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Canon 2 of the Code of Judicial Conduct

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CANON 2 OF THE CODE OF JUDICIAL CONDUCT

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I. INTRODUCTION

The American Bar Association's Code of Judicial Conduct[1] ("Code") provides direction on the manner in which judges should conduct themselves.[2] Most states either have adopted the 1990 Code[3] or have retained the 1972 Code. Depending upon the language chosen by each state, the Code's Canons may be rules to be enforced, or they may be aspirational in character.[4]

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1. In 1924, the American Bar Association House of Delegates adopted 34 Canons of Judicial Ethics. During the next 50 years, a majority adopted the Canons either *verbatim* or in an amended version. In 1969, the President of the American Bar Association appointed California Chief Justice Roger Traynor to chair a Special Committee on Standards of Judicial Conduct to reexamine the Canons. The Committee spent three years reorganizing, revising, and rewriting the Canons to establish higher and more explicit standards of judicial conduct. The American Bar Association House of Delegates adopted the final product of the Committee at its annual meeting in 1972. In 1989, the ABA's Standing Committee on Ethics and Professional Responsibility published a final draft of a revised Model Code of Judicial Conduct, which the ABA House of Delegates adopted in 1990. In many ways, the 1990 Model Code contains the basic standards of the 1972 Code. However, the 1990 Model Code is written in gender neutral language and, for purposes of clarity, frequently uses the term "shall" rather than "should." Other significant additions of form include a preamble and a section on terminology.

2. The Preamble to the 1990 Code states:

> The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing high standards of judicial and personal conduct.

MODEL CODE OF JUDICIAL CONDUCT Preamble (1990).

3. As of early 1996, the following jurisdictions have adopted all or part of the 1990 Model Code: United States Judicial Conference, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, West Virginia, Washington, and Wyoming.

4. According to the Preamble of the 1990 Code:

> When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

The objective of the Code is to maintain both the reality of judicial integrity and the appearance of that reality. The public has confidence in judges who show character, impartiality, and diligence. For each judge, the Code serves as a guide for self-assessment. For judges reviewing the propriety of other judges' behavior, the Code may function as the support for imposing discipline or the basis for review of a trial court's judgment.[5] In either situation, the primary purpose of the Code is to protect the public rather than to discipline an individual judge.

Canon 2 of the Code instructs a judge to avoid impropriety and the appearance of impropriety in all of the judge's activities. Although the language of Canon 2 and its subparts[6] is more general than most of the other canons, it has withstood first amendment overbreadth[7] and due process void-for-vagueness[8] challenges. Judicial ignorance of this Canon or any of its subparts is no defense or excuse.[9]

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5. The Preamble to the 1990 Code further states:

> The Code is designed to provide guidance to judges . . . and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. . . .
>
> The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

Id.

6. The complete text of Canon 2 of the 1990 Model Code of Judicial Conduct follows. A discussion about the adoption of each subpart, its Commentary, and the case law applying Canon 2 is located in the text to notes *infra*.

> Canon 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities.
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> A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. 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. A judge shall not testify voluntarily as a character witness.
>
> C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

7. *See, e.g.*, Halleck v. Berliner, 427 F. Supp. 1225, 1239-40 (D.D.C. 1977); *In re* Conduct of Roth, 645 P.2d 1064, 1069-70 (Or. 1982).

8. *Id.*

9. *See, e.g.*, Matter of Jenkins, 465 N.W.2d 317, 321 (Mich. 1991), (judge's "professed ignorance" of prohibition on ex parte communications bolstered the conclusion that judge had

Regrettably, judicial discussions of Canon 2 issues frequently devote more attention to the appropriate sanction for the judge's misconduct than to the question of whether a violation occurred. Reviewing courts rarely define or analyze the relation between the applicable ethical standard and the offending conduct. Worse, they often include Canon 2's general language about the appearance of impropriety when that standard is not the stated basis for the disciplinary charges against the judge or for the appeal of a civil or criminal judgment.

This Article focuses on the diverse parts of Canon 2 and the cases in which courts have explicitly applied those standards. Each section compares the language of the 1972 and 1990 Codes, and the extent to which the states have modified the Code's black-letter language or its Commentary.[10] Following the exposition of Code language, the Article discusses and analyzes the judicial decisions that contravene the norm of Canon 2 judicial decisionmaking.

II. AVOIDING IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

A. The Code and Its Commentary

Canon 2 of the 1990 Model Code of Judicial Conduct states: "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities."[11] In 1990, the ABA amended both the title of Canon 2 and its black-letter principles as part of the process of replacing the 1972 ABA Code. To enhance the clarity of the new Code's provisions, the language of Canon 2 is mandatory and gender neutral, whereas the 1972 Code's language was aspirational and hortatory and used only masculine pronouns. Following Canon 2 and its black-

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shown "fundamental disregard for the Code"); *In re* Collins, 524 So. 2d 553, 557 (Miss. 1987) ("claim of ignorance . . . as defense to judicial misconduct charge is tantamount to admission" of lack of qualification for office); *In re* Wilkes, 403 So. 2d 35, 42 (La. 1981) (ignorance of Code is "no defense so long as [judge] . . . intentionally or consciously committed acts" for which judicial discipline is sought).

10. The Preamble to the 1990 Code states that the "Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules." MODEL CODE OF JUDICIAL CONDUCT Preamble (1990).

11. Several states have modified the language of the 1972 heading—"A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities"—to make it gender neutral. *See, e.g.*, Connecticut, Louisiana, Missouri, New Jersey, and Washington. Idaho does not use any heading. Maryland shortened the heading to "Avoidance of Impropriety and the Appearance of Impropriety." MD. CT. R. 1231, CODE OF JUDICIAL CONDUCT Canon 2 (1994).

letter principles, the 1972 Code provided three paragraphs of Commentary. Although most states ratified the 1972 version of the Commentary as part of the Code, ten states chose not to adopt any portion of the Commentary.[12] The Commentary to the 1990 version of Canon 2 is more detailed than the 1972 version.[13]

The 1990 Commentary to Canon 2A consists of two paragraphs. The first paragraph is a gender neutral version of the first paragraph to the 1972 version of Canon 2.[14] The second paragraph amplifies the statements of the first paragraph and defends the necessity for generalized standards. More important, the language offers guidance to litigators and judges as well as to lay members of judicial disciplinary bodies regarding the meaning of Canon 2's leading terms of art: the scope of violations comprising an actual impropriety and the type of conduct constituting the appearance of impropriety.[15]

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12. These states are Alaska, Idaho, Iowa, Kentucky, Louisiana, New Hampshire, North Carolina, Oklahoma, Vermont, and Virginia.

13. The format also differs, with Commentary following each of the three black-letter Canons instead of being located at the end of all the black-letter language.

Most states ratifying the 1990 black-letter principles also adopted the 1990 Commentary, leaving several states, as with the 1972 Code, electing not to adopt any portion of the Commentary. Iowa, Maine, Massachusetts, Michigan, Minnesota, Texas, and Utah have not adopted any portion of the 1990 Commentary, but Maine and Michigan have incorporated part of the Commentary into its black-letter principles. MAINE CODE OF JUDICIAL CONDUCT Canon 2 (1994); MICHIGAN CODE OF JUDICIAL CONDUCT Canon 2 (1994).

14. *See infra* note 28.

15. The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 2A, at paragraph 2 (1990). *See infra* notes 36 and 37.

The Delaware and Florida Codes add to the phrase "whether the conduct would create in reasonable minds" the following: "with knowledge of all the relevant circumstances that a reasonable inquiry would disclose." In addition, the Delaware Code adds the following sentence: "A judge does not violate this Code merely because a personal or judicial decision of the judge may be erroneous." DELAWARE CODE OF JUDICIAL CONDUCT Commentary to Canon 2A, at paragraph 2 (1995); FLORIDA CODE OF JUDICIAL CONDUCT Commentary to Canon 2A, at paragraph 2 (1995).

New Jersey omits the second paragraph of the Canon 2 Commentary.

The ABA also rejected several paragraphs of Commentary that were part of an earlier draft. Those paragraphs included the following ideas: 1) acts may be improper, regardless of whether they violated a specific provision of the Code, e.g., a violation of "clear and accepted

B. Case Law and Analysis

Courts frequently refer to Canon 2 when deciding whether a judge has violated the Code. When Canon 2A, Canon 2B, or other portions of the Code are the basis for allegations of improper behavior, courts often rely on the title of Canon 2 itself as an alternative ground for discipline. In other words, even if the judge's actions did not violate another part of the Code, the conduct was improper, or at least *appears* to have been improper.[16] Controversy arises when courts attempt to interpret the admonition of Canon 2 as a rule of discipline by itself. What constitutes a punishable "impropriety" or "appearance of impropriety?"

> Propriety . . . is often in the eye of the beholder. A given individual will find conduct to be within or beyond the bounds of propriety to the extent the conduct comports with that individual's own highly subjective views of propriety.
>
> In many instances society shares common values and a common sense of "propriety." In such cases, the limits of "propriety" may be readily apparent. Nonetheless, disciplinary rules expressed in terms of "propriety" risk mercurial existence rising and falling with the temper of the moment.[17]

Defining the scope of "impropriety" has been a threshold issue for judges who must assess their own conduct or who must rule on the propriety of conduct by other judges. Are judges subject to discipline under Canon 2 for personal as well as professional misbehavior? Can they be sanctioned for deportment that is neither tortious nor crimi-

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community standards"; and 2) a list of examples of apparent impropriety that, though not "a per se violation of the law or [Code]," serve to bring the judiciary into disrepute.

> Examples of such conduct include uttering racial epithets in or out of court even if no actual bias is shown in judicial decisions; contacting a litigant in a case or matter pending before the court to request a personal favor in another matter; and carrying on business transactions that give the appearance of unfair advantage.

MODEL CODE OF JUDICIAL CONDUCT 7-8 (Discussion Draft 1989).

16. An allegation or concern about the appearance of impropriety does not always lead to a finding of a violation. For example, in Trimble v. State, 871 S.W.2d 562, 567 (Ark. 1994), an appellate court refused to reverse a criminal conviction on the basis that the judge's college age son worked in the prosecutor's office during the time of the trial. While the court agreed "that the appearance generated by the employment of a judge's son at the prosecutor's office is none too good," it found that the summer employment in and of itself did not warrant reversal. *Id.* at 567.

17. Matter of Larsen, 616 A.2d 529, 580-81 (Pa. 1992).

nal?[18] Because the focus of Canon 2's black-letter principles is on the need for public trust in the decency and impartiality of the judiciary, courts have answered each of the two questions in the affirmative. This represents a somewhat broader view than is stated in the Commentary. A judge may be punished for any conduct that legitimately reflects upon the judge's ability to act in an official capacity. While this view is necessarily general, it implicitly rejects the imposition of sanctions merely because the judge is an offensive person but permits sanctions when the conduct was neither criminal nor tortious.[19]

Assuming that the judge's behavior cannot be classified as improper, but nevertheless looks improper, how do courts evaluate an appearance of impropriety?[20] By what or whose standards do courts measure the term "appearance"? As Reporter to the 1972 Code of Judicial Conduct, Professor Thode noted "that despite the generality, an 'impropriety and the appearance of impropriety' standard is necessary."[21] He went on to identify certain forms of proscribed conduct such as "influence peddling," in which "appearance" is often a central part of the substantive evil.[22] Under *ejusdem generis* principles, there is no indication that the "appearance of impropriety" standard should be freely applied. Indeed, lack of specificity as to what conduct makes a judge vulnerable to a charge of appearance of impropriety raises serious due process concerns. Leaving the rules unidentified while expecting them to be observed is bound to burden judges with uncertainty; perhaps what is acceptable today will be deemed aberrant tomorrow. Putting men and

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18. The Code of Judicial Conduct "forbids or requires acts neither forbidden nor required by ordinary citizens, or even attorneys subject to other ethical restrictions." *Id.* at 579. *See* Mississippi Comm'n v. Milling, 651 So. 2d 531 (Miss. 1995) (judge removed for living with person she knew was fugitive from another state and for participating actively in fugitive's case).

19. Matter of Glancey (II), 542 A.2d 1350, 1355-56 (Pa. 1988).

20. Scholars and judges have expressed their views about what constitutes a censurable appearance of impropriety. *See, e.g.*, Steven Lubet, *Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct*, 1986 ARIZ. ST. L. J. 379 (1986); Robert J. Martineau, *Disciplining Judges for Non-Official Conduct: A Survey and Critique of the Law*, 10 U. BALT. L. REV. 225 (1981); William Rehnquist, *Sense and Non-Sense About Judicial Ethics*, 28 THE RECORD 694 (1973).

21. E. THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 49 (1972).

22. *Id.* Another way to characterize this behavior is the appearance of "cronyism" or "judge shopping." *See* In the Matter of Laster, 274 N.W.2d 742, 745 (Mich. 1979) (public reprimand due to judge's grant of many bond remissions originally ordered forfeited).

In addition to the appearance of favoritism, the judge's conduct may suggest the appearance that the judge is trying to hide something. *See, e.g.*, In the Matter of Hendrix, 701 P.2d 841, 845 (Ariz. 1985) (censure of judge, in part because the judge permitted the court reporter to delete certain comments from a trial transcript).

women who have to judge the rights of others under such stress tends to undermine their own sense of worth. "Our legal system should treat those who preside over it with more regard."[23]

The leading view is that a court should review judicial behavior by its appearance "to a reasonable person following review of the totality of the circumstances."[24] Suppose a judge receives a product or service

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23. Spector v. State Comm'n on Judicial Conduct, 418 N.Y.S.2d 565, 571 (1979) (citing FULLER, THE MORALITY OF LAW 26-29, 38-39 (rev. ed. 1969)).

