

Trustees of the Justice System: Quasi-Judicial Activity and the Failure of the 1990 ABA Model Code of Judicial Conduct

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Law is the business to which my life is devoted, and I should show less than devotion if I did not do what in me lies to improve it, and, when I perceive what seems to me the ideal of its future, if I hesitated to point it out and to press toward it with all of my heart.¹

-Justice Oliver Wendell Holmes, Jr.

This article discusses the treatment of judges' activities to improve the law in the 1990 Model Code of Judicial Conduct. The 1972 Code of Judicial Conduct separated the guidelines for engaging in acts to improve the law ("quasi-judicial activity") from cautions against off-bench activity wholly unrelated to the law ("extra-judicial activity"). The 1990 Model Code of Judicial Conduct consolidates quasi-judicial activity and extra-judicial activity

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1. Justice Oliver W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 473-74 (1897).

into a single canon — Canon 4. This consolidation provides judges with little encouragement to improve the law. The failure to encourage judges to improve our justice system is contrary to the history of quasi-judicial activity and to other tenets of the 1990 Code itself. A modified version of Canon 4 is proposed which incorporates the rationale for consolidation yet encourages activities to improve the law.

I. INTRODUCTION

Judges across the United States are presently considering the adoption of a new set of ethical rules which will govern their behavior. The importance of this moment in judicial history should not be underestimated. This is only the third time American judges have systematically considered their standards of ethical conduct. The first Canons of Judicial Conduct were adopted in 1924 (*1924 Canons*),² proposed as a result of the “Black Sox” scandal of 1919 and Judge Landis’ role in its resolution.³ In 1969, the ABA appointed Chief Justice of the California Supreme Court Roger Traynor to preside over the redrafting of the *1924 Canons*.⁴ The redrafting process resulted in the *1972 Code of Judicial Conduct (1972 Code)*.⁵ With some modification, the Federal Judiciary and all but a few states adopted the *1972 Code*.⁶ In 1987, the ABA formed a subcommittee responsible for the drafting of a new ethical code.⁷ The result

2. ABA CANONS OF JUDICIAL CONDUCT (1924) [hereinafter 1924 CANONS].

3. An excellent account of Judge Landis’ simultaneous service to the judiciary and to baseball can be found in JOHN P. MACKENZIE, *THE APPEARANCE OF JUSTICE* 180-82 (1974). The eventual five drafters of the *1924 Canons* consisted of Chief Justice of the Supreme Court (and former President) William H. Taft, three justices of state supreme courts (two of whom were Chief Justices), and a lawyer, Charles A. Boston, who later served as president of the ABA. *Id.* at 183.

4. *Id.* at 192.

5. ABA CODE OF JUDICIAL CONDUCT (1972) [hereinafter 1972 CODE]. The *1972 Code* was the result of work by other prominent judges of the time: U.S. Supreme Court Justice Potter Stewart, Federal Appellate Judge Irving R. Kaufman, Judge Ivan L. Holt, Jr. of St. Louis, former Chief Justice Robert A. Leflar of the Arkansas Supreme Court, Colorado Supreme Court Justice James K. Groves, Seattle Superior Court Judge George H. Revell, and Federal District Court Judge Edward T. Gignoux. MACKENZIE, *supra* note 3, at 192-94. Seven other lawyers and scholars were also involved in the drafting process. *Id.*

6. Forty-seven states and the Federal Judiciary adopted the *1972 Code*. Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1, 3 (1988).

7. Membership on the subcommittee drafting the *1990 Code* included three judges and five non-judges. LISA L. MILORD, *THE DEVELOPMENT OF THE ABA JUDICIAL CODE* 3-4 (1992) (Lisa Milord was the Reporter for the *1990 Code*). This composition contrasts with the eight judges and five non-judges who drafted the *1972 Code*. Members of the *1972 Code*’s drafting committee included one Supreme Court Chief Justice, one Federal Appellate Court judge, and three experienced state supreme court justices. By contrast, the most prominent judge on the subcommittee drafting the *1990 Code* was Associate Justice of the Supreme Court of Maine, David G. Robert. *Id.* The subcommittee drafters were “aided” by “liaisons” who were not members of the subcommittee. These included four other judges and a well-known expert on issues of judicial ethics,

was the *1990 Model Code of Judicial Conduct (1990 Code)*.⁸ The *1990 Code* contained several useful changes including: clarifying the permissible activities of judicial candidates; providing a Terminology Section clarifying possibly ambiguous terms; making the Code gender neutral; and banning membership in organizations which discriminate on the basis of race, sex, religion, or national origin.

In October, 1993, the membership of the California Judges Association voted to adopt the *1990 Code*. California's judges, however, adopted it with some significant changes. In the next few years, the judiciaries of most states will presumably consider modifying or replacing their present Codes of Judicial Conduct in response to the ABA suggestion.⁹

This article discusses one part of the *1990 Code* which was considered deficient by California's judges. The authors hope this information will prove a useful resource in the national debate of whether the ABA's *1990 Code* should be adopted by other states without alteration.¹⁰

The most radical proposed structural change from the *1972 Code* was the consolidation of Canons 4, 5, and 6. In the *1972 Code*, Canon 4 concerns quasi-judicial activities, Canon 5 covers extra-judicial activities, and Canon 6 is devoted to guidelines for quasi-judicial and extra-judicial activities.¹¹ The consolidation of Canons 4 and 5 of the

Jeffrey M. Shaman. Of the four members of the judiciary acting as "liaisons," the most prominent was Chief Justice of the Supreme Court of Connecticut, Ellen Ash Peters. *Id.*

8. ABA MODEL CODE OF JUDICIAL CONDUCT (1990) [hereinafter 1990 CODE].

9. The states which have adopted the *1990 Code* (most with modification) are Wyoming, Nebraska, Nevada, Hawaii, West Virginia, Indiana, South Dakota, and Rhode Island. Telephone Interview with Cindy Gray, *American Judicature Society* (June 14, 1993). Connecticut adopted only the *1990 Code's* provisions dealing with ex parte communication, and Colorado and Maryland adopted the provisions concerning bias. *Id.* Presently in the process of reviewing the *1990 Code* for potential adoption are: Kansas, Arkansas, and Michigan. *Id.* The Federal Judiciary has recently adopted a new code of its own, borrowing only slightly from the *1990 Code*. Telephone Interview with R. Townsend Robinson, Deputy Assistant Director for Special Projects, Administrative Office of the United States Courts (June 14, 1993). The *Code of Conduct for United States Judges* can be found in Volume II of the GUIDE TO JUDICIARY POLICIES AND PROCEDURES (1992).

10. As one of the drafters of the *1990 Code* noted in 1991, "[T]he 1990 Code is intended to be modified by jurisdictions adopting it to the extent necessary to be consistent with the jurisdiction's law and practices." M. Peter Moser, *The 1990 ABA Code of Judicial Conduct: A Model for the Future*, 4 GEO. J. LEGAL ETHICS 731, 768-69 (1991).

11. 1972 CODE, *supra* note 5, Canons 4, 5 & 6. The definitions of "quasi-judicial" and "extra-judicial" are at the crux of this article and are discussed at length in its body. Quasi-judicial activities are activities which relate to the improvement of the law, the legal system, or the administration of justice, and are connected to the judicial office;

1972 Code obfuscates the original reasons for the separation of the two canons. The term “quasi-judicial” needs to be re-inserted into the *1990 Code* so that ethical conduct by judges aimed at improving and maintaining our legal systems continues to be clearly encouraged. Throughout this article, the authors will point to statements by scholars and judges that indicate the historically-recognized importance of maintaining a clear organizational and definitional distinction between quasi-judicial activities and extra-judicial activities.

