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## JUDICIAL ETHICS: THE LESS-OFTEN ASKED QUESTIONS

Andrew L. Kaufman\*

*Abstract:* Judicial ethics is a topic of increasing interest to the public, the bar, and the judiciary; only recently has the body of substantive law regarding judicial behavior begun to take shape. This essay explores the less developed issues of *ex parte* communication by judges, activities of judges' spouses, the obligation of judges to report attorney disciplinary violations, and extrajudicial comments by judges about legal matters. The Author analyzes the positions on these issues of the ABA Code of Judicial Conduct, the Judicial Conference of the United States' Code of Conduct for United States Judges, and the Discussion Draft of Draft Revisions to the ABA Code of Judicial Conduct, and offers his own view of the appropriate standards for each.

*Editor's Note:* An earlier version of the following essay was delivered as a talk at the Spring Symposium of the United States Court of Appeals for the Ninth Circuit, held at Blaine, Washington, on April 21 and 23, 1988. The topics discussed were based upon questions regarding judicial ethics submitted to the author by individual Ninth Circuit judges. The talk generated a lively exchange of ideas at the symposium, ideas that have been incorporated into the essay that appears below. Although the author refers primarily to federal appellate judges, the essay is equally relevant to state appellate judges and to federal and state trial judges.

I have selected from the menu of questions concerning judicial ethics the ones that have not been much discussed but that seem to me to be highly relevant for federal appellate judges and, indeed, for all judges. I have therefore ignored much-discussed questions relating to disqualification and financial interests of judges.<sup>1</sup>

My topics are the following: *ex parte* communication by judges with others about pending or impending matters; permissible activities of judges' spouses; the obligation of judges to report disciplinary violations by lawyers to the appropriate disciplinary authorities; and extrajudicial comments by judges about legal matters.

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1. See Lubet, *Regulation of Judges' Business and Financial Activities*, 37 EMORY L.J. 1 (1988); Bloom, *Judicial Bias and Financial Interest as Grounds for Disqualification of Federal Judges*, 35 CASE W.L. REV. 662 (1985).

## I. THE GROWING FIELD OF JUDICIAL ETHICS

When I first began teaching the subject of professional responsibility over 20 years ago, the subject of judicial ethics was of little concern, either to judges, academics, the profession generally, or even to those special critics, the newspapers. There were occasional episodes that produced comment—a public squabble between Justices Jackson and Black over the propriety of Justice Black sitting in a case argued by his former law partner,<sup>2</sup> or Justice Roberts serving as a member of the Pearl Harbor Commission,<sup>3</sup> or the charges of bribery against Judge Manton of the Second Circuit and Judge Davis of the Third Circuit<sup>4</sup>—but they were noteworthy because they were so occasional. Most judges, like most lawyers, appeared to believe they had their ethics well in hand.

Things are quite different today. Questions of judicial ethics have followed questions of professional ethics generally in becoming a staple of professional life. There is, however, one major difference between lawyers' ethics and judges' ethics. There is a substantial amount of substantive law relating to the former, and the possibility of sanctions for violation of that law has become quite real. Not only are there motions to disqualify lawyers from the representation of clients but there is also an increasing possibility of professional discipline, malpractice suits by clients, or even suits by third parties. A lawyer's ethics also may come under scrutiny in the event of appointment to public office, especially judicial office.

The same extensive body of sanctions does not exist with respect to judicial conduct. Occasionally, judges are disqualified from sitting in particular cases; less frequently, judges are disciplined or even removed from the bench; and rarely, judicial behavior is questioned in a confirmation hearing when a judge is promoted. Nevertheless, in recent years, especially since the adoption of the Code of Conduct for United States Judges and the Code of Judicial Conduct for state judges,<sup>5</sup> a body of case law and advisory opinions has developed sufficiently to delineate a body of substantive law of judicial ethics. One

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2. A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW 640-645 (1956).

3. *Id.* at 707.

4. J. BORKIN, THE CORRUPT JUDGE 23-82 (1962); S. PRESSER, STUDIES IN THE HISTORY OF THE UNITED STATES COURTS OF THE THIRD CIRCUIT 171 (1982).

5. The Code of Conduct for United States Judges was adopted in 1973 by the Judicial Conference of the United States and applies to all federal judges except Supreme Court Justices. It is nearly identical to the Code of Judicial Conduct, which was prepared by the American Bar Association. See Comment, *Protecting the Appearance of Judicial Impartiality in the Face of Law Clerk Employment Negotiations*, 62 WASH. L. REV. 813, 816 n.29 (1987). The latter has been adopted, albeit with some modifications, by all states and the District of Columbia except

possible explanation for the development of this substantive law is that lawyers have begun to use motions to disqualify judges in the same way that they sometimes use motions to disqualify opposing counsel: as matters of strategy to disqualify someone perceived to be unsympathetic to the client's cause.<sup>6</sup> While there may be some truth to that observation, I think that it is not a major reason for the growing importance of the subject of judicial ethics.

A more persuasive explanation sees development in the field of judicial ethics as part of the ever-increasing focus in our society upon the conduct of our public officials. Watergate certainly ushered in a new era, one that shows little sign of waning. To be in public life is to live under a microscope. Although judicial business is shielded in part by the confidentiality of court proceedings, that has not protected judges completely from the scrutiny that must be endured by other public officials. Indeed, the very confidentiality that judges enjoy has seemed to some to justify, even to require, greater scrutiny of their conduct to assure or to ascertain the purity of the process.