Justice Arthur Goldberg remarked to Congress that the "appearance of impropriety" canon was "unbelievably ambiguous," and that judges "can benefit greatly from having some ground rules against which to measure their conduct . . . particularly . . . in this area of avoiding even the appearance of impropriety." *Nonjudicial Activities of Supreme Court Justices: Hearings on S. 1097 and S. 2109 Before the Subcommittee on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. (1969).

24. Matter of Larsen, 616 A.2d 529, 584 (Pa. 1992) *cert. denied, In re* Larsen, 114 S. Ct. 65 (1993). The ABA refused to adopt as part of the 1990 Commentary to Canon 2 the notion that, "[i]n exercising discretion in his or her personal conduct, a judge should consider the conduct from the perspective of a person who knows only what is apparent." MODEL CODE OF JUDICIAL CONDUCT 7 (Discussion Draft 1989). The *Larsen* standard is broader, for it is not restricted to the judge's personal conduct. It also provides a standard of review for others to apply rather than a measure of self-assessment. Either approach necessarily rejects the reasonable misinformed or uninformed person standard, i.e., the uninformed or misinformed mind "often assigns guilt where none exists." *Larsen*, 616 A.2d at 584. "[R]easonable citizens require more than vague conjectures and subtle innuendo before they will entertain suspicions of judicial misconduct or ascribe the 'appearance of impropriety' to ambiguous facts and circumstances." *Id. See Spector*, 418 N.Y.S.2d at 572. As the foregoing suggests, the courts generally agree that the proper perspective is the reasonable person, not the specific person(s) who are parties or witnesses to the misconduct. Compare Matter of Cunningham, 456 N.Y.S.2d 36, 38 (1982), in which the court noted that "to the extent that [the] . . . misconduct consisted of creating the appearance of impropriety, it is of some moment that the possible perception of this improper conduct was limited to the eyes of one person only."

In Matter of Mason, 916 F.2d 384 (7th Cir. 1990), Judge Easterbrook posed the dilemma of applying an objective standard to a request for judicial disqualification:

> An objective standard is essential when the question is how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person. Because some people see goblins behind every tree, a subjective approach would approximate automatic disqualification. A reasonable observer is unconcerned about trivial risks; there is always *some* risk, a probability exceeding 0.0001%, that a judge will disregard the merits. Trivial risks are endemic, and if they were enough to require disqualification we would have a system of peremptory strikes and judge-shopping, which itself would imperil the perceived ability of the judicial system to decide cases without regard to persons. A thoughtful observer understands that putting disqualification in the hands of a party, whose real fear may be that the judge will *apply* rather than disregard the law, could introduce a bias into adjudication. Thus the search is for a risk substantially out of the ordinary.
>
> An objective standard creates problems in implementation. Judges must imagine how a reasonable, well-informed observer of the judicial system would react. Yet the judge does not stand outside the system; as a dispenser rather than a recipient or observer of decisions, the judge understands how professional standards and the

from a person or entity, free of charge or at an unduly favorable rate. Other Code provisions prohibit gifts from a current party.[25] Is a gift from a non-party likewise banned on the "appearance of impropriety" theory because everyone is a "potential litigant"?[26] Courts that have thoughtfully considered the framework for an appearance of impropriety analysis have applied a totality of the circumstances approach and deemed the following issues necessary for resolution: 1) the historical context for the gift, e.g., was the donor in a special position to influence the judge; 2) the judge's view of the disputed facts, e.g., was the judge aware of any improper motive by the donor; and 3) the judge's reputation as an ethical and respected jurist. Based on these inquiries, a court will determine whether a reasonable person would conclude that a violation of Canon 2 had occurred. In other words, after considering all the circumstances, would a reasonable person's perception be one of suspicion?[27]

III. COMPLIANCE WITH THE LAW AND PROMOTING CONFIDENCE IN THE JUDICIARY

A. The Code and Its Commentary

The general language of Canon 2A states: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[28]

> desire to preserve one's reputation often enforce the obligation to administer justice impartially, even when an observer might be suspicious. Judges asked to recuse themselves hesitate to impugn their own standards; judges sitting in review of others do not like to cast aspersions. Yet drawing all inferences favorable to the honesty and care of the judge whose conduct has been questioned could collapse the appearance of impropriety standard under §455(a) into a demand for proof of actual impropriety. So although the court tries make an external reference to the reasonable person, it is essential to hold in mind that these outside observers are less inclined to credit judges' impartiality and mental discipline than the judiciary itself will be.

Id. at 386.

25. Canon 4D(5) of the 1990 Code prohibits a judge from accepting a gift, subject to several exceptions. Also, Canon 4D(1)(a) prohibits financial business dealings by a judge that may reasonably be perceived to exploit the judge's judicial position. The 1972 Code contains similar provisions in Canon 5C(1) and 5C(4).

26. In Matter of Chiovero, 570 A.2d 57, 65 (Pa. 1990), the court indicated that, while in the abstract every person on earth is a potential litigant who might appear in the judge's court, that view was unacceptable because it would preclude interaction with other human beings.

27. *Larsen*, 616 A.2d at 583.

28. Canon 2A of the 1972 version of the ABA Code provides: "A judge *should* respect and comply with the law and *should conduct himself* at all times in a manner that promotes

The first paragraph of the 1990 Commentary addresses the general need to maintain public confidence in the judiciary by avoiding all impropriety and the appearance of impropriety.[29] The ABA declined to include draft Commentary language that illustrated, based on earlier interpretations of Canon 2A, actual impropriety relating to a judge's professional and personal conduct.[30] It also dismissed a more general maxim that a judge must avoid conduct that harms "public confidence in the judiciary and which are for that reason alone improper."[31]

B. Case Law and Analysis

1. Scope of Canon 2A

Judicial decisions applying Canon 2A typically involve disciplinary cases against sitting judges; less frequent applications of Canon 2A arise

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public confidence in the integrity and impartiality of the judiciary." MODEL CODE OF JUDICIAL CONDUCT Canon 2A (1972). Italics indicate language in the 1972 Code that is different from the 1990 Code.

Idaho substitutes "does not detract from" for "promotes." IDAHO CODE OF JUDICIAL CONDUCT Canon 2A (1994).

Maryland also added two new sentences: "A judge should behave with propriety and should avoid even the appearance of impropriety" and "The personal behavior of a judge in both the performance of judicial duties, and in everyday life, should be beyond reproach." MD. CT. R. 1231, CODE OF JUDICIAL CONDUCT Canon 2A (1994).

Michigan added the following sentence: "Without regard to a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect." MICHIGAN CODE OF JUDICIAL CONDUCT Canon 2B (1994).

Delaware, New Jersey, and Iowa replace the word "shall" with "should" in both instances. DELAWARE CODE OF JUDICIAL CONDUCT Canon 2A (1995); NEW JERSEY CODE OF JUDICIAL CONDUCT Canon 2A (1994); IOWA CODE OF JUDICIAL CONDUCT Canon 2A (1995).

New Mexico prefaces Canon 2A with the statement "Respect for the law." N.M. SUP. CT. R. 1986, CODE OF JUDICIAL CONDUCT Canon 21-200A (1995).

29. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. 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.

MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 2A, at paragraph 1 (1990). The first paragraph of the 1972 Canon 2 Commentary is identical, except that it is gender neutral.

30. For example, authorities interpreting this standard have found actual impropriety in a judge's professional or personal conduct where a judge fails to cooperate with authorities when apprehended breaking the law, is frequently intoxicated in public, openly solicits sexual favors, discharges a court employee for failure to perform personal services, or demonstrates a pattern of unfair treatment against a lawyer and the lawyer's firm in the conduct of cases.

MODEL CODE OF JUDICIAL CONDUCT 7 (Discussion Draft 1989).

31. *Id.*

from appeals of civil or criminal litigation presided over by the judge. In the usual case, the judge is accused of multiple transgressions based upon alleged violations of both Canon 2A and other Code sections.[32] Under most state systems of judicial discipline, the sanction for unethical conduct ranges from private reprimand to removal. Prior to the disciplinary case reaching the state's highest court, a state judicial qualifications commission already has reviewed the case, and has made findings of fact and a recommendation to that court. Too often, judicial review of commission findings adds little more than a recitation of the facts, the applicable Code sections that have been violated, and a reference to whether the court accepts the commission's recommendations.

Occasionally, courts make the effort to discuss the language of Canon 2A, dissect it, and explain its scope. Canon 2A has two parts that judicial decisions often treat interchangeably: 1) a general admonition that a judge has an obligation to respect and comply with the law; and 2) a general warning that a judge must act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Because the two clauses are independent of each other, it is necessary to find a violation of one clause or the other in order to find a violation of Canon 2A.[33] Inclusion of the phrase "at all times," along with the Commentary language about a judge being the subject of "constant public scrutiny," clearly indicates that Canon 2A covers conduct in the judge's official *or* personal capacity.[34] Moreover, under

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32. A violation of the specific provisions of the Code also constitutes a violation of Canon 2A. *See, e.g.*, Matter of Benoit, 523 A.2d 1381, 1382 (Me. 1987) ("judge who fails to conform his conduct to the minimum standards of other Canons of the Code, is, by definition, in violation of the general requirements of Canon[] . . . 2(A)").

Moreover, a judge's conduct must conform to the applicable ethical standards for attorneys as well as for judges. *See, e.g.*, In the Matter of Waterman, 448 N.W.2d 36, 38 (Mich. 1989) (professional misconduct by attorney who became a judge led to public censure); In the Matter of Callanan, 355 N.W.2d 69, 73 (Mich. 1984) (removal of judge due to criminal convictions); Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978) (former Supreme Court member disbarred for misconduct occurring while a member of judiciary).

33. *In re* Conduct of Roth, 645 P.2d 1064, 1069 (Or. 1982).

34. Matter of Backal, 660 N.E.2d 1104 (N.Y. 1995) (Code prohibits a judge's advice to known lawbreaker on preserving fruits of crime and furnishing a hiding place for those fruits in her home; removal ordered); *In re* Inquiry Concerning a Judge, 788 P.2d 716, 722 (Alaska 1990) (unethical behavior outside courtroom diminishes respect for judiciary); *In re* Hill, 568 A.2d 361, 373 (Vt. 1989) (Code reaches into judge's nonjudicial life); In the Matter of Woodworth, 703 P.2d 844 (Kan. 1985) (even in private life, judge held to higher standards than others); *In re* Winton, 350 N.W.2d 337, 340 (Minn. 1984) (judge's conduct in personal life adversely affects administration of justice); In the Matter of Bennett, 267 N.W.2d 914, 922 (Mich. 1978) (judge should behave as though always on the bench); *see* In the Matter of

Canon 2A, judges are held to a higher standard of personal and official conduct than is expected of lawyers and others in society.[35]

2. Obligation to Respect and Comply with the Law

In deciding whether a judge has failed to respect and comply[36] with the law,[37] most court decisions suggest that any violation of law would also violate Canon 2A. A few courts have qualified this blanket application in two ways. First, a judge may violate Canon 2A without a finding that the judge engaged in the precise criminal conduct charged. Alternatively, a court may inquire into the judge's compliance with the criminal law even if there is no criminal prosecution.[38] Second, because many courts insist upon a willful violation of Canon 2A, not every "violation of law, however trivial, harmless or isolated, would also be a violation of Canon 2A."[39]

A judge's ethical responsibility is to uphold the law, rather than to disregard or violate it. The most repugnant breach of this standard of decency occurs when a sitting judge is convicted of a criminal offense,[40]

Larsen, 616 A.2d 529, 581 (Pa. 1992) (Code also concerned with conduct affecting judge while acting in official capacity). Therefore, for purposes of Canon 2A the ability of judge to perform official duties is not the decisive issue. *Roth*, 645 P.2d at 1069.

35. *Inquiry Concerning a Judge*, 788 P.2d at 722; *In re* Hill, 568 A.2d 361, 373 (Vt. 1989) (judge held to highest standard of any public official); *Winton*, 350 N.W.2d at 340; *In re* Douglas, 382 A.2d 215, 219 (Vt. 1977) (ethical burdens of judges higher than for lawyers).

36. It has been suggested, but never explicitly decided, that the phrase "respect [for] the law" implies inclusion of a lesser degree of wrongdoing than "compl[ying] with the law," or whether the terms are instead conjunctive. *Roth*, 645 P.2d at 1069 n.4.

37. The word "law" is the only Canon 2 term defined in the Terminology section of the 1990 Code; the 1972 Code does not have a comparable segment. "Law" is defined as "court rules as well as statutes, constitutional provisions, and decisional law." MODEL CODE OF JUDICIAL CONDUCT Terminology at 5 (1990).

38. *Roth*, 645 P.2d at 1070. *See* Matter of Glancey (II), 542 A.2d 1350, 1355 (Pa. 1988) (Canon 2 language not limited to criminal conduct).

39. *Roth*, 645 P.2d at 1070. The court noted that someday it may have to draw the line between censurable and noncensureable violations of law. *Id.*

See In the Matter of Sawyer, 594 P.2d 805, 811 (Or. 1979) (minor traffic violations or conduct engaged in good faith belief that it does not violate the law may not be appropriate for discipline). *Cf.* In the Matter of Neely, 364 S.E.2d 250, 255 n.8 (W. Va. 1987) ("*any* kind of improper conduct can undermine public confidence in officials who should be above reproach").