Section II of this article discusses the proposed consolidation of Canons 4 and 5. It argues that the conceptual differences between Canons 4 and 5 make them difficult to consolidate intelligibly into a single canon, and that these conceptual differences in fact operate against the stated goals of the *1990 Code*'s drafters. Section III discusses the elimination of the term “quasi-judicial” from the *1990 Code*. Section IV discusses the central importance of quasi-judicial activity. Section V proposes a modified version of Canon 4 of the *1990 Code* which honors the essential rationale presently given for the proposed consolidation, but solves the problems discussed in this article. Appendix A provides the present text of Canon 4 of the *1990 Code* that served as the foundation of the authors' proposed modified version of Canon 4, and also provides Canons 4, 5, and 6 of the *1972 Code* for comparison purposes.

Nothing in this article is intended to suggest that less force should be accorded to the requirements that judges must conduct themselves in ways which uphold the dignity of their office and of the courts. Judges must *always* so act, and this fact *does* delimit what a judge may do in public life, in pursuing justice system aims, and in choosing between judicial and private life styles.¹² At the same time, these fundamental considerations should in no way decrease the force of the commandment to and need for judges to be actively protecting, defending, and repairing elements of our justice systems. Doing such requires judges to engage — often on a quite public stage — in effective quasi-judicial activities. It is the authors' belief that such quasi-judicial activities, on the part of most judges, are mandated by judges' oaths to defend the Constitution and by the general requirement that judges avoid the appearance of impropriety.¹³

extra-judicial activities concern all the judge's off-bench conduct unrelated to the law.

12. Author Coates is presently writing another article on the appropriate tone, style, and attitude a judge might consider adopting when acting quasi-judicially. This future article's thesis is that because acts to improve the law are a conditional judicial duty, they must be conducted within the canons which require a judge to remain independent and impartial, uphold the integrity of the judicial office, and avoid “appearance[s] of impropriety.”

13. The Biblical expression of this ethical position is from Jesus: “From those unto

II. THE CONSOLIDATION

The drafters of the *1990 Code* collapsed Canons 4, 5, and 6 of the *1972 Code* into a single canon. Part A provides the drafters' reasons for the overall consolidation and provides the reasons why the drafters of the *1972 Code* chose to separate these canons. Part B examines whether the *1990 Code* achieves its writers' stated purposes.

A. Reasons for Consolidation

The drafters of the *1990 Code* declared that they sought to provide four improvements: general limitations, clarity, easy accessibility, and an elimination of redundancy.¹⁴ Three individuals close to the drafting of the *1990 Code* have given reasons for the consolidation of the three canons.¹⁵

Subcommittee member M. Peter Moser, a lawyer who has previously written on professional responsibility issues for *lawyers*, commented: "This combination enables the standards to be located more readily, and eliminates unnecessary repetition. More important, certain general limitations that implicitly governed all extra-judicial conduct under the *1972 Code* Canons 4, 5, and 6 are now explicit."¹⁶ Green Bay Circuit Court Judge Vivi L. Dilweg, a "liaison" to the ABA subcommittee, commented: "The changes in [Canon 4] are primarily to add clarity and give additional guidance to judges."¹⁷ The Reporter for the *1990 Code* provides the clearest reason for consolidation of Canons 4 and 5 — the esteemed drafters of the *1972 Code* were simply mistaken in thinking that the subject matters of Canons 4 and 5 required distinct treatment:

The Committee did not believe such a distinction was accurate or necessary, as all non-judicial activities, including 'quasi-judicial activities,' are 'extra-judicial.' . . . Instead, the Committee became convinced that all of the activities of a judge that are engaged in outside the realm of judicial duties ought to be subject to a single set of overarching principles.¹⁸

Respectfully, comments such as these by parties close to the drafting of the *1990 Code* indicate a regrettable lack of understanding of the fundamental difference between quasi-judicial and extra-judicial

whom much is given, much will be required." *Luke* 12:48.

14. See generally Moser, *supra* note 10; Vivi L. Dilweg, *New Rules to Live By*, *JUDGES' J.*, Winter 1991, at 8; MILORD, *supra* note 7.

15. All indicated that their comments were not to be attributed to the entire subcommittee which prepared the new code.

16. See Moser, *supra* note 10, at 753-54.

17. Dilweg, *supra* note 14, at 42.

18. See MILORD, *supra* note 7, at 30.

activities. The drafters of the *1972 Code* acknowledged *three* distinct areas of judges' conduct needing to be regulated. E. Wayne Thode, the Reporter for the ABA Special Committee on Judicial Standards which drafted the *1972 Code*, wrote:

Early in our work the three-part division of a judge's conduct — judicial, quasi-judicial, and extra-judicial — was adopted. We think it has served us well as a tool of analysis and as a basis for the subject matter definition of Canons 3, 4, and 5. The remaining canons pertain to subjects that do not lend themselves to the three-part division.¹⁹

The earlier drafters thus envisioned three distinct categories of activity, with each canon covering an exclusive "subject matter." Steven Lubet, a professor who has conducted extensive research on quasi-judicial activities, has concluded: "The [1972] Code divides judges' activities into three conceptual areas — judicial, quasi-judicial, and extrajudicial — and deals with each area in a separate Canon."²⁰

B. Evaluation of Reasons Given for Consolidation

The first goal of consolidation stated by the drafters of the *1990 Code* fell under the heading of "needed, general limitations." There is, indeed, a self-evident need to provide general limitations on both quasi-judicial and extra-judicial activities. Canons 4 and 5 of the *1972 Code* provided general guidelines governing a judge's off-bench activity. Surely, judges must never become so involved in any type of off-bench activity that the public suffers at the hands of a preoccupied judicial officer. The general limitations provided in Canon 4 of the *1990 Code* are necessary and should be retained.

The placement of these limitations, however, should not be in the canon's heading nor in Section A.²¹ Judges are, of course, versed in nuances of statutory interpretation, and when a statute's organizational structure changes, judges will be sensitive to the fact that those items placed at the forefront dictate how one interprets provisions appearing later. Further, when a provision that once received prominent emphasis is entirely eliminated, rational interpreters of the wording will conclude that the eliminated provision was intended to be de-emphasized or disfavored.

Canon 4 of the *1990 Code* reads: "A judge shall so conduct the judge's 'extra-judicial' activities as to minimize the risk of conflict

19. E. Wayne Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793, 796 (1972).

20. Steven Lubet, *Judicial Ethics and Private Lives*, 79 NW. U. L. REV. 983, 1007 n.185 (1985).

21. See 1990 CODE, *supra* note 8, Canon 4.

with judicial obligations.”²² This reads similarly to Canon 5 of the *1972 Code*: “A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties.”²³

Including general limitations on all off-bench activity is obviously imperative, but two arguments disfavor this Canon’s heading. First, by incorporating quasi-judicial activity into the heading once devoted only to extra-judicial activity, the more affirmative encouragement given quasi-judicial activity (as found in the heading to Canon 4 of the *1972 Code*)²⁴ is subsumed in a heading that can be read to indicate that extra-judicial and quasi-judicial activities both deserve the same degree of emphasis.²⁵ Furthermore, although the drafters of the *1990 Code* took “cognizance” of the encouragement that should be given to quasi-judicial activity, such encouragement has been taken out of the body and remains *only* in the commentary.²⁶ The commentary section of the code has traditionally been viewed as merely advisory, and is not accorded the status of headings and sections.²⁷ With the removal of Canon 4 and the elimination of the term

22. *Id.* As stated in note 11, the term “extra-judicial” in the *1990 Code* encompasses both “quasi-judicial” and “extra-judicial” activity discussed in the *1972 Code*. The inappropriateness of this definitional change is discussed in Section III *infra*.

23. 1972 CODE, *supra* note 5, Canon 5. The language change from “should” to “shall” is consistent with other changes in the *1990 Code*. This change serves the purpose of eliminating any question that the activity is optional or will be reviewed less severely. Many judges in California objected to this word change throughout the *1990 Code*. See Summary of Changes, Proposed California Code of Judicial Conduct, Second Draft, at xiii (May 1992). The authors have chosen to retain the “shall” wording in their recommended version of Canon 4 (found at the end of this article) to emphasize the primacy of a judge’s obligation to his or her on-bench activity.

