the Code of Conduct.

The Sixth Circuit Judicial Council, by a vote of 10-8, adopted the Special Committee's report and agreed with its ultimate conclusion. The majority determined, among other things, that Judge Paine's "long and sincere efforts to integrate the club in question . . . preclude a finding that he has engaged in misconduct."

The complainant appealed.

DISCUSSION

We defer to the findings of the Sixth Circuit Judicial Council and overturn them only if clearly erroneous.

On appeal, the complainant argues that (1) the decision of the Sixth Circuit Judicial Council was against the weight of the evidence, (2) the decision inappropriately relied on factors other than the Club's membership practices with respect to race and sex, and (3) the Special Committee's investigation was insufficient. We agree with the complainant's first two arguments and, as to the third, we conclude that, although the Special Committee might have engaged in a more thorough investigation, the evidence in the record is sufficient to resolve this matter.

A. Canons 2A and 2C

Congress created the Judicial Conference as "the principal policy making body concerned with the administration of the U.S. Courts." The Judicial Conference, in turn, adopted the Code of Conduct to aid judges and judicial nominees and to "provide standards of conduct for application in" judicial-conduct and judicial-disciplinary proceedings brought pursuant to the Act. Commentary to Canon 1. The Canons of the Code of Conduct offer general guidance. "[I]t is not intended that disciplinary action would be appropriate for every violation of its provisions," especially "where reasonable judges might be uncertain as to whether or not the conduct is proscribed." *Id.* "Whether disciplinary action is appropriate, and the degree of discipline to be

imposed, should be determined through a reasonable application of the text and should depend on” the particular circumstances of the infraction. *Id.*

As noted above, the complaint asserts that Judge Paine’s membership in Belle Meade runs afoul of Canons 2A and 2C. Canon 2A sets forth the broad command of which Canon 2C is one instance: “A judge . . . should act at all times in a manner promotes public confidence in the integrity and impartiality of the judiciary.” Judges must avoid not only actual impropriety but the “appearance of impropriety.” Commentary to Canon 2A; see also 28 U.S.C. § 455(a) (a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned”). This rule is critical — the judiciary’s ability to decide cases efficiently and effectively would be severely impaired, and public confidence in the courts would be undermined, if litigants had reason to suspect judicial bias. In other words, “to perform its high function in the best way ‘justice must satisfy the appearance of justice.’” [Citations omitted.]

The judiciary therefore must take every appropriate measure to instill public confidence in the impartial administration of justice. For this reason, and especially in view of the “constant public scrutiny” that “judge[s] must expect,” Commentary to Canon 2A, members of the judiciary are required to accept unique and heightened restrictions on their personal lives that would not pertain to ordinary citizens. *Id.* Although the Code of Conduct does not purport to enumerate every such restriction, Canon 2C does set forth a mandatory prohibition.

“Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge’s impartiality is impaired.” Commentary to Canon 2C. For that reason, Canon 2C forbids judges from “hold[ing] membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.” Considered in the context of Canon 2A, the invidious discrimination contemplated by Canon 2C has a specific meaning. We are not concerned here only with the sort of discrimination prohibited by the Civil Rights Act, Title VII, or the Constitution. Instead, like Canon 2A, Canon 2C also addresses appearances. Quite simply, judges may not be members of organizations that would reasonably appear to the public to discriminate in their membership practices on any of the grounds listed in Canon 2C.

“[A]n organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.” Commentary to Canon 2C. Because organizations rarely advertise discriminatory practices, though, “[w]hether an organization practices invidious discrimination” for purposes of Canon 2C “is often a complex question.” *Id.* Typically, the inquiry is fact-specific and the answer depends on such factors as the organization’s selection criteria, goals, size, and geographic location. A strong presumption of invidious discrimination arises where “reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of” such discrimination, *id.*, but the membership is not diverse.

B. The Weight of the Evidence

Applying the standards discussed above, we easily conclude that Belle Meade invidiously discriminates against women and African Americans for purposes of Canon 2C and, consequently, that Judge Paine's membership in the organization runs afoul of that Canon. Nashville, Tennessee, is one of the major cosmopolitan cities of the Southern United States. In particular, according to 2010 Census data, it boasts a 28% African American population and its female population is over 50%. Although few organizations perfectly mirror the population trends of their surrounding locales, a member of the public would reasonably expect to see at least some women and African Americans among Belle Meade's Resident Membership barring (1) invidious discrimination or (2) something unique about the Club — "such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members," *id.* — that would suggest otherwise. There is, however, nothing about Belle Meade's stated aims or activities that provides any such justification for the total absence of any female or African American Resident Members. The organization is a social club for prominent persons living in and around the Nashville area. Naturally, there is no shortage of women or — as Judge Paine proclaimed in his 1990 letter to the Club's Board — African Americans fitting that description.

Moreover, although evidence of purposeful discrimination is not a requirement of Canon 2C (and, indeed, is expected to be rare), there is some such evidence in this case. Lady Members have no power to control, manage, vote, or hold office in the Club, and are limited in number to fewer than one sixth of the Club's total approximate membership. Although there appears to be no explicit prohibition on women becoming Resident Members — and there is some evidence that women are eligible (and have been sought out) for such membership — the remaining evidence concerning Lady Membership bolsters the already justifiable public perception of invidious gender discrimination. Indeed, Belle Meade's Bylaws give the distinct impression that the Club is structured for "members" who are male, predominantly if not exclusively:

Privileges of the Club and its facilities are extended to wives of members and unmarried children of members who are 25 years of age and under. In addition, the following, provided each resides in the household of a member, shall also be entitled to the privileges of the Club and its facilities: fathers and fathers-in-law who are over 70 years of age, widowed mothers and widowed mothers-in-law, and unmarried daughters who are over 25 years of age. (emphasis added).

There is also considerable evidence of intentional discrimination with respect to African Americans. Judge Paine has tried for more than two decades to persuade the Club to open its membership to African Americans, even going so far as to put forward his own candidate, without result. It is difficult for us — and, we expect, the public — to conjure a benign explanation for the Club's failure to integrate its Resident Membership in the face of Judge Paine's endeavors and the sentiment expressed in his 1990 letter.

Our impression that the public justifiably perceives that Belle Meade invidiously discriminates is not based solely on speculation or surmise. Rather, there is tangible support for this conclusion in the public arena. Judge Paine’s membership in Belle Meade and the Sixth Circuit Judicial Council’s decision have been a source of much public interest and controversy. Moreover, another Club member who was nominated to the federal bench in 2008 was publicly chastised on the basis of that membership and ultimately failed to receive confirmation. Our analysis does not depend upon this publicity and in no sense is our conclusion in this matter a response to perceived public pressure. But the publicity over judges’ membership in Belle Meade corroborates our independent conclusion that Judge Paine’s membership in the Club creates an appearance of impropriety that we cannot condone.

C. Extraneous Factors Relied upon by the Special Committee and Sixth Circuit Judicial Council

In reaching a contrary conclusion, the Special Committee and Sixth Circuit Judicial Council relied upon two factors that, in our view, are not relevant to consideration of this complaint. First, the Special Committee emphasized that “[t]here are gay, Jewish, and other non-African American persons of color who are Resident members of” Belle Meade. It reasoned that these members’ “presence on the membership rolls contradicts a belief that the Country Club is arbitrarily excluding members on the basis of race, religion, or national origin.” The question for purposes of Canon 2C, though, is whether an organization invidiously discriminates on one – not all – of the listed bases. That Belle Meade does not discriminate against members of certain sexual-orientation, religious, or ethnic groups therefore says nothing about whether the Club discriminates specifically against women or African Americans.