40. *See, e.g.*, *In re* Huckaby, 656 So. 2d 292 (La. 1995) (removal for failure to file federal tax return); Inquiry Concerning Esquiroz, 654 So. 2d 558 (Fla. 1995) (nolo contendere plea to "isolated circumstance" of DUI charge justifies public reprimand); *In re* McIver, 638 So. 2d 45 (Fla. 1994) (public reprimand for misdemeanor gambling convictions); *In re* Garrett, 613 So. 2d 463 (Fla. 1993) (removal from judgeship following shoplifting conviction); In the Matter of Connor, 589 A.2d 1347 (N.J. 1991) (censure follows conviction for DUI, leaving scene of accident, and reckless driving); *In re* Yandell, 772 P.2d 807 (Kan. 1989) (removal follows

especially a conviction for dishonest conduct.[41] Unscrupulous conduct that does not result in criminal charges may also produce charges of ethical wrongdoing, whether or not the conduct relates to the judge's duties.[42] For example, in *In re Yandell*,[43] a judge was removed from office under Canon 2A for pledging the same vehicle as security for two different loans without advising either creditor of the other loan.

A less common application of Canon 2A arises when a judge in an official capacity deliberately disregards binding precedent or mandatory procedures for conducting court proceedings.[44] By contrast, a judge is

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conviction for reckless driving and other ethical violations); *In re* Woodworth, 703 P.2d 844 (Kan. 1985) (public censure for conviction of possession of bootleg whiskey); In the Matter of Callanan, 355 N.W.2d 69 (Mich. 1984) (removal following conviction of three felonies involving conspiracy and complicity to violate RICO and commit mail fraud); In the Matter of Killam, 447 N.E.2d 1233, 1234 (Mass. 1983) (public censure for DUI conviction). *See also* Disciplinary Counsel v. Mosely, 632 N.E.2d 1287 (Ohio 1994) (judge disbarred after theft convictions). A dispute may develop over the appropriate sanction for a judge who has been convicted. In In the Matter of Brooks, 449 S.E.2d 87 (Ga. 1994), the Georgia Supreme Court suspended a judge for three years, rejecting both the state bar's recommendation of disbarment and the judge's request for a six-month suspension. The court's opinion prompted a dissent that advocated disbarment as a penalty appropriate to the severity of the violation, based upon the widespread and prolonged nature of the judge's sexual batteries on five women, of whom some were court personnel. *Id.* at 90-91 (Hunstein, J., dissenting).

41. "The integrity of the judicial system, the faith and confidence of the people in the judicial process, and the faith of the people in the particular judge are all affected by the false statements of a judge." *In re* Inquiry Concerning Judge Leon, 440 So. 2d 1267, 1269 (Fla. 1983). *See* State v. Imbriani, 652 A.2d 1222 (N.J. 1995) (embezzlement in private life constitutes breach of public trust; removal ordered); *In re* Inquiry Concerning Judge Fowler, 602 So. 2d 510 (Fla. 1992) (public reprimand for conviction of furnishing false information about accident).

42. *See, e.g.*, Matter of King, 399 S.E.2d 888, 890 (W. Va. 1990) (censure for misrepresenting status of court decision); Matter of Conda, 370 A.2d 16, 19 (N.J. 1977) (censure, in part for altering court records). *See also* Matter of Harshberger, 450 S.E.2d 667, 670 (W. Va. 1994) (judge admonished for illegally entering a polling place where he was not registered to vote); Matter of Heburn, 639 N.E.2d 11, 12 (N.Y. 1994) (judge of town and village courts removed for "deliberately deceptive" conduct in subscribing as witness to signatures that were added to petition outside judge's presence); *In re* Thoma, 873 S.W.2d 477, 501 (Tex. Rev. Trib. 1994) (removal of judge from office, in part for making misleading docket entries; undermines public confidence in judiciary); Disciplinary Proceeding Against Ritchie, 870 P.2d 967, 973 (Wash. 1994) (removal for submitting misleading travel vouchers seeking reimbursement for trips that were only marginally related to judicial duties).

43. 772 P.2d 807, 810 (Kan. 1989). Canon 1 was also the basis for Judge Yandell's removal.

44. *See, e.g., In re* Pauley, 318 S.E.2d 418 (W. Va. 1984) (six-month suspension for one instance of ignoring court procedures); In the Matter of Donohue, 458 N.E.2d 323 (Mass. 1983) (public censure for initiating probation violation proceedings when judge knew that defendant already had completed term of probation, and for requiring a man to pay child support for child known to have been fathered by another). *See* Ewing v. State, 358 N.E.2d 204 (Ind. Ct. App. 1976) (intentional disregard of court procedures not reversible error). *See*

not likely to be disciplined for making erroneous legal rulings, absent improper motive, ill will, or malice.[45]

> To allow disciplinary proceedings to evaluate judicial decisions could force judges to walk an ill-defined and standardless line between propriety and impropriety. Clearly, such a sword over a judge's head would have a tendency to chill his independence. A judge would have to be as concerned with what is proper in the eyes of the disciplinary commission as with what is the just decision.[46]

Similarly, Canon 2A is not a restriction on the right of an appellate judge to dissent on an issue that has been reviewed previously by that court.[47]

3. Promoting Public Confidence in the Integrity and Impartiality of the Judiciary

> For generations before and since it has been taught that a judge must possess the confidence of the community; that [the judge] must not only be independent and honest, but, equally important, believed by all . . . to be independent and honest. . . . "[J]ustice must not only be done, it must be seen to be done." Without the

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also Joseph B.P. v. Kathleen M.P., 469 A.2d 800 (Del. 1983) (judge disregarded property settlement agreement and instead directed a division of the property contrary to the agreement).

Disregard of precedent or standing court orders also threatens the other prong of Canon 2A—the maintenance of public confidence in the judiciary. *See, e.g.*, In the Matter of Hague, 315 N.W.2d 524, 533 (Mich. 1982) (judge suspended for sixty days, in part for disobeying valid orders entered by superior court and refusing to follow decisions of appellate courts; conduct engendered disrespect for law and threatens public perception of impartial justice system).

45. *See, e.g.*, In the Matter of Sheffield, 465 So. 2d 350, 357 (Ala. 1984) (no violation of Canon 2A); In the Matter of Greene, 317 S.E.2d 169, 171 (W. Va. 1984) (no violation for inadvertent error in procedure); West Virginia Judicial Inquiry Commission v. Casto, 263 S.E.2d 79, 82 (W. Va. 1979) (no violation for error in applying proper legal procedure). *Cf. In re* Weddel, 414 N.W.2d 178 (Minn. 1987) (judge reprimanded for imposing summary punishment for contempt in precipitous manner). *See also* Lazofsky v. Sommerset Bus. Co., 389 F. Supp. 1041, 1044 (E.D.N.Y. 1975) (judicial ruling during trial not covered by Canon 2).

46. Ben F. Overton, *Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions*, 54 CHI.-KENT L. REV. 59, 66 (1977). Several courts have recognized the problem. *See, e.g., In re* Troy, 306 N.E.2d 203, 217 (Mass. 1973); *In re* Judges of Municipal Court of Cedar Rapids, 130 N.W.2d 553, 554 (Iowa 1964).

47. Giger v. District Court for the County of Summit, 540 P.2d 329, 330-31 (Colo. 1975) (Erickson, J., dissenting). Another appellate court judge in *Giger* specially concurred, stating that an earlier opinion in which he dissented now was dispositive on the issue, even though he thought it was still incorrectly decided. *Id.* at 330 (Groves, J., concurring specially). *See* U.S. Term Limits, Inc. v. Hill, 870 S.W.2d 383, 384-385 (Ark. 1994) (no violation of Canon 2A on ground that appellate judge wrote dissenting opinion in prior case involving some of same issues involved in instant case).

> appearance as well as the fact of justice, respect for the law vanishes in a democracy.[48]

Judicial behavior cannot malign the public's confidence in the judiciary. While the misconduct of a single judge reflects unfavorably upon the court over which the judge presides, for a disciplinary violation the judge's wrongdoing must fail to promote public confidence in the integrity and impartiality of the judicial system as a whole. The range of cases applying this portion of Canon 2A is broad, with judges accused of inattentive, rude, biased, and corrupt behavior. At times, this portion of Canon 2A is the sole basis for allegations of unethical behavior,[49] while in other instances it supplements a more explicit Code section.

A judge's activities, on and off the bench, must encourage public trust. Judges must conduct themselves in a decent and dispassionate manner. On the bench, they must be attentive to the proceedings,[50] treat attorneys and litigants with dignity and respect,[51] remain neutral and unbiased, and follow the applicable law. A judge must exercise control to minimize disruption of court proceedings, but there are limits.

> It is recognized also that the pressure of some proceedings may, unfortunately, on an occasion lead a Judge to act in an unjudicial manner. Such conduct on a rare occasion may be excused. That does not mean, however, that a Judge may ever assume that he is vested with tyrannical power over all that he surveys in his

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48. *In re* Del Rio, 256 N.W.2d 727, 753 (Mich. 1977), *appeal dismissed*, 434 U.S. 1029 (1978) (quoting In re Greenberg, 280 A.2d 370,372 (1971), and Tamm, *Are Courts Going the Way of the Dinosaur?*, 57 A.B.A. J. 229 (1971)).

49. For lay persons, perhaps nothing undermines public confidence in the judicial system more than the inability of a judge to appear punctually in court and decide cases. In Complaint Concerning Kirby, 354 N.W.2d 410, 417 (Minn. 1984), a judge was publicly censured in part for being unreasonably tardy in coming to court at least 20% of the time.

50. *See* Matter of Hey, 457 S.E.2d 509 (W. Va. 1995) (agreed resignation from practice of law for judge who was intoxicated as sitting judge); Paine v. State, 823 P.2d 281 (Nev. 1991), *cert. denied*, 115 S. Ct. 1405 (1995) (sentence vacated and case remanded after questions were raised about whether one judge was sleeping during the proceedings).

51. In Matter of Schiff, 635 N.E.2d 286, 287 (N.Y. Ct. App. 1994), the judge was removed, in part because in the presence of an Hispanic attorney, he stated that he recalled a time when it was safe for young women to walk the streets "before the blacks and Puerto Ricans moved here." The judge admitted that the remark was directed at the Hispanic attorney and made to annoy her because she was involved in a controversy with a good friend of the judge. *Id. See In re* Inquiry Concerning Lichtenstein, 685 P.2d 204, 209 (Colo. 1984) (collecting cases on treating attorneys and litigants with dignity and respect); In the Matter of Waltemade, 409 N.Y.S.2d 989, 994 (1975) (same).

Canon 3(A)(3), requiring judicial patience, dignity, and courtesy to all persons with whom the judge deals in an official capacity, is usually alleged as another basis for judicial discipline.

> courtroom, or that the attorneys, litigants and witnesses are there by his sufferance and subject to his temperamental whims.[52]

In addition to maintaining control over the courtroom, a judge's conduct cannot suggest favoritism toward a party, attorney, or witness.[53] In *State v. Glanton*,[54] the Iowa Supreme Court criticized a trial judge who directed student lawyers about when and how to make objections, which not surprisingly the judge sustained. Despite the judge's good intentions, the reviewing court appropriately observed:

> In any event it is ordinarily a dangerous practice for a presiding judge to contribute his efforts in an attempt to equalize what he perceives to be disparity in the trial ability of opposing counsel. Such practice is apt to proceed from disparity in the rightness of one side or the other, rather than the preparation or ability of counsel. It is often difficult for the presiding judge to distinguish exactly where the one disparity begins and the other ends.[55]

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52. *Waltemade*, 409 N.Y.S.2d at 1004 (censure for discourteous and abusive remarks to lawyers and litigants). *See* In the Matter of Sadofski, 487 A.2d 700, 705 (N.J. 1985) (public reprimand for judge who used offensive language in court):

> No matter how tired or vexed . . . judges should not allow their language to sink below a minimally acceptable level. Judges, like other members of society, will occasionally have a "bad day." Even on such days, however, a judge must conduct court proceedings in a manner that will maintain public confidence in the integrity and impartiality of the judiciary.

53. *See, e.g.*, Adams v. Comm'n on Judicial Performance, 897 P.2d 544 (Cal. 1995) (judge removed for accepting gifts or financial benefits from law firms or attorneys whose cases have or are likely to come before the judge's court). Canon 2A is used sometimes as a general supplement to the more specific dictates of Canon 3E of the Code, dealing with judicial disqualification for conflicts of interest. *See* LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT 21-45 (2d ed. 1992).

54. 231 N.W.2d 31 (Iowa 1975).

55. *Id.* at 35-36. While it is traditional for lawyers and judges to counsel less experienced attorneys, the trial process precludes a presiding judge from enjoying the satisfaction of assisting new lawyers. *Id.* at 36.

Another blatant example of "good faith" bias arose in Paulson v. Evander, 633 So. 2d 540 (Fla. Dist. Ct. App. 1994), where, during a hearing on a lawyer's motion to dismiss his former wife's pro se petition, the judge sua sponte amended and redrafted pleadings for the former spouse. In issuing a writ of prohibition and finding a violation of Canon 2A, the court noted that the system of justice imposes upon the court "the duty of ruling on those matters brought before it without participating in the redrafting of pleadings to state a cause of action." *Id.* at 541.

In *In re* Inquiry Concerning a Judge, Gridley, 417 So. 2d 950 (Fla. 1982), following conviction of a criminal defendant, the trial judge personally injected himself and his office into the matter as an advocate for the defendant. The judge corresponded with the defendant and his family and filed a sua sponte order reducing the charge. For these and other ethical violations, the judge was publicly reprimanded. *See In re* Damron, 487 So. 2d 1, 3 (Fla. 1987) (judge removed from office, in part because judge intentionally discouraged defendant from seeking attorney's services by threatening to incarcerate defendant); In the Matter of Buford,

In *Matter of Schiff*,[56] the New York Court of Appeals removed a judge, in part for creating the impression that he was using his judicial powers to satisfy a personal vendetta. A defendant in a civil case pending before the judge was represented by a law firm, one of whose partners was a local part-time judge who had dismissed traffic charges against a driver whose car had collided with Judge Schiff. The judge stated that he was so angry about that ruling that he intended to grant the plaintiff's motion because the defendant was represented by the part-time judge's law firm.