24. The Reporter of the *1972 Code*, E. Wayne Thode, wrote that the purpose of Canon 4 was to “encourage” quasi-judicial activities. E. WAYNE THODE, REPORTER’S NOTES TO CODE OF JUDICIAL CONDUCT 74 (1973). Others have reiterated this conclusion. See, e.g., Walter P. Armstrong, *The Code of Judicial Conduct*, 26 SW. L.J. 708, 719 (1972). Encouragement of quasi-judicial activity received widespread judicial support. *Id.*; see also George Edwards, *Commentary on Judicial Ethics*, 38 FORDHAM L. REV. 259, 274-75 (1969); Irving R. Kaufman, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROBS. 3, 7 (1971). Note, however, that although the *1990 Code*’s Section 4B does provide for legally related “extra-judicial activities,” this is, from a standpoint of statutory interpretation, a demotion in emphasis. The importance afforded quasi-judicial activity has been lessened because it has moved from heading status to section status.

25. Canon 4 of the *1972 Code* affirmatively stated: “A JUDGE MAY ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE.” 1972 CODE, *supra* note 5, Canon 4. This heading has been completely eliminated from the *1990 Code*.

26. William F. Womble et al., *What Role Should Judges Play in the ABA?: The JAD Position*, JUDGES’ J., Spring 1992, at 8, 10.

27. See Steven Lubet, *Judicial Impropriety: Love, Friendship, Free Speech and Other Intemperate Conduct*, 1986 ARIZ. ST. L.J. 379, 395 (1986).

“quasi-judicial activity,” the encouragement of activities to maintain and improve the legal system has been downgraded to a low priority.

Secondly, by placing the limitations on a judge’s outside activity at the forefront, in the heading and in the first section, the communication to judges is that they must be equally as cautious about engaging in activities to improve the law as they are about engaging in entirely non-law-related activities.²⁸ Surely the ABA drafters did not intend to encourage and delimit a judge’s off-bench conduct without regard to the purpose of that conduct. The 1972 Code’s organization was free of this error, and judges should seek to eliminate this difficulty from any new code they adopt.²⁹ Steven Lubet has aptly stated, “If we are best served by a broad and knowledgeable judiciary, then we accomplish nothing by creating vague rules that provide incentives for self-seclusion. Judges need and deserve firmer standards, not necessarily to restrain, but to inform.”³⁰ Professor Grossman, a decade and a half earlier, had said the same thing: “The first requirement of any code of conduct is that it must be reasonably clear about what is or is not prohibited behavior.”³¹ The 1990 Code fails Lubet’s and Grossman’s requirements of clarity, because it combines general limitations on both quasi-judicial and extra-judicial activities, without first differentiating between these two vastly different types of activities.

The general limitations provided in the heading to Canon 4 and Section 4A of the 1990 Code should be retained.³² These “general limitations,” however, should be placed after a heading that provides for both the affirmative recognition of the need for judges to be participating members of the community in which they adjudicate and also of the need for judges to be encouraged to improve all aspects of the law.³³

The second goal of consolidation given by the drafters of the 1990 Code was that of providing clarity.³⁴ The failure to delineate clear

28. The importance of engaging in quasi-judicial activities is discussed in Section IV.

29. Steven Lubet has noted a fundamental difference between the treatment in the 1972 Code of extra-judicial activities and those activities pursued to benefit the legal system: “The general tenor of the Code is to encourage certain quasi-judicial or civic activities and to circumscribe, but not prohibit, extrajudicial activities.” STEVEN LUBET, *BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES* 4 (1984).

30. See Lubet, *supra* note 27, at 399.

31. Joel B. Grossman, *A Political View of Judicial Ethics*, 9 *SAN DIEGO L. REV.* 803, 807 (1972).

32. See the authors’ proposed version of the new Canon 4 in Section V.

33. *Id.* In addition to the organizational change of emphasis, the authors have also inserted the word “quasi-judicial” to make it quite clear that *all* judges’ off-bench activities are subject to these limitations.

34. See Dilweg, *supra* note 14.

guidelines as to what types of off-bench activities are to be encouraged or dissuaded defeats the goal of providing clarity.

Another hazard to clarity concerns the treatment of charitable activities. In the *1972 Code*, judges were not allowed to be involved in organizations conducted for the "economic or political advantage" of their members.³⁵ Under Canon 4C(3) of the *1990 Code*, "A judge may serve as an officer, director, trustee or non-legal advisor . . . of an educational, religious, charitable, fraternal or civic organization not conducted for profit. . . ."³⁶ Although this reads as if little change has been made, a group of scholars familiar with issues of judicial ethics (including one of the "liaisons" to the drafting subcommittee) have noted that "a consequence of the joint treatment of 'law' and 'non-law' organizations is that it may now appear that judges are free to serve as officers of non-profit 'political' organizations."³⁷ The ethical code's requirements that judges remain both independent and impartial make this error particularly significant. In sum, the proposed consolidation of Canons 4 and 5 in the area of charitable activities yields less clarity than presently exists as to the forms of permissible conduct. Thus, two of the drafters' stated goals are sacrificed under the *1990 Code*: providing guidelines and providing clarity.

The third stated goal of the proposed consolidation was to provide easy accessibility. How is this goal to be achieved by lumping together subjects that judges have long come to think of as distinct? Judges, who are well-versed in assessing statutory information, will not expect to find different conceptual areas in a single canon, and certainly not within a canon with a title of "extra-judicial" activities. The failure to address conceptual distinctions by the writers of the *1990 Code* serves to defeat their third goal of providing easy access.

The final stated goal of the drafters was to rid the ethical code of

35. 1972 CODE, *supra* note 5, Canon 5B.

36. 1990 CODE, *supra* note 8, Canon 4C(3).

37. Jeffrey M. Shaman et al., *The 1990 Code of Judicial Conduct: An Overview*, JUDICATURE, June-July 1990, at 21, 24. The same authors have commented elsewhere that the concurrent treatment of law-related and non-law-related activities in a single canon "now raises as a question whether it is wise to allow the same latitude for general charitable organizations as for law-related organizations." STEVEN LUBET ET AL., JUDICIAL CONDUCT AND ETHICS 499 (1990). Note also that a potential solution to this problem was presented to the ABA House of Delegates which eventually approved adoption of the *1990 Code*: "The House of Delegates defeated a proposed amendment to Section 4C(3) that would have substituted for the word 'profit' the words 'the economic or political advantage of its members,' as the *1972 Code* had provided in Canon 5B(3)." See Moser, *supra* note 10, at 757 n.100. Surprisingly, this indicates the problem was known to the ABA, yet ignored.

needless repetition. Redundancy that does not exist can not be eliminated. Quasi-judicial activities and extra-judicial activities are disparate. We ought not muddy this distinction simply in hopes of saving a few paragraphs of text. Interestingly, the proposed consolidation does not, in fact, save text. The text of Canons 4, 5, and 6 of the 1972 Code is eight pages.³⁸ The text of Canon 4 of the 1990 Code is fourteen pages.³⁹ In their zeal to eliminate redundancy, the drafters of the 1990 Code produced a text nearly twice as long.

III. THE ELIMINATION OF THE TERM "QUASI-JUDICIAL"

The drafters of the 1990 Code eliminated the use of the term "quasi-judicial." Canon 4 of the 1990 Code uses the term "extra-judicial" to encompass all activity not conducted inside the courtroom. Part A explores the drafters' reason for allowing the term "extra-judicial" to subsume the term "quasi-judicial." Part B discusses the definitional distinction between the terms "quasi-judicial" and "extra-judicial." Part C discusses the mischief caused by labeling all off-bench activity "extra-judicial."