Second, both the Special Committee and the Sixth Circuit Judicial Council relied on Judge Paine’s “long and sincere efforts to integrate” Belle Meade in concluding that he has not committed judicial misconduct. Admirable though we find Judge Paine’s efforts have been, however, they do not change the analysis under Canon 2C. The ultimate question we face is not whether Judge Paine personally practices or participates in invidious discrimination or whether he tried to change those practices at Belle Meade. Under the Code of Conduct, a judge gives the appearance of impropriety and therefore violates Canons 2A and 2C simply by being a member of an organization that invidiously discriminates. This is a bright-line rule without a subjective component.

D. Guidance on Complying with Canon 2C

Thus, judges must exercise vigilance in complying with Canon 2C. Any judge considering membership in an organization should take steps to ensure that such membership would not appear improper. Naturally, those steps will differ to some degree depending on the particular circumstances. But we expect them to include, in all cases, a survey of the group’s membership, constitution, and bylaws. If “reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination,”

Commentary to Canon 2A, but the membership nevertheless is not diverse, the judge should err on the side of caution and decline membership. Although such a restriction “might be viewed as burdensome by the ordinary citizen,” it is one that judges should accept “freely and willingly.” Id.

The two-year remediation provision set forth in the Commentary to Canon 2C qualifies the above admonition to a limited extent:

When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge’s first learning of the practices), the judge should resign immediately from the organization.

This does not mean, of course, that a judge may join any discriminatory group whatsoever as long as he or she resigns within two years. Instead, the two-year qualification must be read in light of Canon 2C’s safeguarding of the appearance of propriety. Thus, we believe that this provision is available only if a judge determines that diversification efforts by the judge could reasonably succeed. In those circumstances, he or she may continue to hold membership in diligent pursuit of those efforts for a reasonable period of time not to exceed two years.

In any event, this remediation provision does not apply here. The Commentary’s two-year parameter is clear. Judge Paine, however, was aware of the Club’s “perceived exclusionary policies” at least 21 years ago, when he urged the Club to diversify. Any two-year remediation period came and went long ago. Canon 2C plainly does not permit a judge to belong to an organization that invidiously discriminates for as long as he or she keeps trying to change its practices, however long that may be.

* * *

The Sixth Circuit Judicial Council opined that, “although reasonable minds could — and indeed do — differ on the question of whether th[e] Club engages in invidious discrimination, the specific issue [here] is whether [Judge Paine] has committed judicial misconduct.” We disagree. Whether an organization to which a judge belongs practices invidious discrimination and whether that judge has committed judicial misconduct by being a member of the organization are the same question. Such membership by a sitting judge necessarily has “a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.” RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS 3(h)(2).

CONCLUSION

For the reasons discussed above, we conclude that, on the present record, the conclusion that Belle Meade engages in invidious discrimination against women and African Americans is inescapable and, to the extent the Sixth Circuit Judicial Council reached a different conclusion, that conclusion is clearly erroneous. Therefore, Judge Paine's membership in Belle Meade while sitting as a judge violates Canons 2A and 2C and thus constitutes misconduct under the Act.

Judge Paine has announced his forthcoming retirement at the end of 2011. For that reason, and because this decision represents the first enforcement of Canon 2C, there is no cause for us at this point to order Judge Paine's removal from office or to take disciplinary action beyond the public reprimand that this opinion represents. Should Judge Paine change his retirement plans, however, we would be required to revisit this conclusion.

Finally, we note with unreserved sincerity that our decision is not intended to impugn Judge Paine's good faith, of which there is much evidence. He tried to change the Club's discriminatory practices by writing a letter challenging those practices and by promoting the cause of at least one African American applicant for Resident Membership. Moreover, the bright-line rule that we have announced today that pertains to Canon 2C is the first such pronouncement on the Canon by this Committee or any Judicial Council.

More generally, Judge Paine has dedicated much of his life to public service: first in the military, where he served as an officer in the Army and was awarded the Purple Heart and, since 1981, as an able bankruptcy judge for the Middle District of Tennessee. He has also made a significant contribution as a volunteer judge in promoting the Rule of Law in newly democratic countries. Thus, in our view, Judge Paine is retiring from the judiciary with his reputation for devoted service to his country intact.

G. Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

Judges are permitted, perhaps even encouraged to participate in the life of the communities in which they sit through the types of organizations mentioned above. Judges are particularly encouraged to participate in activities relating to the law, the legal system, and the administration of justice. However, judges may not participate in such organizations to the extent doing so would cause them to run afoul of other provisions of the CJC, and are also prohibited from soliciting for contributions for such organizations, except from members of the judge's family or higher ranking judges.⁴⁴

⁴⁴ *Id.* at Rule 3.7.

H. Appointments to Fiduciary Positions

A judge may not generally accept appointment to a position as a fiduciary except on behalf of a member of the judge's family.⁴⁵

I. Service as an Arbitrator or Mediator

A judge generally may not act as an arbitrator or mediator in a matter nor perform other judicial functions except as part of the judge's official duties.⁴⁶

J. Practice of Law

Full-time judges are prohibited from practicing law. Part-time judges, of course, may maintain their practices in addition to performing their judicial duties. Full-time judges may provide legal advice to family members, and provide them with assistance in preparing or reviewing legal documents, but may not appear as an attorney in a matter even on behalf of a family member.⁴⁷

K. Financial, Business, or Remunerative Activities

A judge may manage their own or family members' personal investments, but may not serve as an officer, manager, general partner, advisor, or employee of a business other than a closely held family corporation. A judge also may not engage in financial activities that will interfere with the judge's judicial responsibilities or will result in frequent disqualification of the judge.⁴⁸

L. Compensation for Extrajudicial Activities

Judges may receive reasonable compensation for extrajudicial activities, except to the extent such compensation might appear to a reasonable person to compromise the judge's independence, integrity, or impartiality.⁴⁹

M. Acceptance and Reporting of Gifts, Loans, Bequests, Benefits or Other Things of Value

Most jurisdictions have extensive rules and regulations regarding limits on the amount of gifts and loans and the like that a judge may accept, and strict reporting requirements for such gifts and loans as well. Ordinary gifts between friends and relatives and ordinary social hospitality does not violate this prohibition. Judges may accept discounts and prizes on the same terms that would be

⁴⁵ *Id.* at Rule 3.8.

⁴⁶ *Id.* at Rule 3.9.

⁴⁷ *Id.* at Rule 3.10.

⁴⁸ *Id.* at Rule 3.11.

⁴⁹ *Id.* at Rule 3.12.

available to non-judges. The key is to avoid the appearance that special benefits offered to a judge might serve as an inducement to decide a particular case in a particular manner.⁵⁰

N. Reimbursement of Expenses and Waivers of Fees or Charges

A judge may accept reimbursement of expenses incurred in attending conferences and the like, as long as such reimbursement does not exceed the reasonable value of the expenses incurred.⁵¹

O. Reporting Requirements

Judges are required to report the amounts received for extrajudicial activities, gifts, and expense reimbursement pursuant to the above-discussed provisions.⁵²

III. Political or Campaign Activities

According to Canon 4 of the CJC, judges or candidates for judicial office may not engage in political or campaign activity that is inconsistent with the independence, integrity, or impartiality of the judiciary. Of course, because such political or campaign activity may fall within the scope of protected First Amendment activity, courts have had to engage in a difficult balancing act between the values embodied in the First Amendment, and the demands of maintaining an independent and impartial judiciary.