Courts rely upon Canon 2A to discipline judges for other forms of inappropriate behavior. First, judges subvert public confidence by the manner in which they treat court personnel and judicial colleagues. Judges must not take advantage of their position to realize a personal benefit, such as requiring court personnel to care for a judge's child.[57] Unwelcome sexual advances toward court employees,[58] as well as exacting and demanding sexual favors as a condition of employment,[59] are unacceptable abuses of judicial power. Similarly, unflattering remarks about judicial colleagues' physical appearance, impartiality, and work habits fail to promote public confidence in the judiciary's integrity and impartiality.[60] By contrast,

> [n]ecessary judicial independence requires that a judge not be subject to discipline for good faith comments directed primarily and principally at issues properly before the court. Of course, utilizing a court proceeding as a bully pulpit from which to impose irresponsible and improper invectives upon colleagues or

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577 S.W.2d 809, 837 (Mo. 1979) (thirty-day suspension, in part for judge's participation and tacit approval of negotiation to have lawsuits, involving colleagues as parties, in other courts dismissed in return for judge's action on matter before judge).

56. 635 N.E.2d 286 (N.Y. Ct. App. 1994).

57. *See, e.g.*, Matter of Neely, 364 S.E.2d 250, 255 (W. Va. 1987) (judge admonished, in part because of use of secretary to care for judge's child).

58. *See* Inquiry Relating to Alvord, 847 P.2d 1310, 1313 (Kan. 1993) (public censure for patting court employee on buttocks); Complaint Concerning Miera, 426 N.W.2d 850, 856 (Minn. 1988) (collecting cases about unwelcome sexual advances even outside the employer-employee relationship; public censure and one-year suspension).

59. Inquiry Relating to Hammond, 585 P.2d 1066, 1067 (Kan. 1978) (public censure).

60. *See, e.g.*, Gonzalez v. Commission on Judicial Performance, 188 Cal.Rptr. 880, 886 (1983), *appeal dismissed*, 464 U.S. 1033 (1984) (removal, in part for such remarks). *See also In re* Schenck, 870 P.2d 185, 200 (Or. 1994), *cert. denied*, Schneck v. Comm'n, 115 S. Ct. 195 (1994) (suspension, in part because judge violated Canon 2A by writing letter to editor of local newspaper and a guest editorial in which the judge criticized the local prosecutor for incompetence, inexperience, lack of professional demeanor, and immaturity).

their professional performance would violate the code and subject the judge to discipline.[61]

Second, courts discipline judges under Canon 2A for improper contacts with other judges. By definition, an ex parte communication undermines public confidence in the judiciary by raising concern about why the contact is made without notifying the parties or counsel in the case. For example, a judge should not contact another judge about a case in which the contacting judge is a party.[62] However, most ex parte contact cases are similar to *Matter of Larsen*,[63] in which an associate justice of the Pennsylvania Supreme Court was reprimanded for an ex parte communication with a trial judge about a case pending before the latter judge. The court first stated that, while all such ex parte communications are prohibited, they are not all deserving of the same, or perhaps any, sanction.[64]

The highest level of culpability for ex parte contacts are discussions between judges for criminal or other clearly improper motives, i.e., an attempt to influence the contacted judge on someone's behalf.[65] Less culpable are injudicious ex parte conversations not made for clearly improper motives, such as an attempt to learn about the status of a case

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61. *In re* Brown, 879 S.W.2d 801, 806 (Tenn. 1994) (Tennessee Supreme Court reversed Court of the Judiciary's 6-5 finding of a Code violation for judge's open court, highly critical comments about the fairness, efficiency, and lawfulness of the local juvenile court system, which were relevant to a case before the court).

62. In the Matter of Sauce, 561 N.E.2d 751 (Ind. 1990) (public reprimand, in part because judge obtained a change in custody through an *ex parte* communication with the judge having jurisdiction of his dissolution case). Similarly, in Dixon v. State Commission on Judicial Conduct, 419 N.Y.S.2d 445 (1979), a judge was admonished for requesting or appearing to request that a fellow judge give special consideration to a party before the latter judge.

63. 616 A.2d 529 (Pa. 1992) (reprimand, despite absence of bad motive). In *Larsen*, the justice met with the trial judge presiding over an estate case. He told the judge about two anonymous informants who had told him that the co-administrator of the estate had engaged in bankruptcy fraud.

64. While all *ex parte* communications with judges regarding cases pending before those judges, may be equally prohibited, all *ex parte* communications are not equally sanctionable. . . . [T]here is [a] spectrum of culpability with respect to *ex parte* communications which ranges from the plainly criminally culpable, through the injudicious, to good faith errors, and finally to truly innocent and innocuous *ex parte* remarks. The magnitude of the misconduct will depend upon the context, content, and manner of delivery of the *ex parte* communication.

Id. at 559.

65. *See, e.g.*, *In re* Lorona, 875 P.2d 795, 799-800 (Ariz. 1994) (suspension of nonlawyer justice of the peace); Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978) (disbarment of former state supreme court justice).

or to give the presiding judge information to trigger further inquiry.[66] At the lowest level of culpability are improper communications made for unquestionably proper motives, such as a letter from a trial judge to appellate judges explaining why he had imposed high bail in particular cases and that they should affirm his orders.[67]

IV. PERMITTING RELATIONSHIPS WITH OTHERS TO INFLUENCE THE JUDGE'S CONDUCT

A. The Code and Its Commentary

The language of Canon 2B is more specific than Canon 2A. The first type of prohibited conduct addresses the improper connection between judicial relationships and affiliations and the judge's conduct and judgment. The 1990 version of the first sentence of Canon 2B states: "A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment."[68]

Is *any* influence of these relationships on the judge's conduct prohibited? Can these relationships ever be said to influence judicial conduct in a *proper* way? Surely, the values that a judge acquires from relationships influence the judge's conduct and judgment, but Canon 2B appears to address the influence that the relationship itself can have on

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66. *See, e.g., In re* DiLorenzo, 330 N.Y.S.2d 394 (1972) (public censure for judge who arranged to meet with counsel in charge of a commission investigation).

67. *In re* Emmett, 300 So. 2d 435 (Ala. 1974) (censure not appropriate, though the communication was technically improper because letter was not sent to parties or counsel).

Other factors that affect assessment of this type of misconduct include whether the contacting judge: (1) has a reputation as an ethical judge, (2) is in a position of authority over the contacted judge, and (3) has put the impermissible communication in writing, which provides a record of the information conveyed. *Larsen*, 616 A.2d at 559-561.

68. The first sentence of Canon 2B of the 1972 version of the ABA Code provides: "A judge *should* not allow *his* family, social, or other relationships to influence *his* judicial conduct or judgment." Italics indicate language in the 1972 Code that is different from the 1990 Code.

Delaware, New Jersey, and Iowa replace the word "shall" with "should." DELAWARE CODE OF JUDICIAL CONDUCT Canon 2B (1995); NEW JERSEY CODE OF JUDICIAL CONDUCT Canon 2B (1994); IOWA CODE OF JUDICIAL CONDUCT Canon 2B (1995).

Instead of identifying specific relationships, Texas prohibits the influence of *any* relationship on the judge. TEXAS RULES OF COURT CODE OF JUDICIAL CONDUCT Canon 2B (West 1994).

Delaware, Iowa, and Oregon omit "political" relationships from the listing of possible influencing relationships. DELAWARE CODE OF JUDICIAL CONDUCT Canon 2B (1995); IOWA CODE OF JUDICIAL CONDUCT Canon 2B (1995); OREGON CODE OF JUDICIAL CONDUCT, Judicial Rule 1-101 (E) (1996).

New Mexico prefaces Canon 2B with the subheading "Impartiality." N. M. SUP. CT. R. 1986, CODE OF JUDICIAL CONDUCT Canon 21-200A (1995).

the judge. Although it is implicit from the Canon 2B standard, one state has added that the relationships cannot be allowed to *improperly* influence the judge's conduct or judgment.[69]

B. Case Law and Analysis

A judicial system must be free from the allegations that judges are taking advantage of their position to help or harm others. Canon 3E explicitly prohibits a judge from presiding in a case in which a close relative is a party or counsel, or in which the judge or relative has some interest.[70] However, a judge's position may enable the judge to assist friends or relatives in ways beyond hearing cases. Canon 2B's broader proscription seeks to ensure that a judge will not allow family or other relationships to influence the exercise of judicial conduct or judgment, regardless of whether the judge is actually presiding over a case involving a friend or relative. Incredibly, judges continue to violate this obvious tenet.

The Canon 2B cases represent a broad range of circumstances in which judges have permitted family, social, political, or other relationships to affect judicial conduct or judgment. A typical example of this ethical violation occurs when the judge directly or indirectly participates in the handling of legal charges against a family member. In one case, the Nebraska Supreme Court ordered that a judge be removed from office when the judge delayed the prosecution of the judge's son's traffic citation in bad faith by removing the citation from the appearance date file.[71] In another case, a judge was reprimanded because he "allowed

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69. In Maryland, the judge's conduct cannot be *improperly* influenced by the judge's relationships. MD. CT. R. 1231, CODE OF JUDICIAL CONDUCT Canon 2B (1994).

70. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(d) (1990).

One consequence of a Canon 2B violation may be the judge's disqualification from the case. For example, in Matter of Rowe, 566 A.2d 1001, 1008 (Del. Jud. 1989), the judge's son was arrested and charged with driving under the influence. The judge presided over the son's initial appearance and continued the arraignment for several weeks, at which time the judge would be presiding in the same court. At that time the judge proceeded to dispose of the case with only the judge and son in the courtroom. The judge asserted that he acted in his son's case because he was angry, embarrassed, and wanted to ensure that his son understood the seriousness of the offense. Regardless of whether the judge felt he could be impartial in resolving his son's case, the judge was suspended for six months for failure to recuse himself because his "impartiality might reasonably be questioned" under Canon 3E(1). *See* Scogin v. State, 227 S.E.2d 780, 782 (Ga. Ct. App. 1976) (judge should have recused himself from presiding over criminal case against father of friend's child after giving friend advice about how to obtain support for child from father).

71. State *ex rel.* Comm'n of Judicial Qualifications v. Kelly, 407 N.W.2d 182 (Neb. 1987). A timely prosecution for the traffic offense would have jeopardized the son's probation status.

his anger over the procedure employed in the arrest of a family member to influence his conduct as a judge."[72] The judge conducted a loud conversation in chambers with a police captain during working hours when both were acting in their official capacities. In *Matter of Boese*,[73] a judge received a public reprimand because, while on duty, she threatened her ex-husband with arrest in a way which suggested that her "relationship" with him was affecting her judicial conduct.

Judicial conduct may be subject to the influence of friendship as well. The judge may be disciplined under Canon 2B for using the direct approach, i.e., dismissing or filing away friends' civil or criminal complaints pending in the judge's court.[74] Discipline is also appropriate when a judge approaches an attorney or fellow judge to try to sway the disposition of a friend's case or to coerce a prosecutor into accepting a plea bargain in a case against a friend.[75]

Id. at 187.

72. Matter of Cox, 532 A.2d 1017, 1019 (Me. 1987). *In re* Lockwood, 804 P.2d 738 (Az. 1990) involved the judge's telephone call to a police detective investigating his son to question the method of the investigation and the amount of bail that had been requested. Although the judge claimed to be calling as a concerned parent, his judicial position was apparent to the officer. The judge received a public censure in part for his attempt to influence an ongoing investigation. *See also In re* Mullen, 530 So. 2d 175, 178 (Miss. 1988) (judge suspended for refusing to permit a debtor to redeem replevied property and then purchasing the property and placing the title in the name of a family member).

73. 410 S.E.2d 282 (W. Va. 1991).

74. *See, e.g.*, Matter of Ross, 428 A.2d 858 (Me. 1981) (suspension in part for causing friends' traffic tickets to be filed away).

75. Miss. Comm'n on Judicial Performance v. Chinn, 611 So. 2d 849 (Miss. 1992) (judge removed, in part due to trying to influence another judge to give favorable treatment to a criminal defendant); Inquiry Concerning Eads, 362 N.W.2d 541 (Iowa 1985) (suspension in part for judge interjecting himself into divorce case involving an attorney-friend); Gonzalez v. Comm'n on Judicial Performance, 657 P.2d 372 (Cal. 1983) (removal for trying to obtain dismissal of criminal charges); *In re* Miller, 572 P.2d 896 (Kan. 1977) (censure for asking presiding judge to dismiss traffic ticket issued to friend); Spruance v. Commission on Judicial Qualifications, 532 P.2d 1209 (Cal. 1975) (same as *Gonzalez*). *See* Matter of Lewis, 535 N.E.2d 127 (Ind. 1989) (suspension for judge who had private conversations in chambers with personal friend about friend's relative's case, which was pending before judge).

In *Spruance*, a judge was removed from office, in part for trying to help friends and political supporters. Judge Spruance also improperly assumed jurisdiction over a criminal defendant's case so that he could release the defendant on his own recognizance, thereby allowing the defendant to avoid police interrogation on an outstanding warrant. *Spruance*, 532 P.2d at 1219.