There is yet a third explanation that needs to be explored. Although interest in how law is made has waxed and waned at various times in the history of Anglo-American law, judges and students of law have known for a very long time that there is an element of policymaking that necessarily inheres in judicial decisionmaking. The extent of policymaking has been a subject of debate, but rhetoric and polemic aside, the necessity for judges to exercise some kind of judgment has been generally accepted and recognized. The Legal Realists of the 1920s and 1930s highlighted this insight and sought to raise it to a higher degree of consciousness both in judges and the public generally. Insofar as the public was concerned, however, they did not succeed very notably.

In most recent years, however, a judiciary that has been increasingly and more noticeably activist and creative—and not just in constitutional law matters—has caused more attention to be focused on judges. The attention has been heightened by the very public efforts of academic legal theorists. Both those who have urged the importance of economic models in shaping law and those who, coming from a very

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Montana, Rhode Island, and Wisconsin. Luby, *Professor Polonius Advises Judge Laertes: Rules, Good Taste and the Scope of Public Comment*, 2 GEO. J. LEGAL ETHICS 665, 673 n.42 (1989). A committee of the American Bar Association is working on a revision of the Code of Judicial Conduct and has produced a Discussion Draft, dated May 1, 1989 (hereinafter ABA Discussion Draft).

6. See *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307 (2d Cir. 1988), *reh'g denied*, 869 F.2d 116 (1989) (where the problem is discussed).

different direction, have described judicial decisionmaking as characterized by extreme indeterminacy of principle and by extreme manipulability of result have portrayed judges as possessed of power to shape law more or less (and mostly more) in terms of personal preference. One fallout from these views of judicial decisionmaking has been an increase in concern about the ethics of those who are perceived as possessing such enormous power.

Indeed, the basic rule of the Code of Conduct, the one to which all other rules are mere commentary, reflects this concern: judges should avoid not only impropriety but also the appearance of impropriety in all things relating to their office.<sup>7</sup> A similar canon appeared in the older Model Code of Professional Responsibility governing lawyers' conduct, and many courts still rely heavily on that notion in assessing the propriety of particular conduct.<sup>8</sup> In analyzing the use of that notion, I usually tell my students that most of the time the phrase "appearance of impropriety" is a substitute for thought and close analysis. In most cases, what is usually at stake is a lawyer's responsibility to a particular person, and a court ought to be able to supply a more specific reason for disapproving lawyers' conduct than something called the appearance of impropriety. The only exception I make is when the lawyer is a public lawyer. There, appearances do count, because one responsibility of government lawyers is to the citizenry at large. In that situation, it is permissible to talk of an appearance of impropriety so long as we are told why the mythical "reasonable person" ought to be concerned about the lawyer's conduct.

The same justification for talking about an appearance of impropriety exists when the conduct is that of a judge. Judges owe responsibilities to a wider circle than just the parties and their counsel in the particular case being decided. What we call "the public" ought to be concerned that every case be, and be seen to be, fairly decided. That is the basis not only of the Code of Conduct for United States Judges,<sup>9</sup> but also of 28 U.S.C. section 455(a), which prescribes disqualification in any case in which the impartiality of a judge "might reasonably be questioned." The key of course is the word "reasonably," which provides very little guidance in any particular case. As with other bodies

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7. Canon 2 of the Code of Conduct for United States Judges is headed: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities."

8. Canon 9 of the Model Code of Professional Responsibility, which is still in force in a significant minority of states, is headed: "A Lawyer Should Avoid Even the Appearance of Impropriety." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1981), *reprinted in* T. MORGAN & R. ROTUNDA, 1988 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 66 (1988).

9. *See supra* note 5.

of law where a similar concept obtains, however, the slow process of case-by-case adjudication in courts and advisory committees has begun to build a body of substantive law.

For federal judges, a major source of substantive law is found in the body of advisory opinions promulgated by the Committee on Codes of Conduct ("Advisory Committee"), a committee of federal judges appointed by the Chief Justice of the United States at the request of the Judicial Conference. Its principal task is to give advice to federal judges on matters of judicial ethics. It does so by means of published and unpublished Advisory Opinions.<sup>10</sup> There are 82 Advisory Opinions at last count, and Opinion 62 summarizes all the Advisory Opinions, including many unpublished Opinions, between 1970 and mid-1979 that deal with disqualification and with participation in non-judicial activities. An amazing variety of subject matter has been covered by the Advisory Committee. Moreover, since the earlier work of the ABA provided the basis for the federal Code of Conduct that was approved by the Judicial Conference of the United States, no judge should neglect to keep abreast of the work of the ABA Committee that is currently revising the Code of Judicial Conduct.<sup>11</sup> It is no longer true that one can say, "I am ethical; I don't need to concern myself with what the committee is doing." The ABA committee will doubtless be considering matters that lie fairly close to the daily routine of judges' work. It is not too strong to say that judges who ignore that Committee's activities will do so at their peril.

## II. *EX PARTE* COMMUNICATION

The issue with respect to *ex parte* communication involves the permissible range of consultation by judges on the merits, or on procedures affecting the merits, of pending matters with others: law teachers; judges of other courts, including state courts; and judges of one's own court. The Code of Conduct tells judges not to initiate or consider *ex parte* communication, except as authorized by law.<sup>12</sup> The

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10. The "published" Advisory Opinions were circulated to federal judges but they have only recently been made public. They are available from the Administrative Office of the United States Courts but have not otherwise been published.