A. Political and Campaign Activities of Judges and Judicial Candidates in General

Restrictions on campaign activities sometimes seem to place judges between a rock and a hard place. On the one hand, in a majority of states, at least some judges achieve their positions through contested elections. And by definition, elections require candidates to provide voters with information about their candidacies, which in turn requires candidates to have the funds to provide such information. Moreover, voters themselves have a constitutional right to receive the information necessary for them to make an informed choice among candidates for judicial office. On the other hand, we can also understand how things like campaign promises and the acceptance of donations might at least create the appearance that the judge would be inclined to decide cases certain ways in the future, or be beholden to campaign donors, in a way that might call into question the independence and integrity of the judge.

The CJC attempts to walk this fine line between allowing judges and judicial candidates to provide voters with the information necessary to make informed choices among judicial candidates and candidates for office more generally, and maintaining the independence of the judiciary. Among

⁵⁰ *Id.* at Rule 3.13.

⁵¹ *Id.* at Rule 3.14.

⁵² *Id.* at Rule 3.15.

other provisions, Rule 4.1 prohibits judges from engaging in the following political activities: 1) serving as a leader or officer in a political organization; 2) making speeches on behalf of a political organization; 3) publicly endorsing a candidate for any public office; 4) soliciting funds for, or making a contribution to a political organization or candidate for public office; 5) publicly identifying themselves as a candidate of a political organization; 6) seeking or accepting endorsements from political organizations; 7) personally soliciting or accepting campaign contributions, except through an independent campaign committee; and 8) making pledges, promises, or commitments in relation to issues or cases that might come before the court in the future that would be inconsistent with the impartial performance of judicial duties.

The prohibition on the personal solicitation of donations by the candidate themselves was challenged on First Amendment grounds in a case recently decided by the U.S. Supreme Court.

Williams-Yulee v. Florida Bar

United States Supreme Court

135 S.Ct. 1656 (2015)

Chief Justice Roberts delivered the opinion of the Court, except as to Part II.

Lanell Williams–Yulee, who refers to herself as Yulee, has practiced law in Florida since 1991. In September 2009, she decided to run for a seat on the county court for Hillsborough County, a jurisdiction of about 1.3 million people that includes the city of Tampa. Shortly after filing paperwork to enter the race, Yulee drafted a letter announcing her candidacy. The letter described her experience and desire to “bring fresh ideas and positive solutions to the Judicial bench.” The letter then stated:

“An early contribution of \$25, \$50, \$100, \$250, or \$500, made payable to ‘Lanell Williams–Yulee Campaign for County Judge’, will help raise the initial funds needed to launch the campaign and get our message out to the public. I ask for your support [i]n meeting the primary election fund raiser goals. Thank you in advance for your support.”

Yulee signed the letter and mailed it to local voters. She also posted the letter on her campaign Web site.

Yulee’s bid for the bench did not unfold as she had hoped. She lost the primary to the incumbent judge. Then the Florida Bar filed a complaint against her. As relevant here, the Bar charged her with violating Rule 4–8.2(b) of the Rules Regulating the Florida Bar. That Rule requires judicial candidates to comply with applicable provisions of Florida’s Code of Judicial Conduct, including the ban on personal solicitation of campaign funds in Canon 7C(1).

Yulee admitted that she had signed and sent the fundraising letter. But she argued that the Bar could not discipline her for that conduct because the First Amendment protects a judicial candidate's right to solicit campaign funds in an election. The Florida Supreme Court appointed a referee, who held a hearing and recommended a finding of guilt. As a sanction, the referee recommended that Yulee be publicly reprimanded and ordered to pay the costs of the proceeding (\$1,860).

The Florida Supreme Court adopted the referee's recommendations. The court explained that Canon 7C(1) "clearly restricts a judicial candidate's speech" and therefore must be "narrowly tailored to serve a compelling state interest." The court held that the Canon satisfies that demanding inquiry. First, the court reasoned, prohibiting judicial candidates from personally soliciting funds furthers Florida's compelling interest in "preserving the integrity of [its] judiciary and maintaining the public's confidence in an impartial judiciary." In the court's view, "personal solicitation of campaign funds, even by mass mailing, raises an appearance of impropriety and calls into question, in the public's mind, the judge's impartiality." Second, the court concluded that Canon 7C(1) is narrowly tailored to serve that compelling interest because it " 'insulate[s] judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns.' "

The Florida Supreme Court acknowledged that some Federal Courts of Appeals—"whose judges have lifetime appointments and thus do not have to engage in fundraising"—had invalidated restrictions similar to Canon 7C(1). But the court found it persuasive that every State Supreme Court that had considered similar fundraising provisions—along with several Federal Courts of Appeals—had upheld the laws against First Amendment challenges. Florida's chief justice and one associate justice dissented. We granted certiorari.

II

The First Amendment provides that Congress "shall make no law ... abridging the freedom of speech." The Fourteenth Amendment makes that prohibition applicable to the States. The parties agree that Canon 7C(1) restricts Yulee's speech on the basis of its content by prohibiting her from soliciting contributions to her election campaign. The parties disagree, however, about the level of scrutiny that should govern our review.

We have applied exacting scrutiny to laws restricting the solicitation of contributions to charity, upholding the speech limitations only if they are narrowly tailored to serve a compelling interest. Applying a lesser standard of scrutiny to such speech would threaten "the exercise of rights so vital to the maintenance of democratic institutions." [Citation omitted.]

The principles underlying these charitable solicitation cases apply with even greater force here.

Before asking for money in her fundraising letter, Yulee explained her fitness for the bench and expressed her vision for the judiciary. Her stated purpose for the solicitation was to get her “message out to the public.” As we have long recognized, speech about public issues and the qualifications of candidates for elected office commands the highest level of First Amendment protection. Indeed, in our only prior case concerning speech restrictions on a candidate for judicial office, this Court and both parties assumed that strict scrutiny applied. *Republican Party of Minn. v. White*, 536 U.S. 765, 774, (2002).

Although the Florida Supreme Court upheld Canon 7C(1) under strict scrutiny, the Florida Bar and several *amici* contend that we should subject the Canon to a more permissive standard: that it be “closely drawn” to match a “sufficiently important interest.” *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (*per curiam*). The “closely drawn” standard is a poor fit for this case. The Court adopted that test in *Buckley* to address a claim that campaign contribution limits violated a contributor’s “freedom of political association.” Here, Yulee does not claim that Canon 7C(1) violates her right to free association; she argues that it violates her right to free speech. And the Florida Bar can hardly dispute that the Canon infringes Yulee’s freedom to discuss candidates and public issues—namely, herself and her qualifications to be a judge. The Bar’s call to import the “closely drawn” test from the contribution limit context into a case about solicitation therefore has little avail.