"Other" relationships may improperly influence the judge's conduct and judgment. In Bailey v. Superior Court, 636 P.2d 144 (Az. Ct. App. 1981), after the judge's secretary became pregnant the judge issued an "investigative subpoena" to the putative father, whom the judge advised to hire an attorney because he was being charged with a criminal offense. Issuance of the subpoena violated Canon 2B.

Allegations of political favoritism under Canon 2B may produce motions to disqualify judges whose contributors appear in their court. In *Rocha v. Ahmad*,[76] a motion to recuse two appellate judges was made on the ground that opposing counsel previously had made substantial political contributions to each judge and had hosted victory parties for them after their election. The court denied the motion, finding that no ethical violation had occurred because the judges received no contributions from a party to the litigation and because attorneys are the primary source of contributions in judicial elections.

> A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts.[77]

The court's broad language disguises the differing roles that attorneys can play in judicial election campaigns. Judicial disqualification whenever a typical contributor is counsel of record makes no practical sense unless some actual impropriety is shown. However, where, for example, counsel of record is the judge's current or past campaign manager, there may be an appearance that the political relationship with the campaign manager would influence the judge's judicial conduct or judgment.[78]

V. LENDING THE PRESTIGE OF THE JUDGE TO ADVANCE PRIVATE INTERESTS OR CONVEYING THE IMPRESSION THAT OTHERS CAN INFLUENCE THE JUDGE

A. The Code and Its Commentary

Canon 2B also 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

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76. 662 S.W.2d 77 (Tex. Ct. App. 1983).

77. *Id.* at 78.

78. "Other relationships" under Canon 2B may also interfere with judicial conduct. In In Interest of McFall, 617 A.2d 707 (Pa. 1992), a state judge had agreed to serve as an undercover agent for federal authorities after accepting an illegal gift. The judge continued to hear cases while cooperating with federal authorities, in exchange that her cooperation would be made known to the state prosecutor who appeared daily in the judge's court and who later might prosecute her. The reviewing court ordered new proceedings for any criminal case in which the judge had presided.

a special position to influence the judge."[79] States have modified the language of Canon 2B by including (1) specific types of interests that cannot be advanced;[80] and (2) those persons whom the judge cannot permit to convey the impression of undue influence.[81]

As with Canon 2A, the Canon 2B Commentary builds on earlier judicial and disciplinary experiences to provide some general direction. The first paragraph attempts to distinguish proper and improper uses by the judge of the prestige of the judicial office.[82] The second paragraph

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79. The second sentence of Canon 2B of the 1972 version of the ABA Code provides: "*He should* not lend the prestige of *his* office to advance the private interests of others; nor *should he* convey or permit others to convey the impression that they are in a special position to influence *him*." Italics indicate language in the 1972 Code that is different from the 1990 Code.

New Jersey keeps the word "should" instead of "shall." NEW JERSEY CODE OF JUDICIAL CONDUCT Canon 2B (1994).

New Mexico retains the use of the word "shall" the first time it appears, but substitutes "shall" for "should" the second time it is used in the sentence. N.M. SUP. CT. R. 1986, CODE OF JUDICIAL CONDUCT Canon 21-200b (1995). Oregon substitutes the phrase "use the position" for "lend the prestige of the office." OREGON CODE OF JUDICIAL CONDUCT, Judicial Rule 1-101 (F) (1996).

The Delaware and Iowa Codes do not prohibit advancing the private interests of "the judge and others," only the private interests of "others." DELAWARE CODE OF JUDICIAL CONDUCT Canon 2B (1995); IOWA CODE OF JUDICIAL CONDUCT Canon 2B (1995).

80. California substitutes the phrase "pecuniary or personal" for "private." CALIFORNIA CODE OF JUDICIAL ETHICS Canon 2B(2) (1996). Michigan shortens Canon 2B's second sentence to prohibit the use of the prestige of the judicial office to advance the personal business interests or those of others. MICHIGAN CODE OF JUDICIAL CONDUCT Canon 2B (1994).

81. New Mexico adds the phrase "subject to the judge's direction and control" after "permit others." N.M. SUP. CT. R. 1986, CODE OF JUDICIAL CONDUCT Canon 21-200B (1995). Thus, proof of improper behavior must include that such persons were under the judge's control when they conveyed the impression they could influence the judge. By contrast, both Pennsylvania and West Virginia add the mental state of "knowingly" before the word "permit," so that the judge's awareness of permitting others to communicate improper influence connotes the judge's facilitation of the impropriety. PENNSYLVANIA CODE OF JUDICIAL CONDUCT Canon 2B (1994); WEST VIRGINIA CODE OF JUDICIAL CONDUCT Canon 2B (1994).

82. Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

MODEL CODE OF JUDICIAL CONDUCT Commentary to Cannon 2B, at paragraph 1 (1990).

Arkansas has modified the last sentence to state that judicial letterhead cannot "be used to gain a personal advantage or to effect an economic advantage." ARKANSAS CODE OF

expands that idea by addressing the impropriety of using the prestige of office for advancing the private interests of others.[83]

B. Case Law and Analysis

A judge may not lend the prestige of the judicial office to advance the judge's own private interests or those of the judge's employees,[84] friends,[85] or former clients.[86] Judges damage the public's confidence

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JUDICIAL CONDUCT Commentary to Canon 2B, at paragraph 1 (1994). Iowa omits this paragraph from its Commentary. IOWA CODE OF JUDICIAL CONDUCT Commentary to Canon 2B (1995). Kansas has modified the last sentence to read "judicial letterhead must not be used for non-official matters of any kind." KANSAS CODE OF JUDICIAL CONDUCT Commentary to Canon 2B, at paragraph 2 (1995).

The ABA failed to include the following sentence, which was located at the end of the first paragraph of the draft Commentary: "The use of judicial staff and appurtenances of judicial office for personal business should never conflict with court business and should be kept to a minimum." MODEL CODE OF JUDICIAL CONDUCT 8 (Discussion Draft 1989).

> 83. A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary.

MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 2B, at paragraph 2 (1990).

Delaware changes the mandatory "must" in the first sentence to "should" and changes "advancement of the private interests of others" to include "the judge or others." Delaware also changes the second sentence from "civil suit involving a member of the judge's family" to "litigation involving a friend or member of the judge's family." The last sentence of the paragraph of Model Code Commentary is omitted from Delaware's version. DELAWARE CODE OF JUDICIAL CONDUCT Commentary to Canon 2B, at paragraph 2 (1995).

84. *See, e.g.*, *In re* Cornelius, 436 S.E.2d 836 (N.C. 1993) (censure for assisting county employee in job dispute); Inquiry Relating to Alvord, 847 P.2d 1310, 1312-13 (Kan. 1993) (censure, in part for calling prosecutor on behalf of clerk about traffic ticket); Matter of Deming, 736 P.2d 639, 654 (Wash. 1987), *opinion amended*, 744 P.2d 340 (Wash. 1987) (removal order, in part because judge tried to influence probation department director to promote judge's lover, who worked in director's department); Matter of Hendrix, 701 P.2d 841, 844 (Ariz. 1985) (censure, in part because gave clerk special privileges for jail visitation and telephone usage); Gubler v. Comm'n on Judicial Performance, 688 P.2d 551 (Cal. 1984) (censure, in part because judge approved series of confiscated gun sales to bailiff).

85. *See, e.g.*, Matter of Goodman, 649 N.E.2d 115 (Ind. 1995) (public reprimand; perception that court's hiring and business practices were based upon exchange of favors); Judicial Inquiry and Review Board v. Fink, 532 A.2d 358, 366 (Pa. 1987) (removal ordered, in part due to judge lobbying prosecutor not to prosecute judge's personal friends; "likely to be little public confidence in the fairness and impartiality of the judiciary . . . when one of its judges openly and brazenly attempts to influence the decision as to whether his friends will be prosecuted").

86. *See, e.g.*, Matter of Ward, 448 S.E.2d 546 (S.C. 1994) (public reprimand for judge who improperly issued arrest warrants for cold checks at request of former client engaged in illegal loan business); Matter of Santini, 597 A.2d 1388, 1390-92 (N.J. 1991) (public reprimand for calling public official on behalf of former client); Matter of Peeples, 374 S.E.2d 674, 677

in the judiciary by using their office to procure personal benefit. For example, in *Adams v. Commission on Judicial Performance*,[87] the California Supreme Court upheld a state commission's finding that a judge actively solicited a favorable transaction from a litigant while the latter's case was pending in the judge's court. Shortly after awarding a $5 million dollar judgment in favor of the litigant and while the judge retained jurisdiction of the case pending appeal, the judge contacted the litigant and purchased a car from the litigant at an unduly favorable price. The California court observed:

> Seeking out and accepting a favorable transaction under these circumstances clearly would denote a lack of integrity, as well as corruption and conduct contrary to the moral standards required of the judicial office. Readily inferable from these allegations is that the judge was attempting to receive favors for past deeds, purposefully taking advantage of the power and prestige of his judicial office, and wrongfully using his office to procure a benefit for himself.[88]

Canon 2B issues also abound when a judge uses the judicial office to advance the private interests of others. For example, a judge may violate Canon 2B by recommending to someone that a relative/attorney

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(S.C. 1988) (judge made calls and wrote letter to collect money due former client; public reprimand for that and other misconduct).

Part-time judges have also been disciplined for using the prestige of office to assist their *current* clients. *See, e.g., In re* Soileau, 502 So. 2d 1083, 1087-88 (La. 1987) (judge issued warrant for non-support against opponent of judge's current divorce client). According to the court:

> Such conduct could lead a reasonable person to believe that the judge's client filed the non-support charge on the judge's advice relating to the civil litigation and that the judge acted in furtherance of his client's interest by causing the arrest of the judge's adversary in the related litigation. A lay person also might reasonably infer that the lesson to be learned was that it is better to have the judge as your advocate (rather than your opponent) in marital litigation if there is a possibility of criminal prosecution for failure to perform marital obligations.

Id. at 1088 n. 5. *See* Matter of Johnson, 568 P.2d 855, 866 (Wyo. 1977) (insufficient evidence that part-time judge told police officer to arrest person who had stolen property from judge's client). *See also* Goldstein v. Bartlett, 401 N.Y.S.2d 706, 710 (1978) (Canon 2B relied upon to uphold rule restricting court employees from engaging in the practice of law).

87. 882 P.2d 358 (Cal. 1994).

88. *Id.* at 379. The Canon 2B prohibition may also apply to abuse of the office's prestige in order to advance a less tangible, but equally important, self-interest. Due to prior political and legislative activities, a judge may have become identified with a strong policy position on an issue. Should the judge rule in all cases dealing with that issue? Despite Justice Hugo Black's public views on free speech, he continued to sit on first amendment cases. As the Canon 2B Commentary suggests, a judge must learn to "distinguish between proper and improper use of the prestige of the office." *See* Rehnquist, *supra* note 20, at 708-713.

of the judge be hired to handle a matter. *In re Chaisson*[89] included a finding that a judge improperly had played a role in the retention of the judge's attorney/son by an acquaintance. When the judge was asked by the person whether his son could handle a matter, the judge answered affirmatively. The judge also suggested, alternatively, that his son could associate with another attorney who could handle the matter. In reversing the Judiciary Commission's conclusion that an ethical violation had occurred, the Louisiana Supreme Court found that the judge's response and suggestion did not rise to the level of misconduct; if the judge had urged the person to hire his son or recommend his son's services, a violation would have occurred.[90]

A judge cannot suggest or permit others to imply or insinuate that they can influence the judge. For example, a judge should not advise a *pro se* party about possible defenses to a plaintiff's complaint. To do so transforms the judge from a judge to an advocate, favoring one party to the detriment of the other.[91] Or, if an attorney belatedly hires co-counsel merely because the latter is a good friend of the judge, the judge should not permit the co-counsel to participate in the case.[92] A less obvious example of an ethical violation occurred in *Matter of Fuchsberg*,[93] in which a judge improperly[94] obtained advice and assistance from law professors in at least a dozen cases pending before the court.

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89. 549 So. 2d 259 (La. 1989).

90. "The position of judge with children practicing law is a difficult one, particularly in a small community. He may not use his position to solicit legal work for them, but the Code does not require him to actively discourage potential clients." *Id.* at 264-65. The court also found that the judge's judicial conduct or judgment was not involved; the implication is that when he responded to the third party he was not acting in his judicial capacity.

Judge Chaisson was censured, *inter alia*, for violating Canon 2B in the same matter because of the appearance that he lent the prestige of judicial office to advance the private interest of the acquaintance who had filed a lawsuit against the state. The judge checked with the governor's executive counsel on the status of settlement negotiations between the acquaintance and the state. Although there was no proof that the judge actually influenced the settlement, the court concluded that the judge's role created an appearance of impropriety. A non-judge probably would not have been able to gain access to the details of settlement negotiations. Moreover, "the matter settled on terms favorable to [the acquaintance] shortly after [the judge's private] involvement." *Id.* at 263.

91. *See, e.g.*, Swenson v. Dittner, 439 A.2d 334, 338-39 (Conn. 1981).

92. Josselson v. Josselson, 557 N.E.2d 835, 844 (Ohio Ct. App. 1988), *appeal dismissed*, 535 N.E.2d 305 (Ohio 1989). Similarly, a judge cannot accept money from potential parties in the judge's court. *See* Matter of Cunningham, 538 A.2d 473, 486-87 (Pa.), *appeal dismissed*, White v. Judicial Inquiry and Review Board of Pennsylvania, 488 U.S. 805 (1988).

93. 426 N.Y.S.2d 639 (1978).

94. Advice from an outside expert is proper under Canon 3B(7)(b) [3A(4) under the 1972 Code] when the judge notifies the parties about the consultation and the substance of the advice, followed by an opportunity for the parties to respond.