11. See *supra* note 5.

12. See *supra* note 5. Canon 3(A)(4) of the Code of Conduct for United States Judges provides:

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* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of

Commentary to the Canon is quite explicit that the prohibition includes law teachers and excludes other judges and court personnel whose function is to assist judges in their decisionmaking.

Eighteen years ago as a member of a committee designed to assess the ABA's Code of Judicial Conduct, I fought the prohibition against consultation with law teachers on the ground that, given the pressure on judges, they were entitled to whatever assistance they could get from academics.<sup>13</sup> Since then, I have changed my mind about the desirability of permitting such consultation for three reasons. Quick, offhand advice from law teachers, who may appear to be more informed about a precise question than they really are, is much too casual. Moreover, it is given without the responsible frame of mind that comes from having to cast a vote. Furthermore, so many law teachers are now engaged in outside activities, either for profit or in a nonprofit but partisan fashion, that their advice may well be affected by quite specific interest in ways that will not be known to an inquiring judge. I would therefore leave the prohibition in place. Indeed, I would do more than that. I would make the prohibition even more explicit, because I am continuously surprised at how often it is violated by federal and state judges alike, either directly or via their law clerks.<sup>14</sup>

*Ex parte* communication with other judges is another matter. The purpose of the prohibition is to make sure that parties who appear before a judge have access to the relevant materials on which a judge may rely. Despite the language in the Commentary to Canon 3(A)(4) that judges are not precluded from talking with other judges, I simply cannot believe that can be taken literally. In his published notes, Professor Thode, the Reporter for the ABA Code of Judicial Conduct, states that this exception was recognized as falling within the "authorized by law" language of the Code.<sup>15</sup> But despite Professor Thode's comments, it can hardly be "authorized by law" for a federal judge to talk about a pending matter with a state court judge. There is a formal

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the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

13. Weckstein, *Introductory Observations on the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 785, 788 (1972) (summarizing my views).

14. I am referring here to explicit conversation about the merits of specific cases, not general inquiries for bibliographic assistance with respect to general subject areas. As to the latter, I think no general statements of approval or disapproval may be made. Some inquiries may be so general as to raise no question; others may be so specific as to fall clearly within the rules.

15. E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 53 (1973). The provisions of Canon 3(A)(4) of the ABA's Code of Judicial Conduct and the Code of Conduct for United States Judges are identical.

procedure for certification of questions when a federal judge needs advice about matters of state law. That procedure avoids the too-casual giving of an opinion that is one problem when talking with a judge of another jurisdiction. Moreover, is it “authorized by law” for judges to talk with judges on potential reviewing courts—for a federal district judge in California, for example, to talk with a Ninth Circuit judge? I would think not, even though we know that this was occasionally done even by Supreme Court justices in the nineteenth century.<sup>16</sup> Such consultation has something of the flavor of obtaining an advisory opinion. Likewise, it seems difficult to conceive of a discussion between a district judge in California and a United States Court of Appeals judge in New York as coming within the notion of “authorized by law” when the jurisdiction of the two judges is not coextensive.

In my view, the hardest questions relate to federal judges consulting with other federal judges on the same court. A narrow view might well restrict judges to talking only with other judges who have some responsibility with respect to the pending matter, that is, members of the panel to whom the case is assigned. The only case I am aware of that has discussed the matter takes a different view. In *People v. Hernandez*,<sup>17</sup> a sentencing judge in California to whom a particular case had been cited consulted with the sentencing judge in the cited case about the circumstances of that case and about that judge’s understanding of the meaning of the reviewing court’s opinion. The Court of Appeals treated this consultation as entirely proper. Interestingly, the court did not simply say that consultation between the judges of the same court, the Superior Court of California, was always permissible. Its grounds were narrower. It took note of the tremendous time and caseload pressure placed on trial judges and stated that the discussion that occurred was well within the bounds of public expectation of judicial conduct. While the appellate court did not explicitly equate its perception of public expectation with what is “authorized by law,” it seemed to do so implicitly. The California court’s resolution of the problem is a reasonable accommodation of the conflicting policies, but a more restrictive approach also would be a reasonable assurance that the judge with responsibility is the one deciding the matter.

If Canon 3(A)(4) is to be understood as limiting discussion to members of the same court, federal judges must still decide whether

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16. See, e.g., the correspondence between Justice Bradley and then-Judge Woods as set forth in 7 FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–68, 186–93 (Part 2 1987), especially 186 n.4, which contains references to other instances of such communication.

17. 160 Cal. App. 3d 725, 206 Cal. Rptr. 843 (1984).



“court” should be viewed geographically or hierarchically. Are all Court of Appeals judges members of the same court, or are only Ninth Circuit judges members of the same court? I would draw the line where the demands of cooperation and collegiality seem the greatest, namely geographically. The theory of the Canon is that judges with the power to decide cases should make up their own minds and *not* engage in secret consultations, at least not outside the deciding court to which the parties have no access.