As several of the Bar’s *amici* note, we applied the “closely drawn” test to solicitation restrictions in *McConnell v. Federal Election Comm’n*, 540 U.S. 93, 136 (2003), overruled in part by *Citizens United v. Federal Election Comm’n*, 558 U.S. 310 (2010). But the Court in that case determined that the solicitation restrictions operated primarily to prevent circumvention of the contribution limits, which were the subject of the “closely drawn” test in the first place. *McConnell* offers no help to the Bar here, because Florida did not adopt Canon 7C(1) as an anticircumvention measure.

In sum, we hold today what we assumed in *White*: A State may restrict the speech of a judicial candidate only if the restriction is narrowly tailored to serve a compelling interest.

III

The Florida Bar faces a demanding task in defending Canon 7C(1) against Yulee’s First Amendment challenge. We have emphasized that “it is the rare case” in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest. But those cases do arise. Here, Canon 7C(1) advances the State’s compelling interest in preserving public confidence in the integrity of the judiciary, and it does so through means narrowly tailored to avoid unnecessarily abridging speech. This is therefore one of the rare cases in which a speech restriction withstands strict scrutiny.

A

The Florida Supreme Court adopted Canon 7C(1) to promote the State's interests in "protecting the integrity of the judiciary" and "maintaining the public's confidence in an impartial judiciary." The way the Canon advances those interests is intuitive: Judges, charged with exercising strict neutrality and independence, cannot supplicate campaign donors without diminishing public confidence in judicial integrity. This principle dates back at least eight centuries to Magna Carta, which proclaimed, "To no one will we sell, to no one will we refuse or delay, right or justice." The same concept underlies the common law judicial oath, which binds a judge to "do right to all manner of people ... without fear or favour, affection or ill-will," and the oath that each of us took to "administer justice without respect to persons, and do equal right to the poor and to the rich," 28 U.S.C. § 453. Simply put, Florida and most other States have concluded that the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors.

The interest served by Canon 7C(1) has firm support in our precedents. We have recognized the "vital state interest" in safeguarding "public confidence in the fairness and integrity of the nation's elected judges." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009) (internal quotation marks omitted). The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the executive or the legislature, the judiciary "has no influence over either the sword or the purse; ... neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, "justice must satisfy the appearance of justice." It follows that public perception of judicial integrity is "a state interest of the highest order."

The principal dissent observes that bans on judicial candidate solicitation lack a lengthy historical pedigree. *Post*, at 1676 (opinion of SCALIA, J.). We do not dispute that fact, but it has no relevance here. As the precedent cited by the principal dissent demonstrates, a history and tradition of regulation are important factors in determining whether to recognize "new categories of unprotected speech." But nobody argues that solicitation of campaign funds by judicial candidates is a category of unprotected speech. As explained above, the First Amendment fully applies to Yulee's speech. The question is instead whether that Amendment permits the particular regulation of speech at issue here.

The parties devote considerable attention to our cases analyzing campaign finance restrictions in political elections. But a State's interest in preserving public confidence in the integrity of its judiciary extends beyond its interest in preventing the appearance of corruption in legislative and executive elections. As we explained in *White*, States may regulate judicial elections differently than they regulate political elections, because the role of judges differs from the role of politicians.

Politicians are expected to be appropriately responsive to the preferences of their supporters. Indeed, such “responsiveness is key to the very concept of self-governance through elected officials.” [Citation omitted.] The same is not true of judges. In deciding cases, a judge is not to follow the preferences of his supporters, or provide any special consideration to his campaign donors. A judge instead must “observe the utmost fairness,” striving to be “perfectly and completely independent, with nothing to influence or controul him but God and his conscience.” Address of John Marshall, in Proceedings and Debates of the Virginia State Convention of 1829–1830, p. 616 (1830). As in *White*, therefore, our precedents applying the First Amendment to political elections have little bearing on the issues here.

The vast majority of elected judges in States that allow personal solicitation serve with fairness and honor. But “[e]ven if judges were able to refrain from favoring donors, the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributions is likely to undermine the public’s confidence in the judiciary.” In the eyes of the public, a judge’s personal solicitation could result (even unknowingly) in “a possible temptation ... which might lead him not to hold the balance nice, clear and true.” *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). That risk is especially pronounced because most donors are lawyers and litigants who may appear before the judge they are supporting.

The concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to proof by documentary record. But no one denies that it is genuine and compelling. In short, it is the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity that prompted the Supreme Court of Florida and most other States to sever the direct link between judicial candidates and campaign contributors. As the Supreme Court of Oregon explained, “the spectacle of lawyers or potential litigants directly handing over money to judicial candidates should be avoided if the public is to have faith in the impartiality of its judiciary.” Moreover, personal solicitation by a judicial candidate “inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate.” Potential litigants then fear that “the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions.” A State’s decision to elect its judges does not require it to tolerate these risks. The Florida Bar’s interest is compelling.

B

Yulee acknowledges the State’s compelling interest in judicial integrity. She argues, however, that the Canon’s failure to restrict other speech equally damaging to judicial integrity and its appearance undercuts the Bar’s position. In particular, she notes that Canon 7C(1) allows a judge’s campaign committee to solicit money, which arguably reduces public confidence in the integrity of the judiciary just as much as a judge’s personal solicitation. Yulee also points out that Florida

permits judicial candidates to write thank you notes to campaign donors, which ensures that candidates know who contributes and who does not.

It is always somewhat counterintuitive to argue that a law violates the First Amendment by abridging *too little* speech. We have recognized, however, that underinclusiveness can raise “doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.” In a textbook illustration of that principle, we invalidated a city’s ban on ritual animal sacrifices because the city failed to regulate vast swaths of conduct that similarly diminished its asserted interests in public health and animal welfare. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 543–547 (1993).

Underinclusiveness can also reveal that a law does not actually advance a compelling interest. For example, a State’s decision to prohibit newspapers, but not electronic media, from releasing the names of juvenile defendants suggested that the law did not advance its stated purpose of protecting youth privacy.

Although a law’s underinclusivity raises a red flag, the First Amendment imposes no freestanding “underinclusiveness limitation.” A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of their stated interests.

Viewed in light of these principles, Canon 7C(1) raises no fatal underinclusivity concerns. The solicitation ban aims squarely at the conduct most likely to undermine public confidence in the integrity of the judiciary: personal requests for money by judges and judicial candidates. The Canon applies evenhandedly to all judges and judicial candidates, regardless of their viewpoint or chosen means of solicitation. And unlike some laws that we have found impermissibly underinclusive, Canon 7C(1) is not riddled with exceptions. Indeed, the Canon contains zero exceptions to its ban on personal solicitation.

Yulee relies heavily on the provision of Canon 7C(1) that allows solicitation by a candidate’s campaign committee. But Florida, along with most other States, has reasonably concluded that solicitation by the candidate personally creates a categorically different and more severe risk of undermining public confidence than does solicitation by a campaign committee. The identity of the solicitor matters, as anyone who has encountered a Girl Scout selling cookies outside a grocery store can attest. When the judicial candidate himself asks for money, the stakes are higher for all involved. The candidate has personally invested his time and effort in the fundraising appeal; he has placed his name and reputation behind the request. The solicited individual knows that, and also knows that the solicitor might be in a position to singlehandedly make decisions of great weight: The same person who signed the fundraising letter might one day sign the judgment. This

dynamic inevitably creates pressure for the recipient to comply, and it does so in a way that solicitation by a third party does not. Just as inevitably, the personal involvement of the candidate in the solicitation creates the public appearance that the candidate will remember who says yes, and who says no.