A. Reasons Given for Eliminating the Term "Quasi-Judicial"

No answer was initially provided as to why the term "quasi-judicial" was eliminated. A note in an earlier draft of the 1990 Code explains that "the proposed revised code uses the term 'Extra-Judicial activities' elsewhere to include both Quasi-Judicial and Extra-Judicial activities as they were defined in the 1972 Code."⁴⁰ In addition, Moser wrote, "Provisions under Canons 4, 5, and 6 of the 1972 Code, each of which governed aspects of judges' extrajudicial activities, are reorganized under 1990 Code Canon 4, which covers all aspects of those activities."⁴¹ Finally, three of the drafters of the proposed code commented, "In the 1990 Code, Canons 4 and 5 (both of which governed aspects of a judge's extrajudicial activities) were combined under new Canon 4, placing all aspects of extrajudicial activities in one canon."⁴²

These comments show that the drafters of the 1990 Code did not acknowledge an existing definitional distinction between the terms

38. See MILORD, *supra* note 7, App. C: 1972 Code, at 119-26.

39. See *id.* App. A: 1990 Code, at 83-96.

40. ABA STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES, MODEL CODE OF JUDICIAL CONDUCT, App. C, Canon 4H note, at 63 (1990) [hereinafter ABA REPORT TO THE HOUSE OF DELEGATES].

41. Moser, *supra* note 10, at 735. Moser concludes that "[c]ombining the provisions of Canons 4 and 5 of the 1972 Code under a single Canon 4 in the 1990 Code results in clarifying that substantially the same standards govern all extra-judicial activities of judges." *Id.* at 770.

42. Womble et al., *supra* note 26, at 10.

“quasi-judicial” and “extra-judicial.” Finally, a clear basis for the drafters’ reasoning behind the removal of the term “quasi-judicial” came only *after* the ABA approved the *1990 Code*. The Reporter for the *1990 Code* stated that the drafters affirmatively believed no distinction actually existed: “[A]ll non-judicial activities, including ‘quasi-judicial activities,’ are ‘extra-judicial.’”⁴³ Therefore, the excision of the term “quasi-judicial activity” was justified by the belief that it was equivalent in meaning to the term “extra-judicial activity.”

B. The Distinction Between Quasi-Judicial and Extra-Judicial Activity

The belief that quasi-judicial activity is equivalent to extra-judicial activity is mistaken and remarkable. The drafters of the *1972 Code* considered there to be a conceptual distinction between the three types of a judge’s activity: judicial, quasi-judicial, and extra-judicial.⁴⁴ In order to elaborate on the conceptual distinction between quasi-judicial and extra-judicial activities, it is instructive to examine how these terms have been used in judges’ training courses, in writings on judicial ethics, and in the *1972 Code* itself.

Canon 4 of the *1972 Code* began with the heading: “A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.”⁴⁵ Section A of Canon 4 of the *1972 Code* enumerated the activities defined as quasi-judicial: a judge “may speak, write, lecture, teach and participate in other activities concerning the law, the legal system, and the administration of justice.”⁴⁶ From this foundation, the term “quasi-judicial activities” came to have a meaning distinct from both on-the-bench activity (judicial activity) and from off the bench and non-law-related judge’s activity (extra-judicial activity).⁴⁷

Judge David Rothman, a prolific writer on the subject of judicial

43. MILORD, *supra* note 7, at 30. As will become apparent, this remark is an error within a misstatement. The error is in cavalierly stating that quasi-judicial activities are “non-judicial.” The misstatement involves the assumption that all activity not directly on the bench becomes extra-judicial.

44. See Lubet, *supra* note 20, at 1007 n.185.

45. 1972 CODE, *supra* note 5, Canon 4.

46. *Id.*, Canon 4A.

47. See Armstrong, *supra* note 24, at 719. Although first use of the term quasi-judicial appears to have occurred only in the late 1960s, the concept of a judge working off the bench to improve the law dates back to the beginnings of this country. Historical underpinnings are discussed in Section IV.

ethics, provides a comment which highlights the most important aspect of the distinction: "Judges are permitted to engage in certain activities *connected with their judicial office* that are not related to their adjudicative or administrative duties. . . . These quasi-judicial activities must relate to the improvement of the law, the legal system or the administration of justice."⁴⁸ Rothman pinpoints the difference between quasi-judicial and extra-judicial activities. Extra-judicial activities are those activities of judges outside the courtroom that are not "connected with their judicial office" and that have nothing to do with the "improvement of the law, the legal system or the administration of justice." As Thode stated concerning extra-judicial activities, "The types of potential activities vary widely. Some are a matter of choice, such as avocational or civic and charitable activities. Others, such as financial activities, must be engaged in whatever the size of a judge's income."⁴⁹ Yet the "types" of extra-judicial activities were not conceived to "vary widely" enough to encompass activities connected to the improvement of the justice system. If so, the 1972 Code would not have separated Canon 5 from Canon 4.

The proposed combination of quasi-judicial and extra-judicial activities under a single heading of extra-judicial activities ignores a well-accepted distinction between the two activities. Although a charitable view is that this was perhaps done with good intent, a clear separation needs to remain in any future judicial code of conduct.

Others have agreed that the consolidation of these two distinct types of conduct under the single term "extra-judicial" encompasses too much. The Board of Judges of the Civil Court of the City of New York commented that in Canon 4 of the 1990 Code, "the phrase 'Extra-Judicial,' which is overbroad, should be changed to 'Quasi-Judicial.'"⁵⁰ Similarly, Jeffrey Shaman, a liaison to the ABA subcommittee formulating the 1990 Code, has said in a phone conversation: "It would have been preferable to frame the 1990 Code in terms that more exactly recognize the differences between quasi-judicial and extra-judicial activities so as to more clearly indicate that judges should be encouraged, and perhaps even obligated, to be involved in quasi-judicial activity."⁵¹

Shaman recognizes the need to provide lucid guidance to judges wishing to improve the justice system, and the need to encourage

48. DAVID ROTHMAN, CALIFORNIA JUDICIAL CONDUCT HANDBOOK at I-5 (1990).

49. Thode, *supra* note 19, at 800.

50. ABA REPORT TO THE HOUSE OF DELEGATES, *supra* note 40, App. D: *Compendium of Comments*, at 22. Significantly, this objection was raised before the ABA approved its final draft of the 1990 Code; it was apparently ignored.

51. Telephone Interview with Jeffrey Shaman, Liaison to the ABA Model Code Subcommittee (July 16, 1992).

such work. Under the proposed changes of the *1990 Code*, the potential for judges *not* to engage in quasi-judicial activity out of fear of its prohibition begins to loom realistic. Judge Harriet Henry, a representative of the ABA JAD-National Conference of Special Court Judges, has noted the possibly deleterious effect Section 4B of Canon 4 may have on quasi-judicial activity: "More specific references, either in the text of the Canon or the Commentary, should be included as to permitted activity. The current 1990 provision may be interpreted narrowly to prohibit, for example, various activities by special court judges to improve the juvenile justice system."⁵²

Semantically, quasi-judicial activities equate with nearly-judicial activities. Judicial education programs have long emphasized the need for judges to participate in quasi-judicial activities. These same courses, however, had no reason to encourage judges to engage in extra-judicial activities, except as may be required to avoid the appearance of impropriety. In California, judges have long been urged to honestly assess their own talents and interests, and then to use these strengths to repair and to solve the problems they perceive in the justice system. This is quasi-judicial work, and any code of conduct must recognize the need and corresponding judicial obligation to be involved in such work.

Judges by their natures are a conservative lot. On a daily basis judges are in the public eye. They recognize the dangers to the legal system of being perceived as less than fully attentive to their judicial duties. Thus, if not out of the sheer necessity of gaining re-election, then as part of their oath to the Constitution,⁵³ judges are already careful to fulfill their on-bench duties with full vigor before pursuing outside interests. Judge Kaufman once said that "the members of the judiciary with whom I have come into contact in more than twenty years on the bench are, on the whole, a sober and honest group, far removed from the 'jackals' at whom procrustean limitations are usually directed."⁵⁴

52. ABA REPORT TO THE HOUSE OF DELEGATES, *supra* note 40, App. D: *Compendium of Comments*, at 23. Again, this objection was raised before the ABA approved its final draft of the *1990 Code*, and again this objection was apparently ignored.