I also was asked about the ethical propriety of an appellate judge discussing a case with less than the entire panel of appellate judges, especially in *en banc* cases. In extreme situations, as in the United States Supreme Court in the 1930s, such discussions might even develop into defined caucuses meeting in advance of court conferences.<sup>18</sup> While a pre-conference caucus by part of a court seems to defeat the very idea of a collegial process of decisionmaking, no formal code of ethics with which I am familiar has even addressed the problem. Nor do I perceive any realistic way in which it could. It seems almost unthinkable to prevent two judges with chambers side by side in one city from talking about an *en banc* matter unless their colleagues, who are scattered over 1500 miles, are all brought together. Drafting a rule that permits such discussions but prohibits “caucus” discussions seems impractical, if not impossible. Preventing or remedying the breakdown of collegiality that leads to formation of caucuses seems the only practical solution, and that will not always be successful.

While I am on the topic of *ex parte* communication, I have found myself wondering lately about the practice of judges sitting on law school moot court cases involving matters that either are actually pending in their courts or are, to everyone’s knowledge, wending their way through the judicial system toward their courts. Such cases are the staple of the higher moot court rounds that judges are often asked to judge. Is it enough that the judge refrain from announcing a decision on the merits? I think not. Canon 3(A)(4) is directed against “communications concerning a pending or impending proceeding.” The ABA Committee on Ethics and Professional Responsibility has advised that this same Canon prohibits a judge from asking for research help from a criminal law research project of a law school unless the judge complies with the provisions of the rule requiring

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18. See Rauh, *A Personal View of Justice Benjamin N. Cardozo: Recollections of Four Cardozo Law Clerks*, 1 CARDOZO L. REV. 5, 9 (1979).

notice to the parties, a summary of the advice received, and an opportunity to respond.<sup>19</sup> The briefs and arguments in a moot court case are rather similar and seem to come within the letter and spirit of the rule. The same problem also may occur when judges who are also law teachers invite class discussion of cases pending before them.<sup>20</sup>

### III. ACTIVITIES OF JUDGES' SPOUSES

Another matter about which I was asked relates to the obligations put on judges by reason of the activities of their spouses. A major question relates to political activity by a spouse. The federal Advisory Committee has struggled with the difficult question of trying to accommodate its advice to the judge with the legal rights of the spouse in an age where an active life by both spouses outside the home is becoming increasingly common. The shift in position on this point is an interesting sociological commentary on our times.

Canon 7 of the Code of Conduct prohibits a judge from engaging in political activity except for activities relating to improvement of the law, the legal system, and the administration of justice. The Canon, however, refers only to the conduct of judges, not their spouses. Nevertheless, the Advisory Committee in 1977 went beyond Canon 7's specific injunction to state more generally, without any discussion, that although spouses have the legal right to hold office in a political organization and take part in its activities, the judge has the duty to try to dissuade the spouse from doing so.<sup>21</sup> The Advisory Committee went even further in the very same Opinion in the following extraordinary statement:

The spouses of many judges have concluded that the provisions of the Code should apply to them the same as to the judge. Thus, they refrain not only from political activity but from solicitation of funds for charities and churches and from public comment about matters pending before the spouse, to mention but a few of the prohibitions on judges. Many spouses have regarded the applying to them of the ban on solicitation of funds as a 'fringe benefit' which they welcomed. Each spouse has the right to reach his or her own conclusion as to such activity.<sup>22</sup>

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19. ABA Committee on Ethics and Professional Responsibility, Informal Op. 1346 (1975).

20. Canon 3A(4) has been revised somewhat in the ABA Discussion Draft and renumbered as Canon 3B(6). It does not address the problems mentioned in this essay except that the Commentary does require judges to make reasonable efforts to ensure compliance by law clerks and other personnel with Canon 3B(6).

21. Advisory Committee on Judicial Activities Op. 53 (1977).

22. *Id.*

The Committee did not formally adopt this observation as its own advice because it has no authority to impose obligations on spouses. It seems clear, however, that it was not simply making an irrelevant observation; it was holding up its factual observation as a model of good behavior. If my inference is accurate, the Committee went too far. Its authority is to advise those over whom it has jurisdiction. That does not include spouses. If there is to be some regulation of spouses' conduct, it should come from a body with that power.

It would appear that the Committee now agrees. In 1983, it issued a revised opinion that simply states that the canons themselves adequately define the judge's obligation when the spouse engages in political activity and that the committee does not advise spouses.<sup>23</sup> It added that judges should, as far as possible, disassociate themselves from their spouses' political activity, and it gave some examples of how that might be accomplished. It also pointed out that the judge should make the spouse aware that involvement in politics will increase the number of times when the judge will be obliged to recuse. While the Committee did not state the reasons for issuing a revised opinion or specifically disavow any statements in the earlier opinion, the most plausible explanation is that it came to view its indirect attempt to limit spouses' activities as inappropriate. I assume that the same approach would apply to any other, nonpolitical activities of a spouse. Spouses may do what they wish. Spouses' political activity may sometimes lead judges to disqualify themselves in particular matters, but that is a problem that should be left to the spouses to resolve between themselves.<sup>24</sup>

#### IV. JUDICIAL OBLIGATION TO REPORT DISCIPLINARY VIOLATIONS

The next question is a very serious one for federal judges, although it does not arise so frequently for Courts of Appeals judges as it does for district and bankruptcy court judges. It concerns the obligation of judges to report violations of the Code of Conduct. That is one issue on which the Code gives explicit advice. Canon 3(B)(3) states that "a judge should take or initiate appropriate disciplinary measures against

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23. Advisory Committee on Codes of Conduct Revised Advisory Op. 53 (1983).