In short, personal solicitation by judicial candidates implicates a different problem than solicitation by campaign committees. However similar the two solicitations may be in substance, a State may conclude that they present markedly different appearances to the public. Florida's choice to allow solicitation by campaign committees does not undermine its decision to ban solicitation by judges.

Likewise, allowing judicial candidates to write thank you notes to campaign donors does not detract from the State's interest in preserving public confidence in the integrity of the judiciary. Yulee argues that permitting thank you notes heightens the likelihood of actual bias by ensuring that judicial candidates know who supported their campaigns, and ensuring that the supporter knows that the candidate knows. Maybe so. But the State's compelling interest is implicated most directly by the candidate's personal solicitation itself. A failure to ban thank you notes for contributions not solicited by the candidate does not undercut the Bar's rationale.

In addition, the State has a good reason for allowing candidates to write thank you notes and raise money through committees. These accommodations reflect Florida's effort to respect the First Amendment interests of candidates and their contributors—to resolve the “fundamental tension between the ideal character of the judicial office and the real world of electoral politics.” They belie the principal dissent's suggestion that Canon 7C(1) reflects general “hostility toward judicial campaigning” and has “nothing to do with the appearances created by judges' asking for money.” Nothing?

The principal dissent also suggests that Canon 7C(1) is underinclusive because Florida does not ban judicial candidates from asking individuals for personal gifts or loans. But Florida law treats a personal “gift” or “loan” as a campaign contribution if the donor makes it “for the purpose of influencing the results of an election,” Fla. Stat. § 106.011(5)(a), and Florida's Judicial Qualifications Commission has determined that a judicial candidate violates Canon 7C(1) by personally soliciting such a loan. See *In re Turner*, 76 So.3d 898, 901–902 (Fla.2011). In any event, Florida can ban personal solicitation of campaign funds by judicial candidates without making them obey a comprehensive code to leading an ethical life. Underinclusivity creates a First Amendment concern when the State regulates one aspect of a problem while declining to regulate a different aspect of the problem that affects its stated interest *in a comparable way*. The principal dissent offers no basis to conclude that judicial candidates are in the habit of soliciting personal loans, football tickets, or anything of the sort. Even under strict scrutiny, “[t]he First Amendment does not require States to regulate for problems that do not exist.”

Taken to its logical conclusion, the position advanced by Yulee and the principal dissent is that Florida may ban the solicitation of funds by judicial candidates only if the State bans *all* solicitation of funds in judicial elections. The First Amendment does not put a State to that all-or-nothing choice. We will not punish Florida for leaving open more, rather than fewer, avenues of expression, especially when there is no indication that the selective restriction of speech reflects a pretextual motive.

C

After arguing that Canon 7C(1) violates the First Amendment because it restricts too little speech, Yulee argues that the Canon violates the First Amendment because it restricts too much. In her view, the Canon is not narrowly tailored to advance the State’s compelling interest through the least restrictive means.

By any measure, Canon 7C(1) restricts a narrow slice of speech. A reader of Justice Kennedy’s dissent could be forgiven for concluding that the Court has just upheld a latter-day version of the Alien and Sedition Acts, approving “state censorship” that “locks the First Amendment out,” imposes a “gag” on candidates, and inflicts “dead weight” on a “silenced” public debate. But in reality, Canon 7C(1) leaves judicial candidates free to discuss any issue with any person at any time. Candidates can write letters, give speeches, and put up billboards. They can contact potential supporters in person, on the phone, or online. They can promote their campaigns on radio, television, or other media. They cannot say, “Please give me money.” They can, however, direct their campaign committees to do so. Whatever else may be said of the Canon, it is surely not a “wildly disproportionate restriction upon speech.”

Indeed, Yulee concedes—and the principal dissent seems to agree, *post*, at 1679—that Canon 7C(1) is valid in numerous applications. Yulee acknowledges that Florida can prohibit judges from soliciting money from lawyers and litigants appearing before them. Reply Brief 18. In addition, she says the State “might” be able to ban “direct one-to-one solicitation of lawyers and individuals or businesses that could reasonably appear in the court for which the individual is a candidate.” *Ibid*. She also suggests that the Bar could forbid “in person” solicitation by judicial candidates. Tr. of Oral Arg. 7; cf. *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978) (permitting State to ban in person solicitation of clients by lawyers). But Yulee argues that the Canon cannot constitutionally be applied to her chosen form of solicitation: a letter posted online and distributed via mass mailing. No one, she contends, will lose confidence in the integrity of the judiciary based on personal solicitation to such a broad audience.

This argument misperceives the breadth of the compelling interest that underlies Canon 7C(1). Florida has reasonably determined that personal appeals for money by a judicial candidate inherently create an appearance of impropriety that may cause the public to lose confidence in the

integrity of the judiciary. That interest may be implicated to varying degrees in particular contexts, but the interest remains whenever the public perceives the judge personally asking for money.

Moreover, the lines Yulee asks us to draw are unworkable. Even under her theory of the case, a mass mailing would create an appearance of impropriety if addressed to a list of all lawyers and litigants with pending cases. So would a speech soliciting contributions from the 100 most frequently appearing attorneys in the jurisdiction. Yulee says she might accept a ban on one-to-one solicitation, but is the public impression really any different if a judicial candidate tries to buttonhole not one prospective donor but two at a time? Ten? Yulee also agrees that in person solicitation creates a problem. But would the public's concern recede if the request for money came in a phone call or a text message?

We decline to wade into this swamp. The First Amendment requires that Canon 7C(1) be narrowly tailored, not that it be “perfectly tailored.” The impossibility of perfect tailoring is especially apparent when the State's compelling interest is as intangible as public confidence in the integrity of the judiciary. Yulee is of course correct that some personal solicitations raise greater concerns than others. A judge who passes the hat in the courthouse creates a more serious appearance of impropriety than does a judicial candidate who makes a tasteful plea for support on the radio. But most problems arise in greater and lesser gradations, and the First Amendment does not confine a State to addressing evils in their most acute form. Here, Florida has concluded that all personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary; banning all personal solicitations by judicial candidates is narrowly tailored to address that concern.

In considering Yulee's tailoring arguments, we are mindful that most States with elected judges have determined that drawing a line between personal solicitation by candidates and solicitation by committees is necessary to preserve public confidence in the integrity of the judiciary. These considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance—how to select those who “sit as their judges.”

Finally, Yulee contends that Florida can accomplish its compelling interest through the less restrictive means of recusal rules and campaign contribution limits. We disagree. A rule requiring judges to recuse themselves from every case in which a lawyer or litigant made a campaign contribution would disable many jurisdictions. And a flood of postelection recusal motions could “erode public confidence in judicial impartiality” and thereby exacerbate the very appearance problem the State is trying to solve. Moreover, the rule that Yulee envisions could create a perverse incentive for litigants to make campaign contributions to judges solely as a means to trigger their later recusal—a form of preemptory strike against a judge that would enable transparent forum shopping.