In particular, the judge took substantial portions of the professors' drafts and published them under his own name. The judge also provided the law professors with unpublished draft opinions of other judges without permission. The New York Court on the Judiciary rejected the judge's characterization of the law professors as "ad hoc" law clerks for the judge, and found that "[t]he substantial incorporation of outside experts' language in a Judge's opinion suggests, without more, that the expert is influencing the decision-making process."[95]

VI. A JUDGE'S TESTIMONY AS A CHARACTER WITNESS

A. The Code and Its Commentary

A specific example of a judge using the prestige of the office to benefit another is Canon 2B's prohibition on voluntary character testimony. The concluding sentence of Canon 2B states: "A judge shall not testify voluntarily as a character witness."[96] Some states have modified this standard to define more explicitly the circumstances in which character witness testimony is banned,[97] or is subject to exception.[98]

Whether and when a judge may provide a letter of recommendation is the subject of the third paragraph of the 1990 Commentary:

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95. *Fuchsberg*, 426 N.Y.S.2d at 648. The court believed the judge's claim that he arrived at his conclusions in each case independent of the professors' drafts and used their language simply because it reflected his own views. But the court stated that it was concerned with the appearance which that practice created. *Id.*

96. The third sentence of Canon 2B of the 1972 Code provides: "*He should* not testify voluntarily as a character witness." Italics indicate language in the 1972 Code that is different from the 1990 Code.

97. Alabama prohibits such testimony "at any other hearing before any court, or judicial or governmental commission." ALABAMA CANONS OF JUDICIAL ETHICS Canon 2C (1990).

New Jersey and Virginia omit the word "voluntarily" so that a judge cannot testify as a character witness under any circumstance. NEW JERSEY CODE OF JUDICIAL CONDUCT Canon 2B (1994); VA. SUP. CT. R. pt. 6 § III, CANONS OF JUDICIAL CONDUCT Canon 2B (1994).

98. In Utah, a judge "may provide honest references in the regular course of business or social life." UTAH CODE OF JUDICIAL CONDUCT Canon 2B (1994). Similarly, Michigan's Canon 2D states that "[a] judge may respond to requests for personal references." MICHIGAN CODE OF JUDICIAL CONDUCT Canon 2D (1994). In Oregon, a judge may testify as a character witness "pursuant to subpoena." OREGON CODE OF JUDICIAL CONDUCT Judicial Rule 1-101(G) (1996). California's code refers to an exception for subpoena in its Commentary. CALIFORNIA CODE OF JUDICIAL ETHICS Commentary to Canon 2B (1996).

Idaho expands the subject of a judge's testimony to include any proceeding in which the judge can testify: a judge may testify as a witness (not merely as a character witness) in a proceeding involving the judge personally or in response to an official summons. IDAHO CODE OF JUDICIAL CONDUCT Canon 2B (1976).

> Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.[99]

The first sentence differs from the draft language submitted to the ABA in 1989. Although the draft language is ambiguous, it would have limited a judge to providing a letter of recommendation for a lawyer only if the requesting individual was a member of the judge's family or a current or past employee of the court. Otherwise, instead of writing a letter of recommendation, the draft permitted the judge to use "the judge's name as a reference or respond to a request for a personal recommendation or reference when solicited by a selection authority such as a prospective employer, judicial selection committee, or law school admissions office."[100]

The 1990 Commentary's fifth paragraph also addresses the role of the judge serving as a reference or character witness for others. A judge

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99. MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 2B, at paragraph 3 (1990).

The 1972 Commentary states the following concerning the issue of a judge testifying as a character witness: "The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons." MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 2, at paragraph 2 (1972).

Kansas and New Mexico do not include the second sentence in their Codes. KANSAS CODE OF JUDICIAL CONDUCT Commentary to Canon 2B, at paragraph 3 (1995); N.M. SUP. CT. R. 1986, CODE OF JUDICIAL CONDUCT Commentary to Canon 21-200B, at paragraph 3 (1995). The Delaware Code changes the second sentence to state that the judge should not initiate the communication "[e]xcept in the course of the judge's official duties." DELAWARE CODE OF JUDICIAL CONDUCT Commentary to Canon 2B, at paragraph 3 (1995). Arkansas added the following sentence to its commentary: "Letters of recommendation may be written on judicial stationery based on personal knowledge of the applicant, but not merely for the purpose of lending the prestige of the judicial office to the applicant." ARKANSAS CODE OF JUDICIAL CONDUCT Commentary to Canon 2B. California moved the second sentence from the Commentary to the Code. CALIFORNIA CODE OF JUDICIAL ETHICS Canon 2B(2) (1996).

On the theory that it improperly constitutes lending the prestige of judicial office to advance the private interests of others, the Florida Supreme Court recently prohibited judges from writing character witness letters for any individual on official court stationery. *In re* Fogan, 646 So. 2d 191 (Fla. 1994) (public reprimand for writing character reference letter on official court stationery for personal friend); *In re* Inquiry Concerning a Judge, 632 So. 2d 600, 601 (Fla. 1994). *Accord*, Inquiry Concerning Stafford, 643 So. 2d 1067, 1069 (Fla. 1994) (public reprimand).

100. MODEL CODE OF JUDICIAL CONDUCT 9 (Discussion Draft 1989).

must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. When a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.[101]

B. Case Law and Analysis

While Canon 2 only specifically restricts judges from testifying as character witnesses, the underlying principle applies to all judicial testimony. When a judge testifies, there is concern that the judge not only is presenting evidence, but also is conferring the prestige and credibility of judicial office on a litigant's position. The judge's testimony may influence the factfinder, and the judge also appears to be "taking sides" in the dispute.[102] The concern is not with the competen-

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101. MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 2B, at paragraph 5 (1990). Paragraph five is substantially identical to the draft language of the Commentary. MODEL CODE OF JUDICIAL CONDUCT 9 (Discussion Draft 1989). New Mexico explains that "such testimony may be misunderstood to be an official testimonial." N.M. SUP. CT. R. 1986, CODE OF JUDICIAL CONDUCT Commentary to Canon 21-200B, at paragraph 5 (1995).

The fourth paragraph of the Commentary permits the judge to serve in the process of judicial selection. "Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 5 regarding use of a judge's name in political activities." MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 2B, at paragraph 4 (1990). As adopted by the ABA, the language of this paragraph omitted the following sentence of the draft Commentary: "However, a judge must not directly or indirectly furnish to a candidate a copy of a recommendation written by the judge or disclose its contents to the candidate." MODEL CODE OF JUDICIAL CONDUCT 9 (Discussion Draft 1989).

102. Joachim v. Chambers, 815 S.W.2d 234, 238-39 (Tex. 1991) (Canon 2 precluded retired judge from testifying as expert witness); State v. Grimes, 561 A.2d 647, 649 (N.J. Sup. Ct. App. Div. 1989), *cert. denied*, 570 A.2d 976 (N.J. 1989) (judge's opinion testimony on local law inadmissible). Judicial testimony is excluded on various grounds. *See* United States v. Dowdy, 440 F. Supp. 894 (W.D. Va. 1977) (mental processes used in formulating decision are inadmissible); Standard Packaging Corp. v. Curwood, Inc., 365 F. Supp. 134 (N.D. Ill. 1973) (same); Merritt v. Reserve Ins. Co., 110 Cal. Rptr. 511, 527-28 (1973) (too prejudicial to permit a judge to testify for one party).

Nevertheless, courts have selectively recognized the propriety of judicial testimony when the judge has either personal knowledge of a factual matter litigated before the judge or a firsthand impression of a witness in a trial over which the judge presided. *See, e.g.*, State v. Kelly, 312 A.2d 906 (Vt. 1973) (judge may be compelled to testify concerning the credibility of police officer); Jolly v. State, 269 So. 2d 650 (Miss. 1972) (judge called to relate testimony of witness in original proceeding who has since become mentally incapacitated); State *ex rel.*

cy of the judge to testify; it is with the propriety of a judge's testifying.

> A judge may assume the witness chair like anyone else, but he does not so easily lay aside robe and gavel. His testimony about a person's character may appear to be more than mere opinion and may be mistaken for a judicial pronouncement. . . . The risk of confusion of the roles of witness and judge when the same person acts as both can create an appearance of impropriety.[103]

Attempts to present character testimony from judges occur during judicial proceedings presided over by another judge or as part of a disciplinary matter brought against an attorney or another judge. Although a judge must respond to a subpoena, the practice of judges appearing as character witnesses is discouraged.[104] Indeed, a court may refuse to consider such testimony even if a subpoena issues for the judge.[105] When subpoenaed, the prudent course appears to be to disallow a judge's character testimony if other character witnesses can provide similar testimony.

Courts also use Canon 2B as a guideline for handling other judicial testimony.[106] Some view expert testimony by a judge on the applicable

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Childs v. Hayward, 248 A.2d 88 (N.H. 1968); People v. Drake, 841 P.2d 364, 368 (Colo. Ct. App. 1992) (no plain error for admission of judicial testimony about uncontested matters, although testimony at perjury trial about defendant's demeanor at first trial was irrelevant); DeForest v. DeForest, 694 P.2d 1241 (Ariz. Ct. App. 1985) (judge testified to prove rendition and terms of a judgment).

103. *Joachim*, 815 S.W.2d at 237-38.

104. The Florida Supreme Court recently prohibited any judge from testifying as a character witness in any proceeding except in response to a subpoena. *In re* Inquiry Concerning a Judge, 632 So. 2d 600, 601 (Fla. 1994); *See* People v. Tippett, 733 P.2d 1183 (Colo. 1987) (case remanded to determine whether judge testified voluntarily about character of defendant); State v. Schechter, 339 N.E.2d 654 (Ohio 1975) (pre-Code character testimony by judges about prosecution witness was not illegal, unethical, unfair, or prejudicially erroneous, but it was unwise).

105. *In re* Thomason, 304 S.E.2d 821, 823 (S.C. 1983) (attorneys' disciplinary body ordered to stop issuing subpoenas for judges as character witnesses). *See* People v. Morley, 725 P.2d 510, 518 n.3 (Colo. 1986) (exceptional circumstances may make it appropriate for judge to testify in attorney disciplinary proceedings). *See also* Florida Bar v. Prior, 330 So. 2d 697 (Fla. 1976) (character letters from judges in a disciplinary proceedings are not proper evidence because of the inability to cross-examine and rebut the evidence).

Part-time judges may also run afoul of Canon 2B when they write letters on behalf of clients to further the personal and private purposes of their clients. *See, e.g.*, Matter of Murray, 458 A.2d 116, 118 (N.J. 1983) (judge reprimanded for writing letter on behalf of clients); Matter of Anastasi, 388 A.2d 620, 622 (N.J. 1978) (same).

106. Although Canon 2 explicitly refers to a prohibition on judges acting as character witnesses, it may be argued that a judge may testify as an expert under certain circumstances. For example, Canon 3(A)(8) of the Code prohibits a judge from public comment only about pending or impending proceedings that may come before the judge's court. Further, Rule 605 of the Federal Rules of Evidence makes a judge incompetent to testify at a trial in which he

law of the forum, even if accurate, as inherently prejudicial.[107] As indicated by the 1972 Commentary to Canon 2B, the judge's testimony may be understood as an official testimonial, create the impression that a judge is siding with one of the litigants in the proceeding, and receive undue weight from the jury.[108] Moreover, an attorney should not have to balance the need for zealous cross-examination against the desire not to antagonize a judge who may preside in the attorney's future cases.[109]

VII. A JUDGE'S MEMBERSHIP IN ORGANIZATIONS PRACTICING INVIDIOUS DISCRIMINATION

A. The Code and Its Commentary

Until 1984, the ABA did not directly address the issue of judicial membership in private restricted organizations. Because the Code did not prohibit attorneys or judges from belonging to such organizations, the implication was that membership was permissible. In 1984, as a result of concerns that judicial participation in private club membership casts doubt on the judge's ability to rule impartially and does not advance the public's confidence in the judiciary's impartiality, the

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or she is presiding.

107. State v. Grimes, 561 A.2d 647, 649 (N.J. Super. Ct. App. Div. 1989); Helmbrecht v. St. Paul Ins. Co., 343 N.W.2d 132 (Wis. App. 1983), *aff'd in part/rev'd in part on other grounds*, 362 N.W.2d 118 (Wis. 1985). However, if no substitute for a judicial witness exists, it may be possible to minimize the Canon 2 problems by not disclosing to the jury the fact that the witness is a judge. *Joachim*, 815 S.W.2d at 239.

108. State v. Grimes, 561 A.2d at 649; Phillips v. Clancy, 733 P.2d 300, 306 (Ariz. Ct. App. 1986); Merritt v. Reserve Ins. Co., 110 Cal. Rptr. 511, 528 (1973).

109. *Joachim*, 815 S.W.2d at 240.

Judicial testimony has been sought in legal malpractice cases where one of the elements to be proved is that, but for counsel's negligence, the aggrieved party would have prevailed on the underlying claim. In Phillips v. Clancy, 733 P.2d 300, 305 (Ariz. Ct. App. 1986), after noting the prejudicial impact of judicial expert testimony, the court found that it would be "simply impractical, inefficient and unworkable to expect judges to testify how they would have ruled in the underlying case had the attorney not been negligent." *Id.*

To allow evidence of what the trial judge would have done would also open the door to allowing the jury to be reconvened as witnesses to testify how it would have decided the original action if the case had been properly presented. Cornett v. Johnson, 571 N.E.2d 572, 575 (Ind. Ct. App. 1991) (judge should not have testified). *See* Carey and Emmings, Ltd. v. Ludowese, 434 N.W.2d 483, 485 (Minn. Ct. App. 1989) (Foley, J., concurring specially) (judge lent prestige of office to advance private interest of another when he filed affidavit indicating how he would have ruled had certain evidence been submitted to him at the underlying action).