24. See *In re Gaulkin*, 69 N.J. 185, 351 A.2d 740 (1976), in which the New Jersey Supreme Court reviewed the whole subject and relaxed its former prohibition barring a judge's spouse from engaging in political activity. The Commentary to Canon 5B(1)(a) of the ABA Discussion Draft states: "Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity."

a judge or lawyer for unprofessional conduct of which the judge may become aware.”<sup>25</sup> There are no qualifications, except for the use of the word “should” instead of “shall.” I confess that I do not quite understand the distinction in the judges’ Code of Conduct. In the lawyer’s disciplinary rules,<sup>26</sup> the words are used to differentiate mandatory rules, whose violation may be sanctioned, from hortatory or aspirational rules, whose violation may not. But since there are no sanctions directly linked to the judges’ Code of Conduct—although there is the possibility of disqualification or discipline—the difference between “should” canons and “shall” canons is not entirely clear. But it also is true that since the possibilities of anything that might be called sanctions are so small, that simply increases the obligation on judges to abide by their own self-made rules of conduct.

I start with an observation that I believe to be true but that I cannot prove: federal and state judges, appellate and trial, do not often take or initiate disciplinary measures against lawyers, although recently instances of reporting seem to be increasing. The question is to explain the reluctance of judges to do so. It must be that trial judges and, occasionally, appellate judges see conduct that constitutes a serious violation of the disciplinary rules: lawyers who knowingly conceal from the court precedents that are directly on point; lawyers who knowingly make a false statement of law or fact to the court or engage in conduct that involves dishonesty, misrepresentation, deceit or fraud; and lawyers who engage in illegal conduct involving moral turpitude before the court.

I can only speculate about the reasons that lead courts to pay very little attention to Canon 3(B)(3). Courts are very busy. Focusing on violations by lawyers puts an additional burden on the judicial system, is expensive, and deflects attention from the main business of adjudicating the rights and liabilities of the litigants. Rule 11 of the Federal Rules of Civil Procedure itself has been criticized on those grounds, and the time may not be right to add yet another side issue, another tactic, to distract the court.

There also may be another reason. Judges are lawyers and they may succumb to the same anti-snitch sentiment that has largely nullified the similar obligation to report violations that exists for lawyers in most jurisdictions. There is, however, a big difference between lawyers

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25. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 3(B)(3).

26. The reference is to the Model Code of Professional Responsibility and the Model Rules of Professional Conduct, which provide the basis for most of the substantive law of professional responsibility in this country.

and judges in this regard. In reporting disciplinary violations by lawyers, judges would be enforcing the rules for which they themselves are responsible. By and large, courts have been jealous of their power to regulate the conduct of lawyers in this country and have been unwilling to cede this responsibility to legislatures or to administrative bodies. Courts should not be able to have it both ways. If they are going to maintain responsibility for rules of conduct and their enforcement, then they should be taking the lead in enforcement with respect to violations that occur in front of them. Lawyers can shield themselves to a large extent by taking refuge in the comfort that they do not "know" that a violation has occurred in most cases. Judges should not draw the line so finely with respect to their own rules. They should forward matters for investigation when there is an apparent violation even if they are not absolutely certain and do not have the time or the resources to make a crucial finding of fact.

All this seems apparent simply by reason of the court's rule making power. But the Judicial Conference has imposed an ethical duty on judges in Canon 3(B)(3) to report disciplinary violations of which they become aware. At least in those cases, judges have no excuse for silence. One final reason for such silence that I have not touched upon is that these matters are not high in judges' minds. My purpose in discussing the matter is to raise awareness about this issue.

It is true that the policy and wording of Canon 3(B)(3) raise some problems. The Canon imposes an obligation whenever the judge "becomes aware" of a disciplinary violation. The contrasting provision in the lawyers' professional code imposes an obligation whenever a lawyer has information "clearly establishing" a violation of the disciplinary rules. The different wording justifies an interpretation imposing an obligation on judges whenever a serious question arises in their minds that a violation has occurred. I would not interpret the Canon to make it identical to the very restrictive wording that permits lawyers to avoid a reporting obligation because they are not certain that a violation has occurred.

For one thing, judges ought not to be required to interrupt the business of adjudicating disputes to make the requisite findings of fact regarding disciplinary violations by lawyers when the underlying facts are unclear. Federal judges, especially, may wish to refer such matters to state disciplinary authorities. States are the primary licensing authority. Except where federal courts have adopted their own rules, state law is generally the primary source of the law of professional responsibility. Where the law is unclear, there is even more reason for

federal courts to refer disciplinary matters to the state disciplinary machinery.

This discussion, however, ought to give federal courts some pause with respect to the substantive law of professional responsibility that they apply. In situations where the district court has not by local rule explicitly adopted a state's professional responsibility code as its own, federal courts have tended to follow the most recent code promulgated by the American Bar Association as "a guide." A federal court that follows that route loses one justification for referring a disciplinary matter to the state authorities. A state with a different body of professional responsibility law (usually the older Model Code but perhaps an amended version of the Model Rules) may be reluctant to adjudicate discipline under an unfamiliar body of substantive law.

The ABA Discussion Draft clarifies the judge's obligation but, in my view, it has taken a step in the wrong direction. It provides in Canon 3D:

(1) A judge having knowledge that another judge has committed a violation of this Code should take appropriate action and, if the violation raises a substantial question as to the other judge's fitness for office, shall inform the appropriate authority.

(2) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] should take appropriate action and, if the violation raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate authority.