As for campaign contribution limits, Florida already applies them to judicial elections. Fla. Stat. § 106.08(1)(a). A State may decide that the threat to public confidence created by personal solicitation exists apart from the amount of money that a judge or judicial candidate seeks. Even if Florida decreased its contribution limit, the appearance that judges who personally solicit funds might improperly favor their campaign donors would remain. Although the Court has held that contribution limits advance the interest in preventing *quid pro quo* corruption and its appearance in political elections, we have never held that adopting contribution limits precludes a State from pursuing its compelling interests through additional means. And in any event, a State has compelling interests in regulating judicial elections that extend beyond its interests in regulating political elections, because judges are not politicians.

In sum, because Canon 7C(1) is narrowly tailored to serve a compelling government interest, the First Amendment poses no obstacle to its enforcement in this case. As a result of our decision, Florida may continue to prohibit judicial candidates from personally soliciting campaign funds, while allowing them to raise money through committees and to otherwise communicate their electoral messages in practically any way. The principal dissent faults us for not answering a slew of broader questions, such as whether Florida may cap a judicial candidate's spending or ban independent expenditures by corporations. Yulee has not asked these questions, and for good reason—they are far afield from the narrow regulation actually at issue in this case.

We likewise have no cause to consider whether the citizens of States that elect their judges have decided anything about the “oracular sanctity of judges” or whether judges are due “a hearty helping of humble pie.” The principal dissent could be right that the decision to adopt judicial elections “probably springs,” at least in part, from a desire to make judges more accountable to the public, *ibid.*, although the history on this matter is more complicated. In any event, it is a long way from general notions of judicial accountability to the principal dissent's view, which evokes nothing so much as Delacroix's painting of Liberty leading a determined band of *citoyens*, this time against a robed aristocracy scurrying to shore up the ramparts of the judicial castle through disingenuous ethical rules. We claim no similar insight into the People's passions, hazard no assertions about ulterior motives of those who promulgated Canon 7C(1), and firmly reject the charge of a deceptive “pose of neutrality” on the part of those who uphold it.

* * *

The desirability of judicial elections is a question that has sparked disagreement for more than 200 years. Hamilton believed that appointing judges to positions with life tenure constituted “the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.” The Federalist No. 78, at 465. Jefferson thought that making judges “dependent on none but themselves” ran counter to the principle of “a government founded on the public will.” 12 The Works of Thomas Jefferson 5 (P. Ford ed. 1905). The federal courts reflect

the view of Hamilton; most States have sided with Jefferson. Both methods have given our Nation jurists of wisdom and rectitude who have devoted themselves to maintaining “the public’s respect ... and a reserve of public goodwill, without becoming subservient to public opinion.” Rehnquist, *Judicial Independence*, 38 U. Rich. L. Rev. 579, 596 (2004).

It is not our place to resolve this enduring debate. Our limited task is to apply the Constitution to the question presented in this case. Judicial candidates have a First Amendment right to speak in support of their campaigns. States have a compelling interest in preserving public confidence in their judiciaries. When the State adopts a narrowly tailored restriction like the one at issue here, those principles do not conflict. A State’s decision to elect judges does not compel it to compromise public confidence in their integrity.

The judgment of the Florida Supreme Court is

Affirmed.

Note that only a plurality of the Court joined Section II of Justice Roberts’ opinion, where he announced that strict scrutiny should be the standard of review to apply to the solicitation ban. Justices Breyer and Ginsburg, who otherwise joined the majority opinion, were of the view that a lower level of scrutiny should apply. Justices Thomas, Scalia, Kennedy, and Alito dissented.

Despite the Supreme Court’s decision in *Williams-Yulee*, the United States Court of Appeals for the Sixth Circuit subsequently upheld a challenge brought by three Kentucky judges to a number of the other campaign restrictions contained in Rule 4.1. In *Winter v. Wolnitzek*, 834 F.3d 681 (6th Cir. 2016), the Court applied strict scrutiny to strike down Kentucky’s judicial conduct rules that prohibited judges from: 1) campaigning as a member of a political organization and making speeches for a political organization; 2) making a contribution to a political organization, publicly endorsing a candidate for public office, and acting as a leader in a political organization; 3) making any misleading statements; and 4) making commitments that are inconsistent with impartial performance. While this decision only applies to Kentucky’s rules, it will be interesting to see if other courts apply a similar analysis to virtually identical restrictions that apply in other states, or whether the more lenient approach of the Supreme Court in *Williams-Yulee* will be applied.

B. Political and Campaign Activities of Judicial Candidates in Public Elections

Rule 4.2 of the CJC imposes additional obligations upon candidates for office in judicial elections.

In addition to placing restrictions on activities that may be engaged in by the judicial candidates themselves, the Rule also imposes obligations on judicial candidates to supervise carefully campaign statements and other publicity prepared by the candidate's campaign committee, and also to supervise carefully persons campaigning on behalf of the candidate to make sure that such persons do not engage in conduct that would be prohibited if engaged in by the candidate him or herself pursuant to Rule 4.1.

C. Activities of Candidates for Appointive Judicial Office

Of course, many judicial positions continue to be filled by executive appointment, rather than by contested elections. With regard to such positions, persons are permitted to communicate with the relevant appointing authority, and seek endorsements for the appointment other than from a partisan political organization.⁵³

D. Campaign Committees

One of the primary means to ensure judicial independence despite the demands of campaigning for elective office is through the establishment of "independent" campaign committees. I put the term "independent" in quotes, because candidates for judicial office retain ultimate responsibility for ensuring that their campaign committees comply with the requirements of the CJC and other applicable law. However, if set up properly, campaign committees can engage in activities that the candidates themselves are prohibited from engaging in, such as soliciting funds.⁵⁴

Even if set up and conducted properly, at some level, contributions to independent campaign committees might raise a question as to a judicial candidate, and ultimately a judge's independence and impartiality. Consider the following landmark U.S. Supreme Court case.

⁵³ ABA, Model Code of Judicial Conduct Rule 4.3.

⁵⁴ ABA, Model Code of Judicial Conduct Rule 4.4.

Caperton v. A.T. Massey Coal Company, Inc.
United States Supreme Court

129 S.Ct. 2252 (2009)

Justice Kenney delivered the opinion of the Court.

In this case the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of \$50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion. The basis for the motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages.

Under our precedents there are objective standards that require recusal when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” [Citation omitted.] Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal.

I

In August 2002 a West Virginia jury returned a verdict that found respondents A.T. Massey Coal Co. and its affiliates (hereinafter Massey) liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations. The jury awarded petitioners Hugh Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales (hereinafter Caperton) the sum of \$50 million in compensatory and punitive damages.

In June 2004 the state trial court denied Massey’s post-trial motions challenging the verdict and the damages award, finding that Massey “intentionally acted in utter disregard of [Caperton’s] rights and ultimately destroyed [Caperton’s] businesses because, after conducting cost-benefit analyses, [Massey] concluded it was in its financial interest to do so.” In March 2005 the trial court denied Massey’s motion for judgment as a matter of law.

Don Blankenship is Massey’s chairman, chief executive officer, and president. After the verdict but before the appeal, West Virginia held its 2004 judicial elections. Knowing the Supreme Court of Appeals of West Virginia would consider the appeal in the case, Blankenship decided to support an attorney who sought to replace Justice McGraw. Justice McGraw was a candidate for reelection to that court. The attorney who sought to replace him was Brent Benjamin.