53. A Constitution which states in its Preamble: "We the people of the United States, in Order . . . to establish Justice . . . do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl.

54. Kaufman, *supra* note 24, at 8. Judge Edwards similarly commented that "the judges with whom I have worked during nearly 18 of these years on four different courts have been a sober, frugal, industrious, and conscientious group." Edwards, *supra* note 24, at 261; see also Simon H. Rifkind, *A Judge's Nonjudicial Behavior*, 38 N.Y. Sr. B.J. 22 (1966).

All the cautionary language contained in Canons 1-3, in compliance with which judges must conform their behavior, could have the unhealthy effect of deepening some judges' natural inclination toward inactivity off the bench. Many judges have acted with fanatical caution, resolving any questions in this area on the side of timidity or silent inactivity. "Better safe than sorry" has seemed to be their operative motto. Such a posture reminds one of something once said by Walter B. Wriston: "Be nice and play safe."⁵⁵ If there was ever "a prescription for producing a dismal future," as Wriston described it, that has to be it (to say nothing of being unethical).⁵⁶ Such a mindset also equates to a prescription for producing a dismal legal future in America. Indeed, adoption of the 1990 Code's Canon 4 would provide further impetus for the fostering of this presently all-too-familiar judicial attitude. Therefore, judges need the affirmative message that their activities to improve the justice system are not only approved but encouraged. The judges' ethical code should help judges find what the Chief Justice of the Hawaii Supreme Court once called "a balance between activism and restraint, so that — in the words of one [of] our judicial colleagues — we are more than 'passive machines' but not 'zealous reformers.'"⁵⁷ This wise message can be sent by preserving a canon heading affirmatively stating that judges are encouraged to engage in quasi-judicial activities. Judges are uniquely suited to discovering and resolving problems in the legal system.⁵⁸ The public will inevitably think that, if judges work in the legal system and comprehend its problems, do judges not have a simple duty to make the system work? The code and the judges should answer this question clearly before it is asked by a public that is increasingly disillusioned with their legal system.

The elimination of the term "quasi-judicial activity" raises several other troubling questions based on statutory interpretation. By way of emphasis, is the new code more concerned with regulating quasi-judicial activity than with an affirmation of the duty to improve the legal system? Were the drafters of the 1990 Code as committed to encouraging quasi-judicial activity as the drafters of the 1972

55. James Flanigan, *Citicorp Has a Habit of Taking the Right Risks*, L.A. TIMES, May 22, 1987, at B1.

56. *Id.*

57. Herman Lum, *Our Role as Judges in Modern Society*, CT. REV., Winter 1987, at 4, 6. Justice Shirley Abrahamson of the Wisconsin Supreme Court agrees: "While we want judges to conduct themselves appropriately off and on the bench, we do not want to force them to retreat into monastic isolation." LUBET ET AL., *supra* note 37, at viii.

58. 1990 CODE, *supra* note 8, Canon 4B Commentary. The commentary section, however, is offered as advice and does not have the binding nature of the sections or headings. See *supra* note 27 and accompanying text. In the authors' proposed Canon 4, this affirmative statement that judges are encouraged to engage in quasi-judicial activities is moved to the status of beginning a section. See *infra* Section V.

Code?⁵⁹ It seems not. It appears inescapable that the *1990 Code* presents a deliberate attempt to demote such activities or to discourage them altogether, out of fear that . . . what? That judicial obligations will be "slighted?"⁶⁰ What will be the result if the *1990 Code* is adopted without solving this error? Will fewer judges participate in actions to improve our ailing justice system? If judges are to be truly encouraged to preserve and improve our justice system, we should not have to ask such questions.

States ought not muffle the message of the obligation to work to preserve and to improve the legal system by labeling it an *extra-judicial activity*. Extra-judicial activities are those entirely unconnected with judicial office. When improvement of the judicial system is not defined as a nearly-judicial activity, the signal is sent that acting to improve the justice system is equivalent to joining a country club. What a danger there is in denying the legal system the efforts of those most qualified and surely those most motivated in improving its inefficiencies! Undeniably, states do not wish to send this stifling, irrational message to new or to presently active judges, nor to its citizens.

The *1990 Code* gives encouragement to activities to improve the law in truly flaccid, tentative, and equivocal terms. Declaring that judges "may" act to improve the law belies the importance of quasi-judicial activity. The wording of Canon 4's heading needs to be

59. The drafters of the *1990 Code* did not place high value on the need to encourage quasi-judicial activity. The commentary to Section 4B which most clearly encourages quasi-judicial activity was placed in the *1990 Code* only after the ABA House of Delegates was lobbied to provide for its inclusion in the *1990 Code*. See LUBET ET AL., *supra* note 37, at 50. This commentary reads: "Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession. . . ." 1990 CODE, *supra* note 8, Canon 4B Commentary.

60. The idea held by some that quasi-judicial activities should not be encouraged by the Judicial Code of Conduct was familiar to the drafters of the *1972 Code*. These drafters, however, rejected the notion that because on-bench activities can be "slighted," quasi-judicial activities should be discouraged. While participating in drafting the *1972 Code*, Judge Kaufman wrote:

One could take the position that since judicial tasks might be slighted, quasi-judicial and extra-judicial activities should be abandoned altogether, especially since drafting a specific rule permitting some quasi-judicial activities seems virtually impossible. Yet this would, I submit, be the worst of all possible worlds, for it would place a premium on judicial myopia in an age that incessantly demands more independence and more understanding to solve the increasingly complex and sensitive issues our society leaves to be settled by litigation.

Kaufman, *supra* note 24, at 7. Thode has written that provisions of Canon 4 of the *1972 Code* were drafted with the acknowledgement that it is important to keep "the judge in contact with the world around him" and to make a judge's expertise available in the ever-continuing effort to improve the law. THODE, *supra* note 24, at 76.

changed to include: "Judges are encouraged to engage in activities to improve the law."⁶¹ This wording more accurately indicates judges' natural role as skilled and devoted handymen in the upkeep of the legal system. This view finds support from Judge Norman Krivosha, a former Chief Justice of the Nebraska Supreme Court, who has long said that the wording of the code should make it clear that there is an affirmative duty to participate in activities that improve the justice system.⁶²

The term "quasi-judicial" must be reinserted into the code, and also must be defined in the new Terminology Section of the 1990 Code. These two slight modifications will make a world of difference. Judges and the public will thereby be shown that a judge's efforts to improve the legal system are "activities connected with [a judge's] judicial office."⁶³ Recognizing this connection is the first step in enlisting the efforts of those "in a unique position to contribute to the improvement of the law."⁶⁴

IV. THE IMPORTANCE OF QUASI-JUDICIAL ACTIVITY

While extra-judicial activities surely may broaden the judicial mind,⁶⁵ these activities do nothing to directly benefit the justice system. One of the constitutional mandates under which judges work in our nation, however, is that of *the advancement of justice*.⁶⁶ It is therefore important, first, to acknowledge that a judge's quasi-judicial activities are an inherent part of facilitating that mandate. Indeed, quasi-judicial activities are encouraged in order to heighten the judiciary's efficiency, independence, vitality, impartiality, and public image. This section addresses each of these points to highlight the need for the judicial code of conduct to affirmatively encourage judges to engage in quasi-judicial activity. Furthermore, there are ethical reasons consistent with the 1990 Code for retaining the term "quasi-judicial."

The ability to administer justice efficiently depends on quasi-judicial activity. Quasi-judicial activities include activities to reform courts' administrative procedures and to redraft legislation that is not meeting its *raison d'être*. It includes teaching law, explaining the law to lay audiences, and writing. It can also include acts aimed at making probation effective. Sir Edward Coke once stated, "A

61. See the proposed code, *infra* Section V.

62. Sheila Macmanus, *11th National Conference Convened*, JUD. CONDUCT REP., Fall 1988, at 1, 2.

63. ROTHMAN, *supra* note 48, at I-65.

64. 1990 CODE, *supra* note 8, Canon 4B Commentary. In the authors' proposal, the quoted statement is moved to section status.