(3) Acts of a judge in the discharge of disciplinary responsibilities imposed by this section 3D shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge. Note: The rule was changed specifically to require judges to report to a disciplinary authority significant misconduct of lawyers and other judges, thus diminishing the number of instances in which judges take it on themselves to impose sanctions for professional misconduct without such reporting. Another reason for modifying the rule was to encourage judges to take other remedial steps as appropriate, such as referring the judge or lawyer whose conduct is in question to a bar-sponsored substance abuse treatment agency, without precluding judges from imposing sanctions for professional misconduct. The revised rule was designed to reflect the standards for reporting professional misconduct that appear in Rule 8.3 of the ABA Model Rules of Professional Conduct. The new rule also makes provision for judicial immunity in the exercise of reporting professional misconduct, a concept recognized by law. See *Forrester v. White*, 98 L. Ed. 2d 555 (1988) (absolute immunity

for judicial acts, such as acting to disbar lawyer for contempt, but not for administrative acts, such as firing court employee).

The Commentary then underlines the fact that "knowledge" is defined as "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." The proposed Canon's combination of requirements—the state of mind must be "actual knowledge" and the actual knowledge must be of "a violation" of the rules, nothing less—makes it apparent that the language has been carefully designed to exempt judges from any obligation to take action in a great many instances of apparent wrongdoing by both judges and lawyers. They simply will not "know" of "a violation." Such a provision would make a mockery of the judicial claim to authority over the behavior of judges and lawyers. It should not be recommended by the ABA. If recommended, it should not be adopted by the courts.

A concomitant feature of my suggestion that judges take seriously the requirement of initiating disciplinary action against lawyers even if they are not certain that a violation has occurred is that they treat the lawyer fairly when they refer a matter to disciplinary authorities. Judges ought to be careful that they not abuse their power. Public criticism of a lawyer in an opinion in which the court does not undertake the job of fact-finding with all the procedural safeguards involved in a disciplinary proceeding may destroy or severely damage a lawyer's reputation. When the lawyer has had no chance to defend, the mere mention of the fact of reference to disciplinary authorities is problematic, especially if accompanied by an unfavorable characterization of the lawyer's conduct.

A good example of such a situation is *United States v. Ofshe*.<sup>27</sup> A defendant in a federal proceeding in Florida claimed denial of due process by reason of prosecutorial misconduct. The lawyer-author Scott Turow,<sup>28</sup> was then an Assistant United States Attorney in Illinois. While he was investigating the defendant's attorney in connection with "Operation Greylord" (a federal investigation of corruption in Cook County, Illinois courts), the attorney offered to provide information in relation to the drug trade. The result was that without informing the prosecutors in Florida or the court, Mr. Turow arranged to "wire up" the attorney to record conversations with the defendant although he also instructed the attorney not to violate the attorney-client privilege.

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27. 817 F.2d 1508 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 451 (1988).

28. Author of ONE L (1977) and PRESUMED INNOCENT (1987).

Mr. Turow further instructed the attorney to withdraw from representing the defendant once surveillance was completed. No notice of the monitoring was given to defendant. Indeed, the attorney did not move to withdraw until ten months later, and even then, the withdrawal was sealed so that defendant did not discover the reason for nearly a year.

The trial court refused to order dismissal of the indictment and the Court of Appeals affirmed on the ground that the defendant had not demonstrated any prejudice. In a footnote to the published opinion, the court said that, although the conduct of Mr. Turow and of defendant's counsel was not "sufficiently outrageous" to require reversal of the conviction, it was "reprehensible." The court therefore assumed that the district judge would "refer this matter to The Attorney Registration and Disciplinary Commission, 203 N. Wabash, Suite 1900, Chicago, Illinois 60601, for appropriate action."<sup>29</sup> The court did not state why it was not, in view of this conclusion, imposing any discipline itself. Perhaps it thought that procedural fairness necessary to support the imposition of discipline required notice and an evidentiary hearing whose focus would be the lawyer's conduct. Perhaps it thought that a proceeding that had taken place in Florida and had been reviewed in the Eleventh Circuit ought not to be the occasion for discipline of a government lawyer who worked in Illinois and had taken no part in the Florida proceeding, although defendant's counsel, whose conduct also was criticized as reprehensible, had participated in the proceeding.

After the opinion was filed, Mr. Turow moved to have the footnote removed from the opinion. The court wrote a 13-page opinion, denying his motion.<sup>30</sup> It concluded that since the defendant had argued that his conviction should be reversed because the lawyers' conduct had violated his constitutional right to due process, the review process necessarily had focused on the lawyers' conduct. Going beyond its earlier footnote, the court then concluded that Mr. Turow may well have obstructed justice in violation of 18 U.S.C. section 1503. It therefore ordered the clerk to forward its order to the United States Attorney for the Southern District of Florida. Subsequently, a one-page letter from the Public Integrity Section of the Department of Justice announced that there was no evidence that Mr. Turow or his superiors

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29. 817 F.2d at 1516 n.6.

30. *United States v. Ofshe* (11th Cir. 1987) (No. 86-5351) (unpublished).



violated any federal statute.<sup>31</sup> Thereafter, the Supreme Court of Illinois Attorney Registration and Discipline Commission informed Mr. Turow that it had voted to dismiss the investigation.<sup>32</sup>

The Court of Appeals was quite correct in taking so seriously its duty to initiate disciplinary investigations of lawyers' conduct. The issue is a subcategory of the larger question of the stage at which disciplinary authorities should make public the fact that disciplinary proceedings are pending against lawyers or judges. The difference here is that the notice is from the court itself, a body that might, at least in some cases, be taking further action after the disciplinary authorities have acted.