In addition to contributing the \$1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost \$2.5 million to "And For The Sake Of The Kids," a political organization formed under 26 U.S.C. § 527. The § 527 organization opposed McGraw and supported Benjamin. Blankenship's donations accounted for more than two-thirds of the total funds it raised. This was not all. Blankenship spent, in addition, just over \$500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as television and newspaper advertisements—" 'to support ... Brent Benjamin.' " [Citation omitted.]

To provide some perspective, Blankenship's \$3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. Caperton contends that Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.

Benjamin won. He received 382,036 votes (53.3%), and McGraw received 334,301 votes (46.7%).

In October 2005, before Massey filed its petition for appeal in West Virginia's highest court, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct, based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion in April 2006. He indicated that he "carefully considered the bases and accompanying exhibits proffered by the movants." But he found "no objective information ... to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial." In December 2006 Massey filed its petition for appeal to challenge the adverse jury verdict. The West Virginia Supreme Court of Appeals granted review.

In November 2007 that court reversed the \$50 million verdict against Massey. The majority opinion, authored by then-Chief Justice Davis and joined by Justices Benjamin and Maynard, found that "Massey's conduct warranted the type of judgment rendered in this case." It reversed, nevertheless, based on two independent grounds—first, that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and, second, that res judicata barred the suit due to an out-of-state judgment to which Massey was not a party. Justice Starcher dissented, stating that the "majority's opinion is morally and legally wrong." Justice Albright also dissented, accusing the majority of "misapplying the law and introducing sweeping 'new law' into our jurisprudence that may well come back to haunt us."

Caperton sought rehearing, and the parties moved for disqualification of three of the five justices who decided the appeal. Photos had surfaced of Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending. Justice Maynard granted Caperton's recusal motion. On the other side Justice Starcher granted Massey's recusal motion, apparently based on

his public criticism of Blankenship's role in the 2004 elections. In his recusal memorandum Justice Starcher urged Justice Benjamin to recuse himself as well. He noted that "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court." Justice Benjamin declined Justice Starcher's suggestion and denied Caperton's recusal motion.

The court granted rehearing. Justice Benjamin, now in the capacity of acting chief justice, selected Judges Cookman and Fox to replace the recused justices. Caperton moved a third time for disqualification, arguing that Justice Benjamin had failed to apply the correct standard under West Virginia law—*i.e.*, whether "a reasonable and prudent person, knowing these objective facts, would harbor doubts about Justice Benjamin's ability to be fair and impartial." Caperton also included the results of a public opinion poll, which indicated that over 67% of West Virginians doubted Justice Benjamin would be fair and impartial. Justice Benjamin again refused to withdraw, noting that the "push poll" was "neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification."

In April 2008 a divided court again reversed the jury verdict, and again it was a 3-to-2 decision. Justice Davis filed a modified version of her prior opinion, repeating the two earlier holdings. She was joined by Justice Benjamin and Judge Fox. Justice Albright, joined by Judge Cookman, dissented: "Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority." The dissent also noted "genuine due process implications arising under federal law" with respect to Justice Benjamin's failure to recuse himself.

Four months later—a month after the petition for writ of certiorari was filed in this Court—Justice Benjamin filed a concurring opinion. He defended the merits of the majority opinion as well as his decision not to recuse. He rejected Caperton's challenge to his participation in the case under both the Due Process Clause and West Virginia law. Justice Benjamin reiterated that he had no " 'direct, personal, substantial, pecuniary interest' in this case." Adopting "a standard merely of 'appearances,' " he concluded, "seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day—a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations."

We granted certiorari.

II

It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." As the Court has recognized, however, "most matters relating to judicial disqualification [do] not rise to a constitutional level." The early and leading case on the subject is *Tumey v. Ohio*, 273 U.S. 510 (1927). There, the Court stated that "matters of kinship, personal bias, state policy, remoteness of

interest, would seem generally to be matters merely of legislative discretion.”

The *Tumey* Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has “a direct, personal, substantial, pecuniary interest” in a case. This rule reflects the maxim that “[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” The Federalist No. 10, p. 59 (J. Cooke ed.1961) (J. Madison). Under this rule, “disqualification for bias or prejudice was not permitted”; those matters were left to statutes and judicial codes. Personal bias or prejudice “alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause.”

As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances “in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.” To place the present case in proper context, two instances where the Court has required recusal merit further discussion.

A

The first involved the emergence of local tribunals where a judge had a financial interest in the outcome of a case, although the interest was less than what would have been considered personal or direct at common law.

This was the problem addressed in *Tumey*. There, the mayor of a village had the authority to sit as a judge (with no jury) to try those accused of violating a state law prohibiting the possession of alcoholic beverages. Inherent in this structure were two potential conflicts. First, the mayor received a salary supplement for performing judicial duties, and the funds for that compensation derived from the fines assessed in a case. No fines were assessed upon acquittal. The mayor-judge thus received a salary supplement only if he convicted the defendant. Second, sums from the criminal fines were deposited to the village’s general treasury fund for village improvements and repairs.

The Court held that the Due Process Clause required disqualification “both because of [the mayor-judge’s] direct pecuniary interest in the outcome, and because of his official motive to convict and to graduate the fine to help the financial needs of the village.” It so held despite observing that “[t]here are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment in it.” The Court articulated the controlling principle:

“Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process

of law.”

The Court was thus concerned with more than the traditional common-law prohibition on direct pecuniary interest. It was also concerned with a more general concept of interests that tempt adjudicators to disregard neutrality.

This concern with conflicts resulting from financial incentives was elaborated in *Ward v. Monroeville*, 409 U.S. 57 (1972), which invalidated a conviction in another mayor’s court. In *Monroeville*, unlike in *Tumey*, the mayor received no money; instead, the fines the mayor assessed went to the town’s general fisc. The Court held that “[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle. The principle, instead, turned on the “ ‘possible temptation’ ” the mayor might face; the mayor’s “executive responsibilities for village finances may make him partisan to maintain the high level of contribution [to those finances] from the mayor’s court.” As the Court reiterated in another case that Term, “the [judge’s] financial stake need not be as direct or positive as it appeared to be in *Tumey*.”

The Court in *Lavoie* further clarified the reach of the Due Process Clause regarding a judge’s financial interest in a case. There, a justice had cast the deciding vote on the Alabama Supreme Court to uphold a punitive damages award against an insurance company for bad-faith refusal to pay a claim. At the time of his vote, the justice was the lead plaintiff in a nearly identical lawsuit pending in Alabama’s lower courts. His deciding vote, this Court surmised, “undoubtedly ‘raised the stakes’ ” for the insurance defendant in the justice’s suit. 475 U.S., at 823–824.

The Court stressed that it was “not required to decide whether in fact [the justice] was influenced.” The proper constitutional inquiry is “whether sitting on the case then before the Supreme Court of Alabama ‘ “would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.” ’ ” The Court underscored that “what degree or kind of interest is sufficient to disqualify a judge from sitting ‘cannot be defined with precision.’ ” In the Court’s view, however, it was important that the test have an objective component.