65. Extra-judicial activities may even, indirectly, reflect honor on the judiciary.

66. U.S. CONST. art. I.

court must not engage in a vain act."⁶⁷ Sometimes, judges are called upon to repair or reform the legal system in order to prevent the judiciary from engaging in "vain acts." The drafters of the 1972 *Code* recognized the need for and the suitability of judges participating in reform of the laws and the adjudicative process.⁶⁸ Thode has indicated that Canon 4 of the 1972 *Code* was drafted with attention to the propriety and desirability of judges engaging in legislative and judicial reform: "The *Code* authorizes a judge to engage in much broader contributions to the public interest in the field of legislation."⁶⁹ He also said: "Judges have a direct interest, and many have special expertise, in matters of judicial administration."⁷⁰ Judges of this time period, including recognized greats like Friendly and Kaufman, took these edicts of the 1972 *Code* seriously.⁷¹

The drafters of this nation's first code of judicial ethics also recognized the suitability of judges working to reform laws and procedures which inhibited judicial efficiency.⁷² Chief Justice (and former President) Taft, who was in charge of drafting the 1924 *Canons*, was deeply involved in quasi-judicial activities that "he considered judicial reform."⁷³ Another great Justice of that era, Justice Cardozo, went so far as to advocate the establishment of a "Ministry of Justice" to mediate between the judicial and legislative branches.⁷⁴ As members of this ministry, Cardozo envisioned that judges, legislators, legal scholars, and members of the bar would study the law and recommend revisions.⁷⁵ As the quote which launches this article indicates, Justice Oliver Wendell Holmes was an avid practitioner of

67. This proposition is first attributed (in English Law) to Lord Coke in *Laughter's Case*, 5 Rep. 1; Co. Litt. 127b, cited in *Marson v. Short*, 2 Bing, N.C. 118, 121, 42 Rev. Rep. 544, 547 (1835); Wing Mamx. 600; see also *Bell v. Midland Ry.*, 10 C.B.M.S. 287, 306, 128 Rev. Rep. 719, 729 (1861).

68. 1972 CODE, *supra* note 5, Canons 4A, 4B.

69. THODE, *supra* note 24, at 75.

70. *Id.*

71. See Kaufman, *supra* note 24, at 7; Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).

72. 1924 CANONS, *supra* note 2, Canon 23.

CANON 23: LEGISLATION. A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience.

Id.

73. MACKENZIE, *supra* note 3, at 189.

74. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 125 (1921).

75. *Id.* MacKenzie points out that judges have been historically active in another

quasi-judicial activity.⁷⁶ These activities by Holmes and Cardozo have prompted one judge to write: "Some, like Holmes and Cardozo, are remembered and valued in the law as much for their 'outside' legal writing as for their opinions."⁷⁷

The "occasional" duty to engage in legal reform will only become more frequent as this decade passes. With crowded dockets and fiscal limitations, practitioners' actions to improve the efficiency of the legal system will often be the only method of reprieve. Laws and commandments which are doing more to inhibit, rather than expedite justice, must be exposed and eliminated. In recognition of this pressing necessity, Justice Ruth Bader Ginsburg has written that judges and legislators should set up a statutory revision committee to review imperfections in the laws.⁷⁸

As has been recognized throughout our legal history, commandments from the judges' code of ethical conduct must not discourage the efforts of even a single judge who might otherwise act to improve the legal system. The code which judges choose to adopt should not mumble the message "quasi-judicial activities are to be encouraged," for the very efficiency of our justice system depends on these activities.

The first canon of the 1990 Code mandates that "a judge shall uphold the integrity and independence of the judiciary."⁷⁹ Judicial independence is upheld, among other ways, through intelligent quasi-judicial activity. The judiciary must consist of individuals who are unafraid to face the pressing legal-system issues of their time.⁸⁰ Judge Irving Kaufman, a drafter of the 1972 Code, wrote: "There can be few qualities more conducive to continued judicial independence than the breadth of vision acquired in differing endeavors to

quasi-judicial area, that of offering legal advice to Presidents. Justices from Jay and Marshall to Jackson and Frankfurter have served as legal advisors to Presidents. MACKENZIE, *supra* note 3, at 1-8.

76. See *supra* note 1. This oft-cited quote by Holmes illuminates his beliefs concerning the revision of rules of law which have outlived their usefulness: "It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV." Holmes, *supra* note 1, at 469.

77. See Edwards, *supra* note 24, at 275.

78. Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1433 (1987). Retired judges would be on the revising committee and active judges would assist the committee "by identifying for committee consideration Delphic or inconsistent prescriptions, or measures with missing links." *Id.*; see also Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 1013 (1987).

79. 1990 CODE, *supra* note 8, Canon 1.

80. Holmes once said: "I think that, as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived." Oliver W. Holmes, *Memorial Day*, in OCCASIONAL SPEECHES 6-7 (Mark D. Howe ed., 1962).

advance law and justice.”⁸¹ Furthermore, if a judge is to stoutly uphold the independence of the judiciary, then those drafting the judges’ ethical codes must strive to create “conditions under which judges can offer a fresh, enriched, and informed view of solutions to society’s problems.”⁸² Quasi-judicial activities provide judges with an “informed view” and they should be clearly encouraged in order to maintain the judicial independence that the *1990 Code* commands.

Quasi-judicial activities must be unequivocally encouraged because the vitality of the justice system depends upon the existence of sound judicial minds, minds well versed in the continuing complexities of the law. George Edwards, Circuit Judge for the United States Court of Appeals, Sixth Circuit, once said that “[l]egal writing, lecturing, teaching and studying are antidotes to judicial atrophy.”⁸³ Similarly, Professor Joel B. Grossman has written that the increasing intricacy and complexity of litigation leaves “little room for encouragement of judicial myopia.”⁸⁴ Chief Justice Warren Burger, who was quasi-judicially active throughout his time on the bench, once noted the importance he afforded his law teaching activities:

[J]udges must not withdraw from the world, either the world at large or the world of law. . . .

No matter how tired and jaded I was when I undertook these tasks, I left each of them refreshed and exhilarated by the contact with the alert and keen minds of the students.⁸⁵

If the justice system is to be served, let it be served by vital judges who are immersed in the law, not cloistered from its teaching, discussion, and reform.

Judges are told by Canon 3 of the *1990 Code* that “a judge shall perform the duties of judicial office impartially and diligently.”⁸⁶ Impartiality is vital to all parties seeking the dispensation of justice and to the public’s perception of the legal system. If judges are isolated from the members of the society in which they live and their legal concerns, judges cannot remain impartial. Dean Robert B. McKay once wrote that “a judge is likely to be a better dispenser of justice if he is aware of the currents and passions of the time, the developments of technology, and the sweep of events.”⁸⁷

81. Kaufman, *supra* note 24, at 5.

82. Grossman, *supra* note 31, at 809.

83. Edwards, *supra* note 24, at 275.

84. Grossman, *supra* note 31, at 809.

85. MACKENZIE, *supra* note 3, at 165.

86. 1990 CODE, *supra* note 8, Canon 3.

87. Dean Robert B. McKay, *The Judiciary and Non-Judicial Activities*, 35 LAW

The elegance of what is meant by “impartial” in legal terms changes with time, just as the political views of a populous change over time. One need only consider civil rights issues to realize that what some judges considered as impartial, even twenty years ago, might today be seen as an exhibition of partiality. As much as some might desire, and politicians may promise, the status quo can never be maintained. Change is the constant and eternal law of the universe. As an arbitrator of present conflict, a judge must change with his or her times, continually adding insight and perspective, or the public will simply see that judge as a blind, reactionary curmudgeon. To avoid such public perceptions, a judge must know what the legal community and communities at large view as partiality. A judge must therefore be engaged in his or her legal community, and this means, almost necessarily, engaging in quasi-judicial activities. Indeed, quasi-judicial activities are the tonic to prevent stagnant legal perspectives and thereby to ensure impartiality on the bench.