In *Ofshe*, the notice given by the court had the beneficial effect of sending an educational message to lawyers concerning the court's view of the lawyer's conduct. It also had the beneficial effect of assuring the public that the court was doing its duty with respect to required reporting. Those are important considerations. On the other hand, it clearly did serious injury to a lawyer's reputation in a proceeding in which he never appeared as a party.

It is true that the court was required to focus on the lawyer's conduct in connection with the defendant's appeal and it is also probably true that the major damage to the lawyer's reputation came from the court's description and characterization of his conduct rather than from its reference to the disciplinary authorities. It is nevertheless one thing to reach a judgment about the lawyer's conduct for the purpose of dealing with defendant's rights and quite another to link the lawyer so publicly with charges of disciplinary violation when the court was unwilling to undertake the task of disciplinary assessment itself.

The court could certainly have sent a sufficient message to lawyers without the specific reference to possible discipline of this lawyer. The further message regarding discipline would have come later if the disciplinary authorities had found that the lawyer had violated the disciplinary rules. When the state disciplinary authorities decided to dismiss their investigation, however, there was no public notice of that at all. The only item of record is the Court of Appeals' negative comment. Thus, it seems that a court that has the power but is unwilling to undertake the disciplinary process itself, either directly or through a

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31. N.Y. Times, May 1, 1988, § 1, at 38, col. 1. Mr. Turow believes that the finding constitutes a public "vindication." Turow, *Law School v. Reality*, N.Y. Times, Sept. 18, 1988, § 6 (Magazine), at 52, col. 1.

32. Letter from Deborah M. Kennedy, Senior Counsel to the Commission, to Thomas P. Sullivan, attorney for Mr. Turow (Dec. 13, 1988). The letter also noted that the disciplinary investigations are confidential.

master (or other body appointed by it), should be very cautious about the specific comments it makes about discipline.<sup>33</sup>

### V. EXTRAJUDICIAL COMMENTARY

Another question that was put in a variety of ways relates to the propriety of extrajudicial statements by judges on issues of general public interest. As a formal matter, the Code of Conduct tries to walk a fine line between, on the one hand, respecting the needs of judges to exercise their own freedom of speech and (not to put too fine a point on it) to earn additional money and, on the other hand, forbidding judges from engaging in the kind of speech that may lead to reasonable fears of partiality or, ultimately, to disqualification. Canon 4 of the Code of Conduct reflects that tension when it tells judges that, so long as they do not cast doubt on their capacity to decide any issue impartially, they may write and teach about the law, may appear at public hearings before legislative or executive bodies on matters concerning the law or the administration of justice, may consult with such bodies on the latter topic, and may serve on organizations devoted to the improvement of the legal system.<sup>34</sup>

I should interject here that I have been surprised (to use a mild word) at the increasing numbers of articles and speeches by judges, especially Supreme Court Justices, in the past 20 years in which they discuss all sorts of issues that seem likely to come before them and discuss also the views and foibles of their colleagues. There is a difference between exhibiting greater willingness to discuss the business of courts by way of educating the public and engaging in public argument for positions they hold dear. I said above that there is a relation between the perceived power of judges and public scrutiny of the propriety of their activities. There also would seem to be a relation between the willingness of judges to enter into the public fray and the increasing tendency of some academics and some media figures to equate judges with legislators.

The Judicial Conference's Committee on Codes of Conduct has addressed the general permission given by Canon 4 to appear before legislative and executive hearings on matters concerning the law by

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33. *Cf. Beiny v. Wynyard*, 132 A.D.2d 190, 522 N.Y.S.2d 511 (1987), where the court gave public notice of the referral to disciplinary authorities not only of the law firm's conduct in improperly obtaining confidential information but also of the allegation in a newspaper report that a member of the law firm had assaulted another attorney in the Surrogate's Court at a conference in the proceeding.

34. CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 4. The ABA Discussion Draft reflects the same tension in almost identical words in Canon 4A(1), 4B, and 4C(1).

reading that permission narrowly to include only situations where the matter deserves the comment of a judge in his or her professional capacity.<sup>35</sup> Its explanation is that legislation involving important political and social issues may well spawn litigation likely to come before the judge. That explanation implies that a judge who has urged the legislature or executive to follow a particular course of action with respect to a particular issue has cast doubt on his or her ability to decide impartially a case involving such an issue. If that is the case, why does the same problem not exist when a judge makes a speech on the same subject matter although not in a legislative or judicial forum?

There is enormous tension between enforcing the ideal of impartiality and disabling judges from effective judicial service. Many judges have taken positions before appointment, either in their capacity as advocates or as citizens, on the general subject matter that will come before them. Those positions were taken without the institutional responsibility that comes with being a judge. Moreover, the judiciary could not function if such prior expressions were a basis for disqualification. Likewise, many judges who have sat on the bench long enough have well established positions on certain issues. When a similar issue arises, a party might reasonably believe such a judge will not approach the issue with the perfect disinterestedness of one considering the issue *de novo*. But we do not expect that kind of disinterestedness in our judges. Indeed, we expect them to develop identifiable positions as a result of their judicial service. On the other hand, Canon 4 would seem clearly to prohibit judges from publicly announcing their views about cases pending before them.