The *Lavoie* Court proceeded to distinguish the state-court justice’s particular interest in the case, which required recusal, from interests that were not a constitutional concern. For instance, “while [the other] justices might conceivably have had a slight pecuniary interest” due to their potential membership in a class-action suit against their own insurance companies, that interest is “ ‘too remote and insubstantial to violate the constitutional constraints.’ ”

B

The second instance requiring recusal that was not discussed at common law emerged in the criminal contempt context, where a judge had no pecuniary interest in the case but was challenged because of a conflict arising from his participation in an earlier proceeding. This Court

characterized that first proceeding (perhaps pejoratively) as a “ ‘one-man grand jury.’ ” *Murchison*, 349 U.S., at 133.

In that first proceeding, and as provided by state law, a judge examined witnesses to determine whether criminal charges should be brought. The judge called the two petitioners before him. One petitioner answered questions, but the judge found him untruthful and charged him with perjury. The second declined to answer on the ground that he did not have counsel with him, as state law seemed to permit. The judge charged him with contempt. The judge proceeded to try and convict both petitioners.

This Court set aside the convictions on grounds that the judge had a conflict of interest at the trial stage because of his earlier participation followed by his decision to charge them. The Due Process Clause required disqualification. The Court recited the general rule that “no man can be a judge in his own case,” adding that “no man is permitted to try cases where he has an interest in the outcome.” It noted that the disqualifying criteria “cannot be defined with precision. Circumstances and relationships must be considered.” These circumstances and the prior relationship required recusal: “Having been a part of [the one-man grand jury] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.” That is because “[a]s a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his ‘grand-jury’ secret session.”

The *Murchison* Court was careful to distinguish the circumstances and the relationship from those where the Constitution would not require recusal. It noted that the single-judge grand jury is “more a part of the accusatory process than an ordinary lay grand juror,” and that “adjudication by a trial judge of a contempt committed in [a judge’s] presence in open court cannot be likened to the proceedings here.” The judge’s prior relationship with the defendant, as well as the information acquired from the prior proceeding, was of critical import.

Following *Murchison* the Court held in *Mayberry v. Pennsylvania*, 400 U.S. 455, 466, “that by reason of the Due Process Clause of the Fourteenth Amendment a defendant in criminal contempt proceedings should be given a public trial before a judge other than the one reviled by the contemnor.” The Court reiterated that this rule rests on the relationship between the judge and the defendant: “[A] judge, vilified as was this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication.”

Again, the Court considered the specific circumstances presented by the case. It noted that “not every attack on a judge ... disqualifies him from sitting.” The Court distinguished the case from *Ungar v. Sarafite*, 376 U.S. 575 (1964), in which the Court had “ruled that a lawyer’s challenge, though ‘disruptive, recalcitrant and disagreeable commentary,’ was still not ‘an insulting attack

upon the integrity of the judge carrying such potential for bias as to require disqualification.’ ” The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is “likely” to be neutral, or whether there is an unconstitutional “potential for bias.”

III

Based on the principles described in these cases we turn to the issue before us. This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.

Caperton contends that Blankenship’s pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias. Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected. That temptation, Caperton claims, is as strong and inherent in human nature as was the conflict the Court confronted in *Tumey* and *Monroeville* when a mayor-judge (or the city) benefited financially from a defendant’s conviction, as well as the conflict identified in *Murchison* and *Mayberry* when a judge was the object of a defendant’s contempt.

Justice Benjamin was careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order. In four separate opinions issued during the course of the appeal, he explained why no actual bias had been established. He found no basis for recusal because Caperton failed to provide “objective evidence” or “objective information,” but merely “subjective belief” of bias. Nor could anyone “point to any actual conduct or activity on [his] part which could be termed ‘improper.’ ” In other words, based on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.

Following accepted principles of our legal tradition respecting the proper performance of judicial functions, judges often inquire into their subjective motives and purposes in the ordinary course of deciding a case. This does not mean the inquiry is a simple one. “The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be farther from the truth.” B. Cardozo, *The Nature of the Judicial Process* 9 (1921).

The judge inquires into reasons that seem to be leading to a particular result. Precedent and *stare decisis* and the text and purpose of the law and the Constitution; logic and scholarship and experience and common sense; and fairness and disinterest and neutrality are among the factors at work. To bring coherence to the process, and to seek respect for the resulting judgment, judges often explain the reasons for their conclusions and rulings. There are instances when the

introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work. If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case.

The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

We turn to the influence at issue in this case. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case. Blankenship contributed some \$3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. Caperton claims Blankenship spent \$1 million more than the total amount spent by the campaign committees of both candidates combined.

Massey responds that Blankenship's support, while significant, did not cause Benjamin's victory. In the end the people of West Virginia elected him, and they did so based on many reasons other than Blankenship's efforts. Massey points out that every major state newspaper, but one, endorsed Benjamin. It also contends that then-Justice McGraw cost himself the election by giving a speech during the campaign, a speech the opposition seized upon for its own advantage.

Justice Benjamin raised similar arguments. He asserted that “the outcome of the 2004 election was due primarily to [his own] campaign’s message,” as well as McGraw’s “devastat[ing]” speech in which he “made a number of controversial claims which became a matter of statewide discussion in the media, on the internet, and elsewhere.”

Whether Blankenship’s campaign contributions were a necessary and sufficient cause of Benjamin’s victory is not the proper inquiry. Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion. This is particularly true where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias. Due process requires an objective inquiry into whether the contributor’s influence on the election under all the circumstances “would offer a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.” In an election decided by fewer than 50,000 votes (382,036 to 334,301), Blankenship’s campaign contributions—in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election—had a significant and disproportionate influence on the electoral outcome. And the risk that Blankenship’s influence engendered actual bias is sufficiently substantial that it “must be forbidden if the guarantee of due process is to be adequately implemented.”

The temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice. The \$50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor’s company \$50 million. Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship’s extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin’s recusal.

Justice Benjamin did undertake an extensive search for actual bias. But, as we have indicated, that is just one step in the judicial process; objective standards may also require recusal whether or not actual bias exists or can be proved. Due process “may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process. We find that Blankenship’s significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—“

‘ “offer[s] a possible temptation to the average ... judge to ... lead him not to hold the balance nice, clear and true.” ’ On these extreme facts the probability of actual bias rises to an unconstitutional level.

Chief Justice Roberts, with whom Justice Scalia, Justice Thomas, and Justice Alito join, dissenting.

I, of course, share the majority’s sincere concerns about the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such. But I fear that the Court’s decision will undermine rather than promote these values.

Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or the appearance of bias were never a basis for disqualification, either at common law or under our constitutional precedents. Those issues were instead addressed by legislation or court rules.

Today, however, the Court enlists the Due Process Clause to overturn a judge’s failure to recuse because of a “probability of bias.” Unlike the established grounds for disqualification, a “probability of bias” cannot be defined in any limited way. The Court’s new “rule” provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.

Don Blankenship ran for election to the United States, but was defeated in the Republican Party primary during the summer of 2018.

E. Activities of Judges Who Become Candidates for Nonjudicial Office

In a requirement that is sometimes colloquially referred to as “resign to run,” judges who become candidates for a nonjudicial elective office are required to resign their judicial offices in order to do so. Judges are not required to resign from their positions in order to be considered for a nonjudicial appointed office.⁵⁵

IV. Review Questions

There is a [CALI Lesson](#) available with multiple choice questions that review the materials covered in this chapter.

⁵⁵ ABA, Model Code of Judicial Conduct Rule 4.5.