In K & K Management, Inc. v. Lee, 557 A.2d 965, 972 (Md. App. 1989), a judge was permitted to testify as an expert because he had been retained as an expert prior to appointment as a judge.

American Bar Association added the following paragraph to the Code's Commentary for Canon 2:

> It is inappropriate for a judge to hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Membership of a judge in an organization that practices invidious discrimination may give rise to perceptions by minorities, women, and others, that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined by a mere examination of an organization's current membership rolls but rather depends upon the history of the organization's selection of members and other relevant factors. Ultimately, each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination.[110]

The 1984 ABA addition took a cautious approach to the issue by including it in Canon 2's Commentary rather than its black-letter standards. The 1984 Commentary also did not require a judge to choose between the judgeship or the organizational membership, but left the decision on the issue to "the judge's own conscience." Judges, then, were free to belong to discriminatory organizations. After 1984, though, those judges who maintained their memberships appeared to engage in even more purposeful discrimination for disregarding the idea that membership was inappropriate.[111]

In 1990, the ABA added Canon 2C to the black-letter language of Canon 2. It elevates from the earlier Commentary to black-letter status the impropriety of membership by a judge in certain organizations. The addition of Canon 2C provided an important principle to eliminate negative perceptions about whether a judge's private affiliations could affect the judge's decisionmaking. Canon 2C states: "A judge shall not hold membership in any organization that practices invidious discrimina-

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110. MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 2, at paragraph 3 (1984). The fact that attorneys still are not prohibited from joining these organizations again suggests current differences in defining permissible conduct by lawyers and judges.

111. *See* Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 1004 (1985).

More than a dozen states that ratified other portions of the 1972 Commentary never ratified the 1984 addition to the Commentary, meaning that more than half the states (by including those states that have not adopted *any* Canon 2 Commentary) have no statement about the suitability of membership in such organizations.

tion on the basis of race, sex, religion or national origin."[112]

As written, Canon 2C provides a strict liability standard: a judge may be in violation even in the absence of knowledge about the membership or the fact that the organization practices invidious discrimination.[113] Moreover, the governing criterion is invidious, rather than illegal, discrimination. "Invidious" discrimination arguably is broader than discrimination that is unlawful under federal or state law.[114]

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112. Michigan phrases the concern of Canon 2C differently in its Canon 2E: "A judge should be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, or other protected personal characteristic." MICHIGAN CODE OF JUDICIAL CONDUCT Canon 2E (1994).

Delaware, Georgia, Virginia, and Washington use the verb "should" rather than "shall." DELAWARE CODE OF JUDICIAL CONDUCT Canon 2C (1995); GEORGIA CODE OF JUDICIAL CONDUCT Canon 2C (1994); VA. SUP. CT. R. pt. 6 § tit. III, CANONS OF JUDICIAL CONDUCT Canon 2C (1994); WA CODE OF JUDICIAL CONDUCT Canon 2C (1992). Colorado substitutes the term "gender" for "sex." COLORADO CODE OF JUDICIAL CONDUCT Canon 2C (1990 & Supp. 1993).

Florida adds the following sentence to Canon 2C: "Membership in a fraternal, sororal, religious, or ethnic heritage organization shall not be deemed a violation of this provision." FLORIDA CODE OF JUDICIAL CONDUCT Canon 2C (1995). The following states also add an exemption for membership in a religious organization: California, Michigan, Utah, and West Virginia. CALIFORNIA CODE OF JUDICIAL CONDUCT Canon 2C (1994); MICHIGAN CODE OF JUDICIAL CONDUCT Canon 2E (1994); UTAH CODE OF JUDICIAL CONDUCT Canon 2C (1994); WEST VIRGINIA CODE OF JUDICIAL CONDUCT Canon 2C (1994). West Virginia also exempts memberships in organizations that are (1) dedicated to the preservation of ethnic, historical or cultural values that are of legitimate common interest to their members; or (2) an intimate, distinctly private association of persons whose membership limitations would be entitled to constitutional protection. WEST VIRGINIA CODE OF JUDICIAL CONDUCT Canon 2C (1994). California also exempts memberships in official military organizations of the United States. CALIFORNIA CODE OF JUDICIAL ETHICS Canon 2C (1996).

Georgia does not specify bases for discrimination, but instead ends the standard after the term "invidious discrimination." GEORGIA CODE OF JUDICIAL CONDUCT Canon 2C (1994).

New Mexico prefaces Canon 2C with the heading "Membership in Organizations." N.M. SUP. CT. R. 1986, CODE OF JUDICIAL CONDUCT Canon 21-200C (1995).

113. Colorado, Iowa, and Oregon require that the judge "know" that the organization practices invidious discrimination. COLORADO CODE OF JUDICIAL CONDUCT Canon 2C (1990 & Supp. 1993); IOWA CODE OF JUDICIAL CONDUCT Canon 2C (1995); OREGON CODE OF JUDICIAL CONDUCT Judicial Rule 1-101(H) (1996). Texas requires that the judge knowingly hold the prohibited membership. TEXAS RULES OF COURT, CODE OF JUDICIAL CONDUCT Canon 2C (West 1994).

114. Maine and Minnesota substitute the term "unlawful discrimination" for "invidious discrimination." MAINE CODE OF JUDICIAL CONDUCT Canon 2C (1994); MINNESOTA CODE OF JUDICIAL CONDUCT Canon 2C (1996). Oregon describes a discriminatory organization as one that discriminates "as a policy or practice and contrary to applicable federal or state law . . . ." OREGON CODE OF JUDICIAL CONDUCT Judicial Rule 1-101(H) (1996). Washington provides that a judge "should not hold membership in any organization practicing discrimination prohibited by law." WASHINGTON CODE OF JUDICIAL CONDUCT Canon 2C (1995).

Discrimination based upon criteria other than those listed in Canon 2C is illegal, e.g.,

The 1990 Commentary for Canon 2C contains three paragraphs of explanation and definition.[115] The first paragraph reiterates the appearance of partiality problems when a judge belongs to an organization that currently practices invidious discrimination. While it offers factors to assist in the difficult task of determining whether an organization engages in such practices, the Commentary also allows membership in groups that discriminate on the basis of religion or ethnic background.[116]

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discrimination based upon disability. Rhode Island added "disability" to Canon 2C as a prohibited type of discrimination. R.I. SUP. CT. R. art. VI, CODE OF JUDICIAL CONDUCT Canon 2C (1994).

California added "sexual orientation" to its Canon 2C as a prohibited basis for discrimination. CALIFORNIA CODE OF JUDICIAL ETHICS Canon 2C (1996).

Oregon prohibits knowing membership in a "discriminatory organization," which is defined to include persons who are treated "less favorably in granting membership privileges, allowing participation or providing services," on the basis of, *inter alia*, "sexual orientation, marital status, disability or age." OREGON CODE OF JUDICIAL CONDUCT Judicial Rule 1-101(H) (1996).

115. California, Colorado, Hawaii, Nevada, Rhode Island, and Wyoming have adopted the Canon 2C Commentary verbatim or in substantially the same form as the ABA Code. The following states adopting the 1990 language (or variations) of Canon 2C have not adopted any of the Commentary: Iowa, Maine, Massachusetts, Michigan, Minnesota, Oregon, Texas, Utah, and Washington.

Florida adds a paragraph at the beginning of the Canon 2C Commentary: "Florida Canon 2C is derived from a recommendation by the American Bar Association and from the United States Senate Committee Resolution, 101st Congress, Second Session, as adopted by the United States Senate Judiciary Committee on August 2, 1990." FLORIDA CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 1 (1995).

116. Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an 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. *See* New York State Club Ass'n. Inc. v. City of New York, 108 S. Ct. 2225 . . . (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 . . . (1987); Roberts v. United States Jaycees, 468 U.S. 609 . . . (1984).

MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 2 (1990).

Florida omits the second sentence from its Commentary. FLORIDA CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 2 (1995). In addition, the following is included after the Florida Commentary's case cites:

Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential

The concluding paragraphs of the Canon 2C Commentary were not part of the Commentary submitted to the ABA in 1989 by its Standing Committee on Ethics and Professional Responsibility. The second paragraph of the Canon 2C Commentary expands the prohibition beyond membership in such an organization to a judge who arranges a meeting or regularly uses the organization's facilities.[117] The final paragraph

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members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination.

Id.

In addition to those factors cited in the ABA Commentary, Delaware and North Dakota cite other relevant factors, such as the size and nature of the organization as well as the diversity of persons in the locale who might reasonably be considered potential members. DELAWARE CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 1 (1995); NORTH DAKOTA CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 1 (1994). The North Dakota Commentary continues: "Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination." *Id.*

South Dakota's Commentary elaborates on which groups cannot be said to discriminate. "Organizations dedicated to the preservation of religious, fraternal, sororal, spiritual, charitable, civic, or cultural values, which do not stigmatize any excluded persons as inferior and therefore unworthy of membership, are not considered to discriminate invidiously." SOUTH DAKOTA CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 2 (1994).

West Virginia's Commentary completes the thought in the ABA Commentary's first sentence by adding that the judge's impartiality is impaired "because of the appearance of judicial bias against persons excluded from membership." WEST VIRGINIA CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 1 (1994).

Georgia's first paragraph of Commentary ends with the following: "Ultimately, each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination." GEORGIA CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 1 (1994). This language was offered to the ABA as an alternative in the draft submitted in 1989. MODEL CODE OF JUDICIAL CONDUCT 10 (Discussion Draft 1989).

Arkansas does not enumerate the factors at the end of the fourth sentence, and its Commentary omits the citations. ARKANSAS CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 1 (1994).

New Jersey's Canon 2C Commentary contains only one sentence, which is a variation on the ABA Code's fourth sentence of the first paragraph. "Organizations dedicated to the preservation of religious, spiritual, charitable, civic or cultural values, that do not stigmatize any excluded persons as inferior and therefore unworthy of membership are not considered to discriminate invidiously." NEW JERSEY CODE OF JUDICIAL CONDUCT Commentary to Canon 2C (1994).

117. Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section

requires a judge/member of such an organization to resign, but the judge may first make efforts to persuade the organization to discontinue its practices.[118]

2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 2 (1990). New Mexico omits the first sentence from its Commentary. N.M. SUP. CT. R. 1986, CODE OF JUDICIAL CONDUCT Commentary to Canon 21-200C, at paragraph 2 (1995).

Arizona's Commentary omits the reference in the second sentence to examples of invidious discrimination. ARIZ. SUP. CT. R. 81, CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 2 (1993). North Dakota omits the last phrase of the second sentence. NORTH DAKOTA CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 2 (1994).

Georgia omits this paragraph from its Commentary. Florida specifically exempts membership in religious and ethnic clubs, such as Knights of Columbus, Masons, B'nai B'rith, and Sons of Italy; civic organizations, such as Rotary, Kiwanis, and The Junior League; young people's organizations, such as Boy Scouts, Girl Scouts, Boy's Clubs, and Girl's Clubs; and charitable organizations, such as United Way and Red Cross. FLORIDA CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 3 (1995).

Despite its prohibition on memberships in organizations that discriminate based upon "sex" and "sexual orientation," California's Canon 2C does not "bar membership in a nonprofit youth organization" such as the Girl Scouts of America or Boy Scouts of America, as long as the membership does not violate Canon 4A (dealing with extrajudicial activities in general). CALIFORNIA CODE OF JUDICIAL ETHICS Canon 2C (1996). A "nonprofit youth organization" is:

> any nonprofit corporation or association not organized for private gain of any person, and one whose purposes are irrevocably dedicated to benefiting and serving the interests of minors, and which maintains its nonprofit status in accordance with applicable state and federal tax laws.

Id. at Section on Terminology.

118. When a person who is a judge on the date this Code becomes effective [in the jurisdiction in which the person is a judge] learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 3 (1990).

Delaware, Maryland, and North Dakota expand the time limitation for mandatory resignation from one to two years. DELAWARE CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 3 (1995); MD. CT. R. 1231, CODE OF JUDICIAL CONDUCT

B. Case Law and Analysis

Although as of early 1996 no judicial decisions have applied or interpreted Canon 2C, several judicial ethics advisory committee opinions have discussed its scope and meaning. Canon 2C applies to organizations such as service or professional organizations and country clubs with more or less constant memberships controlled by some type of approval policy. The groups meet for professional, social, recreational, charitable, educational, or civic purposes. A Canon 2C group offers membership benefits beyond interaction with other members, e.g., recreation, opportunities for education, community involvement, or professional or business advancement.[119] The stated reason for Canon 2C is that discriminatory clubs symbolize inequality, and therefore membership in a group that practices invidious discrimination invites questions about the judge's commitment to equality and fairness. A judge's membership in such a group contributes to the perpetuation of unequal opportuni-

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Commentary to Canon 2C, at paragraph 3 (1994); NORTH DAKOTA CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 3 (1994).

Delaware and Indiana do not require the judge to suspend participation in other activities while attempting to persuade the organization to discontinue its discriminatory activities. DELAWARE CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 3 (1995); INDIANA CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 3 (1994). The Delaware Commentary also states that the judge "should" rather than "shall" resign immediately. In addition, the judge should make both immediate and continuous efforts to have the organization discontinue its discriminatory practices. DELAWARE CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 3 (1995).

California and Georgia omit this paragraph from their Commentary. Arizona replaces the third paragraph with a simple statement that a judge must resign from the organization within one year of the inception of judicial service. ARIZ. SUP. CT. R. 81, CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 3 (1993). Nebraska's Commentary demands that a judicial candidate is deemed to be on notice of the Code's requirements, and, if successful, the person must resign from the discriminatory organization before assuming office. NEBRASKA CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 4 (1992).