Finally, the Preamble to the new *1990 Code* points to two other duties that can be fulfilled through quasi-judicial activity: judges are enjoined to “strive to enhance and maintain confidence in our legal system.”⁸⁸ The great French novelist Honore Balzac said that “[t]o distrust the judiciary marks the beginning of the end of society.”⁸⁹

The drafters’ choice of the word “enhance” denotes that judges are to improve or heighten public confidence in the legal system. The drafters let us know that they believed confidence could be higher, and that judges should play a part in improving this confidence. Improvements come through right actions or insights widely communicated. Thus, to know how to act or communicate, judges must first discover why public confidence in our legal system is lower than it could be. Arguendo, if one concluded that the public’s perceptions of the legal system were too low because judges have been too active pursuing off-bench law-related activities, then the *1990 Code*’s tempered inducement towards engaging in quasi-judicial activities are consistent with the Preamble’s dictates. A decline in the quantum of quasi-judicial activity would serve to “enhance” public confidence in the legal system. However, studies⁹⁰ have shown that the failing public confidence in our legal setup stems from measurable factors such

& CONTEMP. PROBS. 9, 12 (1971). McKay also writes: “If a judge is to live in *this* world and not in the isolation of a sequestered juror, he is constantly shaping his views on all kinds of matters that may come before him.” *Id.*

88. 1990 CODE, *supra* note 8, Preamble. The first duty is to “enhance” confidence; the second is to “maintain” confidence.

89. OTTO KIRCHHEIMER, POLITICAL JUSTICE 175 (1961).

90. See Kathleen Neumeier, *Witness for the Prosecution*, L.A. MAG., Feb. 1994, at 66.

as criminal recidivism, the slow speed at which the courts are capable of dispensing justice,⁹¹ the growing tendency to treat the resolution of all problems as matters for the courts,⁹² the misallocation of government resources away from the justice systems and rehabilitation programs, and the growing general distrust of all levels and branches of government.

The foregoing is by no means an exhaustive list, but it includes the reasons why people actually are disgruntled with our legal system. Therefore, the *1990 Code's* treatment of quasi-judicial activity is contrary to the dictates of the *1990 Code's* own Preamble. Judicial activity to improve the law is not part of the problem, but is one of the best solutions. Enhancing public confidence requires the elimination of the long list of actual causes of its decline. The Preamble urges judges to do some of this enhancing. Quasi-judicial activities directed at solving known problems are the only means judges have of fulfilling the dictates of the Code's Preamble, and thus the *1972 Code's* prominent emphasis on the significance of quasi-judicial activity must be retained.

As trustees of the system, judges have the duty to see that justice is actually being delivered and that the public knows this, in order to maintain public "confidence in our legal system." Judges also help maintain public confidence in the legal system by showing people that, individually and collectively, judges have a deep life commitment to workable justice. With the overcrowding and underfunding of the court system, the public's perception of the judiciary's ability to dispense quality justice will only decline unless the public understands some details of the constraints under which judges must adjudicate. If judges are to fulfill their duty to maintain public confidence in the legal system, judges must take the forefront in actions to educate the alienated. Educating the public concerning legal matters is a classic quasi-judicial activity. Judges are uniquely suited to do this work. One writer on judicial ethics notes that judges "have the opportunity to observe [the law's] theoretical and practical application and to analyze its strong and weak points. . . . Of all public officials, judges may be the best qualified to perform the task of public education."⁹³

91. This is caused by a chain of events beginning with crowded dockets and fiscal limitations and ending with too few judges assisted by overworked staffs.

92. There is a corresponding inevitable failure of the courts to be able to adequately solve all problems.

93. Robert F. Copple, *From the Cloister to the Street: Judicial Ethics and Public Expression*, 64 DENV. U. L. REV. 549, 578 (1988).

Judges should continue to be encouraged to engage in a panoply of educational activities which, together, can serve to maintain public confidence in our legal institutions. Indeed, the code which governs judges' ethical responsibilities must clearly acknowledge the role that quasi-judicial activity plays in fulfilling the dictate of the Preamble that judges "strive to . . . maintain confidence in our legal system."

The term "quasi-judicial" must be reinserted into the code to uphold the continued importance and independent meaning of the activities it describes. Quasi-judicial and extra-judicial activities must not be muddled together and made equivalent. The motivations for engaging in these activities and the results of such engagement are widely divergent. Judges have rightly sensed their obligations to engage in activities to improve their life's endeavor: the law and its work. No equivalent motivation exists when a judge joins a social club or labors for his or her church. Quasi-judicial activities by their very nature enhance public confidence in our legal system; they help keep judges informed, open, and impartial, while helping save the judicial mind from atrophy. Finally, such work assists in the maintenance of judicial independence, and the work product is the very reform of the failings of our legal system. Extra-judicial activities achieve none of these essential and grand results. No less than the strength of our legal system depends on judges receiving this message without the static interference caused by proximity to, much less incorporation with, the category of extra-judicial activities.

Judges must be focused, thorough, and objective while performing their on-bench obligations. Certainly, the ethics code must continue to declare the primacy of on-bench activity to be beyond question. Yet, judges should not be governed by the same standards when they engage in off-bench activity.

Judges should continue to be clearly encouraged to improve the legal system and discouraged from certain other outside activities. By lumping these types of activities together *and* not definitionally distinguishing them, two bad messages are sent. One is that quasi-judicial activities are just another "outside" interest of a judge, no more important than joining a private club. The second, an even more dangerous interpretation, is that extra-judicial activities are to be elevated to a status equally to be encouraged of judges as those activities pursued to improve the justice system. Steven Lubet once summed up this drafting problem: "The goal of a system of judicial restriction should be to draw the line between those nonjudicial activities which enrich, or at least are harmless to, the judiciary and those which actually detract from or interfere with the business of judging."⁹⁴

94. See LUBET, *supra* note 29, at 9.

V. A PROPOSAL TO ALLEVIATE THE PROBLEM

A proposed reorganization and modification of the *1990 Code* follows. This re-draft retains a great deal of the *1990 Code*'s wording.⁹⁵ The most significant change, however, involves the re-insertion of the term quasi-judicial activity. The definition of quasi-judicial activity is included in the new Terminology Section. The Canon's heading is changed to an emphasis encouraging quasi-judicial activity, recognizing that a judge's primary obligation is to on-bench duties. Moreover, by moving portions of the *1990 Code*'s commentary into new section headings, the distinct difference between quasi-judicial and extra-judicial activities is retained. Finally, a one-line addition clarifies that judges cannot participate in non-profit political organizations.

CANON 4

JUDGES ARE ENCOURAGED TO ENGAGE IN QUASI-JUDICIAL
ACTIVITIES**; AND COMPLETE SEPARATION OF A JUDGE
FROM EXTRA-JUDICIAL ACTIVITIES IS UNWISE. A JUDGE
SHALL SO CONDUCT ALL OFF-BENCH ACTIVITY SO AS TO
MINIMIZE THE RISK OF CONFLICT WITH ON-BENCH
OBLIGATIONS.

A. QUASI-JUDICIAL** ACTIVITIES IN GENERAL.

(1) As a judicial officer and person specially learned in the law**, a judge is in a unique position to contribute to the improvement of the law, the legal system and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice.

(2) A judge may speak, write, lecture, teach, and participate in other quasi-judicial activities to improve the law, the legal system, and the administration of justice, subject to the other requirements of this Code.

** ALL ASTERISKS REFER TO THE DEFINITION TO BE FOUND IN THE TERMINOLOGY SECTION.

Commentary:

To the extent that time permits, a judge is encouraged to improve the legal system, either independently or through a bar or judicial association or other group dedicated to the

95. Appendix A, *infra*, provides the relevant portions of the present text of Canon 4 of the *1990 Code*, and the relevant portions of Canons 4, 5, and 6 of the *1972 Code* for comparison purposes.

improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

In order to improve the law, the legal system and the administration of justice through a judge's participation in and creation of legal education programs and materials, it may be necessary to promote such programs and materials, in part, by identifying the creator and/or participant by judicial title. This is permissible, provided such use of the judicial title does not contravene Canon 2A.