Canon 4 therefore requires the exercise of prudential judgment in interpreting its injunction against engaging in such outside activities that might cause a litigant or the public reasonably to question the judge's impartiality. It certainly is not the development of views on matters that might come before judges that we fear. We want our judges to read, to think, to educate themselves about law in the largest sense. But there is a difference between a private thought and a public speech or published article. Going public requires much more care and responsibility and also may indicate such a desire to persuade others as to bring it within the range of Canon 4's prohibition of speech that casts doubt on the impartiality of the judge.

An early opinion of the federal Advisory Committee resolved the tension inherent in the language and policies of Canon 4 by stating

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35. Advisory Committee on Judicial Activities Advisory Op. 50 (1977).

that a judge should "circumscribe his comments so as to avoid a positive commitment on any legal issue which is likely to arise before him."<sup>36</sup> More recently, however, the Committee has quoted with approval the statement in the Reporter's Notes to the ABA's Code of Judicial Conduct that a "judge may write or lecture on a legal issue, analyzing the present law and its history, its virtues, and its shortcomings; he may commend the present law or propose legal reform without compromising his capacity to decide impartially the very issue in which he has spoken or written."<sup>37</sup>

The Reporter's statement is far too broad, for many such reform proposals may well cast doubt on a judge's impartiality. There is not always such a clear line between expressing willingness to follow present law and urging legislative change in the law. If present law is unclear, an expression of a desirable legislative solution may well appear to signal the judge's view of the desirable judicial solution. Moreover if, as the Committee suggested, a judge ought not urge legislative passage of the Equal Rights Amendment, or, to take another example, if a judge ought not appear before a legislature to urge repeal of capital punishment, then it should not be permissible for a judge to write an article or to give a public talk on the deficiencies of our law with respect to capital punishment. The judge will have sufficient opportunity to express a view when the issue arises, appropriately argued, in a litigated matter. The reasonable public fear regarding the judge's impartiality in reviewing a capital sentence seems equivalent whether the judge appears before a committee or produces a speech or article because in those two situations both the testimony before the committee and the speech or article bespeak a significant commitment to oppose capital punishment.<sup>38</sup>

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36. Interim Advisory Committee on Judicial Activities Advisory Op. 3 (1970).

37. Advisory Committee on Judicial Activities Advisory Op. 55 (1977) (quoting E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 74 (1973)).

38. A closely divided Florida Supreme Court concluded that although a trial judge had come close to the line in writing an article for a church newsletter opposing capital punishment, he had saved himself by making clear that "he would do his duty as a judge and follow the law as written." *In re Gridley*, 417 So. 2d 950, 955 (Fla. 1982). Cf. *In re Mandeville*, 144 Vt. 608, 481 A.2d 1048, 1049 (1984) (imposing discipline on a trial judge who stated in a public interview that defendants who pleaded guilty would be treated more leniently than those who went to trial). See generally Lubet, *Judicial Ethics and Private Lives*, 79 NW. U.L. REV. 983, 996 (1985).

Since this lecture was delivered, the subject of extrajudicial speech has been canvassed extensively in Ross, *Extrajudicial Speech: Charting the Boundaries of Propriety*, 2 GEO. J. LEGAL ETHICS 589 (1989). Professor Ross expresses a number of the same reservations about extrajudicial speech as are contained in the present article. A response by Professor Lubet argues against an expansive notion of extrajudicial silence. Lubet, *supra* note 5.

The failure of the Advisory Committee to repeat the Canon's caveat in its most recent opinion may be due to a fear that an expansive reading of the prohibition would make it difficult for judges to engage in law school teaching, a practice sanctioned by long history and by virtual economic necessity for some judges if they are to remain on the bench. But one quality teaching may have is that it is exploratory, tentative, informal, and impermanent. Such teaching is different from the typical public speech or article. On the other hand, teaching may be just as authoritative as a speech or article. Such teaching carries the same danger of compromising the appearance of impartiality. If I had to engage in prudential line drawing, I would interpret the Canon as permitting the former, but not the latter, style of teaching. While that may be "too nice" a distinction, the language of Canon 4 seems to contemplate just that kind of fine line drawing.

Thus, if I had to choose between the phrasing of Advisory Opinion No. 3 and that of Advisory Opinion No. 55, I would choose the former, more restrictive statement. One reason for that choice is that, except for egregious conduct, judges enjoy what lawyers often say they themselves enjoy but which lawyers really have less and less these days—a self-regulating profession. The critical thing about such a status is that it is regarded quite jealously by those who do not enjoy it. If judges are perceived as abusing that status, it will come under fire and they may lose it.

The second reason for my restrictive attitude toward public speech by judges is that, notwithstanding the policymaking function of the judiciary, there is still a big difference between judges and legislators. Reflecting that difference, our tradition has been that most judges, most of the time, have waited for cases to present issues to them before speaking out. I hope that today's judges will pause before undertaking extrajudicial activities that narrow that difference. If the differences between judges and legislators are eliminated one by one, we may some day find that we have eroded the essential nature of the separation of powers between our legislative and judicial branches that has been such a distinctive feature of our society.<sup>39</sup>

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39. I have spelled out my views on this subject in Kaufman, *Judges or Scholars: To Whom Shall We Look for our Constitutional Law?*, 37 J. LEG. ED. 184 (1987).