No state that has adopted Canon 2C and its Commentary has adopted the bracketed portion of the third paragraph.

119. As long as a facility is a place where clients may visit, the relative modesty of the facility "probably" does not affect the applicability of Canon 2C. Indiana Commission on Judicial Qualifications, Advisory Opinion 1-94, n.4.

ties[120] still encountered by minorities in commerce, corporations, professions, and business.

Generally, the judicial ethics opinions apply a three-part analysis for Canon 2C:

> 1) Does an organization discriminate on the basis of race, national origin, religion, or gender?
> 2) If the organization does discriminate, is it, in the words of the Commentary, not "in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited"?[121]
> 3) If the organization discriminates and is not protected as an intimate, private group, are the discriminatory practices "invidious"?

A negative response to any of the issues requires no further inquiry. An affirmative response to all three queries indicates that the judge should resign or not seek membership in the organization.

1. Does the Organization Discriminate?

Whether an organization discriminates is a fact-specific question, requiring that each judge assume the burden of gathering information in order to assess whether membership would comply with Canon 2C.[122] The factors frequently examined are the composition of the organization's membership as well as statements in the group's governing documents that suggest explicit or de facto discriminatory practices. For example, a bylaw indicating that an organization is for the benefit or advancement of a group is not discriminatory, but a bylaw stating that

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120. In Nebraska Judicial Ethics Committee, Advisory Opinion 93-2, Judge Alan Gless wrote a concurring opinion that questioned the reasoning of United States Judicial Conference Advisory Opinion 934. The latter suggested that, if a group prohibited membership for business purposes, exclusion of women from membership is proper. Judge Gless observed:

> Anyone who is denied the opportunity for full membership in such organizations is thus concomitantly denied the opportunity in that social setting to meet and work with local leaders who can and do provide the contacts necessary to economic success. The organization's policy may prohibit membership for business purposes or personal advantage on paper, but cannot prevent it in reality because of the inescapable nexus between rural social life and rural economic life.

121. MODEL CODE OF JUDICIAL CONDUCT Commentary to Canon 2C, at paragraph 1 (1990).

122. Even if they are aware of the history, purpose, functions, tenets, and activities of all organizations, judicial ethics commissions are unwilling to create lists of approved or disapproved groups. *See, e.g., id.* An ethics committee should refuse to accept a judge's claims about the organization at face value. *See* Nebraska Judicial Ethics Committee, Advisory Opinion 93-2 (Gless, J., concurring).

the group is to be composed only of one group is explicitly discriminatory. Although that expression could have been a drafting mistake, the judge nevertheless should examine the application and recruitment processes to learn more fully about the existence and extent of discrimination.[123]

The Boy Scouts of America and Girl Scouts of America generally restrict their respective memberships by gender. Although limited parts of each program are open to both genders, nondiscrimination in some segments of an organization does not make it nondiscriminatory. "When an organization discriminates in *any* membership category, its discriminatory practices require further analysis under Canon 2C."[124]

2. · Is the Organization Exempt from Scrutiny Because it is Purely Private?

As the Canon 2C Commentary states, an organization's discriminatory membership limitations are exempt from government interference when the group is "in fact and effect an intimate, purely private organization." However, this "safe harbor" for distinctly private groups is quite narrow, as suggested by the United States Supreme Court cases cited in the Commentary.[125] The ethics opinions merely suggest an inquiry for distinguishing between private groups and organizations. Besides the purpose of the group and whether membership is controlled by some type of approval method, other factors useful to a decision about whether an organization is distinctly private include:

> [its] size, its overall selectivity in membership, whether it advertises or publicizes its activities, whether it has subjected itself to governmental regulation such as with a liquor license, whether it sells retail goods or services, whether it offers its services or facilities to non-members, or whether it has developed a public identification such as through civic or charitable activities or participation in public events.[126]

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123. *See, e.g.*, Arizona Judicial Ethics Advisory Committee, Opinion 94-13 (1994). If no one in the excluded group has ever applied for group membership, that could support an inference that the group does not encourage applications from individuals in that group. *Id.*

124. Arizona Judicial Ethics Advisory Committee, Opinion 94-7 (1994).

125. *See supra* note 116.

126. Indiana Commission on Judicial Qualifications Opinion 1-94, n.2. "Canon 2C is aimed directly at country clubs, dining clubs, and service and professional organizations." *Id.* "Canon 2C does not proscribe participation in gender-restricted activities like mother-daughter banquets, men's support groups, college fraternity or sorority alumni groups, boy scouts, girls' basketball, and single-sex fitness facilities." Such "participation signifies nothing untoward about the judge's commitment to fairness and impartiality, nor are entire protected classes of

In contrast to large, broad-based groups which are undoubtedly subject to Canon 2C, "a few people who gather informally and periodically to play cards are not covered."[127]

3. Is the Discrimination Invidious?

A judge's membership in an organization that discriminates and is not "purely private" does not require further action unless the discrimination is invidious. An invidious distinction is an arbitrary one made on an illegitimate or offensive basis.[128] Membership discrimination is invidious if the reasons for the restrictions fail to reflect legitimate, generally accepted values.[129]

When an organization engages in discriminatory practices, an affirmative justification is necessary to support judicial membership in the organization. Some groups exist for the legitimate purpose of perpetuating or celebrating cultures, historical events, and ethnic or religious identities and traditions.[130] Judicial ethics opinions regard

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people being denied economic opportunity by the exclusions in the activities." *Id.* at n.3.

127. *Id.*

128. Indiana Commission on Judicial Qualifications, Advisory Opinion 1-94.

129. *Id.*

> [A] group's interests in its membership practices are legitimate when they (1) serve "religious, ethnic or cultural values of legitimate common interest to its members;" (2) are not generally regarded as repugnant in contemporary society; and (3) cause no harm to the excluded group or harm that is minimal and that is substantially outweighed by the group's legitimate interests. However, when the harms to those excluded - such as economic or educational disadvantage or a stigma of inferiority - are significant, the assertion that the membership practices serve some legitimate common interest does not render those practices acceptable.

Id.

The Commission cited the Daughters of the American Revolution, the Knights of Columbus, and the Sons of Italy as groups with permissible membership limitations.

As the harm caused by discrimination to the excluded group increases, the organization must increasingly justify its practices. For example, because Boy Scouts and Girl Scouts usually engage in recreational and community service activities, excluded groups do not experience the loss of economic opportunities. At this point the Advisory Opinion equivocated and finessed its way past the issue of stigmatization. "*If* each group has *legitimate* reasons for its membership policies, and *if* both males and females have essentially equal opportunity to participate . . ., then no stigma of inferiority is likely to attach to children of either gender." *Id.* (emphasis added).

Instead, the Commission reported that it had not probed into matters such as the relative financial resources of the groups or the details of the activities they sponsor, and therefore it was left to each judge to make that inquiry.

130. In 1993, the United States Judicial Conference, Advisory Opinion 934 relied upon a 1990 United States Senate Judiciary Committee Resolution pertaining to *nominees* for federal judgeships in finding that judicial membership in the Masonic Order is permissible despite its gender membership restrictions. The Resolution expressly omitted from its category

membership in those groups as inclusive of an entire group rather than exclusive of certain groups.[131] A group's *legitimate*[132] purposes may lead to the conclusion that its membership limitations are not unfair or stigmatizing, but instead are closely linked to what the group seeks to preserve or celebrate.[133] The difficult issue appears to be assessing

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of groups that practice invidious discrimination "fraternal, sororal, religious or ethnic heritage organizations." That reliance and almost exclusive dependence upon the inquiring judge's version of the organization's practices came under sharp attack from Judge Alan Gless in Nebraska Judicial Ethics Committee, Opinion 93-2 (1993).

131. California Judges Association Committee on Judicial Ethics, Opinion No. 34 (1987).

132. Merely promoting group advancement or cohesion is not a legitimate basis for exclusion. Arizona Judicial Ethics Advisory Committee, Opinion 94-13 (1994).

Suppose that victims of past invidious discrimination form or control an organization to discriminate and to compensate for disadvantages suffered as a result of the prior discrimination. Can such discrimination be legitimate if there has been a disadvantage suffered by the group's membership that is related to its basis for exclusion, i.e., the intent in forming or continuing the organization is to compensate for the disadvantage? Arguably, this may be permissible if the group's programs and policies are not based upon and do not perpetuate stereotypical notions, and the organization's discriminatory policies and programs directly and substantially help its members compensate for the previous disadvantage. *See id.*

133. Regardless of a group's preference to maintain membership segregation, each judge should examine the goals of the group to ensure that its interests are consistent with contemporary society. Arizona Judicial Ethics Advisory Committee, Opinion 94-7 (1994). The opinion acknowledged the opposing views about the benefits of matters like gender segregation and decided to refrain from determining which is correct. Instead, the Committee stated that such groups do not foster "malicious" discrimination prohibited by Canon 2C, and referred to the evidence that the membership practices of those groups are beneficial to the children. *Id.*

The California Judges Association has addressed four cases about unidentified international service organizations. The first involved a service club that had a bylaw excluding women from membership without justification. The Judges Association found that the organization discriminated invidiously and that a parallel "auxiliary" organization for wives of members was clearly patronizing and stigmatized women as inferior. California Judges Association Committee on Judicial Ethics, Opinion No. 34 (1987). *See* Nebraska Judicial Ethics Committee, Advisory Opinion 93-2 (1993). An assessment of invidiousness may include a determination of whether the discrimination is unlawful, i.e., illegal discrimination is invidious. For example, the California Judges Association Opinion found that the practices of the group that was the subject of the first inquiry violated not only Canon 2C but also the California Civil Rights Act. California Judges Association Committee on Judicial Ethics, Opinion No. 34, *supra.*

The second case approved a judge's membership in a local chapter of a similarly situated international group when the local group had opened its membership to women though none had joined as of the date of the opinion. In the third case, the governing documents of the international group required membership in both a local chapter (which had admitted women to membership) and the international parent organization (which did not admit women). The opinion supported the judge's membership in the local chapter, finding no public perception about the judge's impartiality due to the judge's pro forma membership in the invidiously discriminating international group.

which purposes are legitimate without raising concerns about fairness or restricting public officials' private lives.

It is unlikely that judges will end their affiliations with invidiously discriminating groups or that all organizations will abandon their membership policies. The necessity for applying Canon 2C, then, will continue. For courts and judicial ethics committees, the scope of Canon 2C awaits further development, for three reasons. First, the criteria for determining whether an organization invidiously discriminates are still indefinite. Until there is a consensus about the appropriate technique for Canon 2C analysis, judges cannot predict an ethics committee or appellate decision for any group to which they belong. Of course, even consistently applied criteria may lead to disparate conclusions from state to state about the propriety of judicial memberships.

Second, unlike other standards in the Code of Judicial Conduct that apply both to the judge as well as to other members of the judge's household,[134] Canon 2C applies only to the memberships held by the judge and is therefore subject to abuse. A judicial nominee who is a member of an organization that invidiously discriminates in violation of Canon 2C may choose to resign the prohibited membership in order to improve the chances of being confirmed as a judicial appointee or being elected by the voters. Shortly after being confirmed or elected, however, the judge's spouse rejoins the discriminatory organization in the spouse's name. Because Canon 2C does not prohibit the judge's spouse from belonging to a discriminatory organization, this indirect violation can occur.

Finally, it is unclear when and who will be able to obtain relief for violations of Canon 2C. Judicial ethics committees will attempt to respond to inquiries about the correctness of judicial membership in various groups, only to leave it to the individual judge to assess the

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In the fourth case, the Association failed to reach a decision for a judge who belonged to an international organization that excluded women from membership everywhere except within California. A plurality believed that Canon 2C should apply to groups that discriminate invidiously anywhere within the United States, while a minority believed that the judge's pro forma membership in the international group did not affect his membership in a nondiscriminatory local chapter in California.

134. *See, e.g.*, Canon 3E(1)(c) (judge cannot sit in case when the judge, the judge's spouse, or a minor child residing in the judge's household has a financial interest in the subject matter or a party); Canon 3E(1)(d) (judge cannot sit in case when the judge, the judge's spouse, and someone within the third degree of relationship to either, or the spouse of such person, acts as a party, officer, director, or trustee of a party, a lawyer, has an interest that could be substantially affected by the outcome of the proceeding, or is likely to be a material witness in the proceeding).

circumstances of the particular case. Litigants before the judge will have an interest in the judge's associations as well. As with other parts of Canon 2, litigants may seek the disqualification of a judge under Canon 3E due to the judge's memberships. The losing party on a motion for recusal would seek an appellate reversal of either a criminal conviction or a verdict in a civil case. There also may be a standing problem in Canon 2C litigation. Who can raise a Canon 2C problem in court? Anyone may be able to challenge the judge's group affiliations. Perhaps the courts will decide instead that the challenging litigant must be a member of the group that has been excluded from the judge's organization in order to raise a Canon 2C issue.

VIII. CONCLUSION

Canon 2 describes the circumstances in which the American Bar Association and ratifying states have determined that a judge is accountable for both improper conduct and the appearance of such behavior. This Article has noted specific ways in which appellate courts have interpreted or applied Canon 2 beyond its terms. Frequently, a common law of judicial ethics standards evolves through judicial (and political) reaction to an individual judge's conduct. Periodically, these experiences have persuaded the American Bar Association and individual states to adopt additions or modifications for the Code language itself. Public confidence in the integrity of the judiciary and its decisionmaking process requires that public institutions regularly review the ethical standards for judges. In that way, judges can conform their professional and personal conduct to public expectations.