In this and other sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic, or charitable activities. This phrase is included to remind judges that the use of permissive language in various Canons of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

In espousing positions on laws, judges shall not express opposition to existing laws to a degree that would cause a reasonable person to doubt the judge's ability to follow that law in cases heard by that judge.

B. EXTRA-JUDICIAL ACTIVITIES IN GENERAL. COMPLETE SEPARATION OF A JUDGE FROM EXTRA-JUDICIAL ACTIVITIES IS NEITHER POSSIBLE NOR WISE; A JUDGE SHOULD NOT BECOME ISOLATED FROM THE COMMUNITY FROM WHICH THE JUDGE LIVES. A JUDGE MAY PARTICIPATE IN EXTRA-JUDICIAL ACTIVITIES SUBJECT TO THE REQUIREMENTS OF THIS CODE.

Commentary:

Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of a classification such as their race, sex, religion, sexual orientation or national origin. See Canon 2C and accompanying Commentary.

C. GENERAL LIMITATIONS. JUDGES SHALL SO CONDUCT THEIR QUASI-JUDICIAL AND EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS. A JUDGE SHALL CONDUCT THESE ACTIVITIES SO THAT THEY DO NOT:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; or
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

Commentary:

A judge's on-bench duties are his/her highest priority. These limitations, however, should not be interpreted as discouraging off-bench activity.

The remaining sections of Canon 4 of the *1990 Code* remain unaltered by the authors except for the following changes:

1. Section C of the *1990 Code* now becomes Section D, and Section D of the *1990 Code* now becomes Section E, etc.

2. The commentary following Section 4C(3) of the present *1990 Code* (what will become Section 4D(3) of the authors' proposed modified version) should include the following text:

*Judges are not permitted to serve as officers of non-profit political organizations**.*

** ALL ASTERISKS REFER TO THE DEFINITION TO BE FOUND IN THE TERMINOLOGY SECTION.

Further, the following definition⁹⁶ must be added to the Terminology Section of the *1990 Code*:

"Quasi-judicial activities" are those activities that are connected with a judge's judicial office that are not related to their adjudicative or administrative duties. These activities relate to the improvement of the law, the legal system, or the administration of justice. Quasi-judicial activities include: speaking, writing, lecturing, teaching, and participating in activities related to improving the law.

VI. CONCLUSION

This article is best summarized by analyzing a diagram devoted to the comparison of Canons 3 and 4 of the *1990 Code*, and Canons 3, 4, and 5 of the *1972 Code*:

96. This definition is borrowed from the *1972 Code*, Section 4B of the *1990 Code*, and Judge David Rothman's *California Judicial Conduct Handbook*, *supra* note 48, at I-65.

Model Code

Canon 3

On-Bench/ Primary Obligation

Canon 4

Extra-judicial/ after on-bench done-
not encouraged and not
"connected with" judicial office.

1972 Code

Canon 3

On-Bench/ Primary Obligation

Canon 4

Quasi-Judicial/ Encouraged and
"connected with" judicial office.

Canon 5

Extra-judicial/ after on-bench
done, but not encouraged and not
"connected with" judicial office.

As the diagram shows, the consolidation of Canons 4, 5, and 6 into a single Canon 4 in the *1990 Code* completely eliminates an entire field of activity. The amalgamation leaves the judge with only two spheres of activity: on-bench duties and extra-judicial activity. In the *1972 Code*, quasi-judicial activities were encouraged and perceived by the judiciary as connected with the judicial office.⁹⁷ The *1990 Code's* Canon 4 is premised on the notion that quasi-judicial activities are the same as extra-judicial activities. In pursuit of that premise the term "quasi-judicial activity" is excised from the *1990 Code* and the canon once entirely devoted to quasi-judicial activity (Canon 4 of the *1972 Code*) is consolidated out of existence. Furthermore, these two changes necessitate a lesser degree of encouragement for quasi-judicial activity.

The *1990 Code* provides only the flaccid assertion that "complete separation from extra-judicial activities is neither possible nor wise."⁹⁸ As a result, judges are left with little encouragement to improve what the public perceives to be a failing justice system, nor any sense that it is their duty to engage in activities to improve the law. The failure to encourage judges to improve our justice system is contrary to the history of quasi-judicial activity in this nation and to other tenets of the *1990 Code* itself. As indicated in the authors' proposed version of Canon 4, however, the consolidation of these three canons is possible without inheriting the *1990 Code's* failings.

97. See ROTHMAN, *supra* note 48, at I-65.

98. 1990 CODE, *supra* note 8, Canon 5.

Quasi-judicial activities such as working to repair inefficiencies and inequities in the legal system should not be mentioned in the same paragraph as guidelines describing which clubs can be joined. The ethical code which states adopt must clearly draw the line between those activities which are encouraged and those which are not. American judges, and the public they serve, deserve a living code of judicial ethics which relates to the real world and addresses real problems, one which holds judges to the adult and ancient standard of "trustees of the justice system." Affirmatively encouraging judges to work on quasi-judicial activities promotes this standard. It tells judges and the public alike that the Constitutional guarantee of justice is real, and that judges, the parent-figures of the justice systems, can be expected to act as adult trustees. The *1972 Code* was not, in this respect, "broken,"⁹⁹ and we therefore ought not "fix it."

APPENDIX A

1990 MODEL CODE OF JUDICIAL CONDUCT

CANON 4

A JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS

A. EXTRA-JUDICIAL ACTIVITIES IN GENERAL. A JUDGE SHALL CONDUCT ALL OF THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES SO THAT THEY DO NOT:

- (1) cast reasonable doubt on the judge's capacity to act impartially as a judge;
- (2) demean the judicial office; or
- (3) interfere with the proper performance of judicial duties.

Commentary:

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

99. A drafter of the *1990 Code* seems to indicate that the subcommittee writing the *1990 Code* followed a similar guideline: "[T]he substance of provisions in the *1972 Code* that were well understood and were working effectively should not be changed." See Moser, *supra* note 10, at 733. The authors of this article are willing to concede the potentiality that the provisions regarding quasi-judicial activity were not "well understood" or were not "working effectively." The method chosen to solve the problem, however, was wrong.

Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. See Section 2C and accompanying Commentary.

B. AVOCATIONAL ACTIVITIES. A JUDGE MAY SPEAK, WRITE, LECTURE, TEACH AND PARTICIPATE IN OTHER EXTRA-JUDICIAL ACTIVITIES CONCERNING THE LAW, THE LEGAL SYSTEM, THE ADMINISTRATION OF JUSTICE AND NON-LEGAL SUBJECTS, SUBJECT TO THE REQUIREMENTS OF THIS CODE.**

Commentary:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession and may express opposition to the persecution of lawyers and judges in other countries because of their professional activities.

** In this and other Sections of Canon 4, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.*

**** ALL ASTERISKS REFER TO THE DEFINITION TO BE FOUND IN THE TERMINOLOGY SECTION.**

1972 CODE OF JUDICIAL CONDUCT

CANON 4

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

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

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

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

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

Commentary:

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. Extra-judicial activities are governed by Canon 5.

CANON 5

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

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts,

sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

Commentary:

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

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

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

Commentary:

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

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

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

Commentary:

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

C. Financial Activities.

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

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

Commentary:

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

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

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

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

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

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

disqualification.

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

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

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

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

Commentary:

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

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

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

Commentary:

Canon 3 requires a judge to disqualify himself in any proceeding in which he has a financial interest, however small; Canon 5 requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of his judicial duties; Canon 6 requires him to report all compensation he receives for activities outside his judicial office. A judge has the rights of an ordinary citizen, including the right to privacy of his financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of his duties.

Owning and receiving income from investments do not as such affect the performance of a judge's duties.

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

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

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

Commentary:

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

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

Commentary:

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

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

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

G. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however,

may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Commentary:

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

CANON 6

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

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

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

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

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