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JUDICIAL PROFESSIONALISM AND THE RELATIONS BETWEEN JUDGES AND LAWYERS

RANDALL T. SHEPARD*

When judges and lawyers discuss matters of ethics and legal professionalism, we usually focus on the performance of lawyers. We consider how lawyers relate to clients, how they relate to each other, how they behave in court, and similar topics. Legal literature is chock full of analysis on these points, and the appellate disciplinary authorities issue multiple opinions each year covering much of the same territory.

While our profession also examines judicial behavior, that part of the debate is but a sliver of the whole. The number of appellate opinions concerning judicial conduct is a fraction of those about lawyers, and applicable monographs are few and far between.

Least explored of all is how we lawyers and judges relate to each other, what issues derive from the interaction between advocate and adjudicator. While judges and lawyers are cut from the same cloth, judges have many obligations that practitioners do not. Many of the most ticklish of these have to do with the places where judges and lawyers interact.

Here, I explore some of the professional and ethical questions that arise at various of these intersections, particularly judicial communications with lawyers, activity in bar associations, disqualifications because of relationships with lawyers, business dealings with lawyers, and campaign contributions made by lawyers.

I. WHAT IS EX PARTE ANYWAY?

As early as law school or bar review courses, we lawyers accept the basic notion that “ex parte communications are prohibited.” This directive is at least as old as our profession’s first formal canons.¹ Modern professional rules memorialize it as a

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1. After the American Bar Association promulgated the *Canons of Professional Ethics for Lawyers* in 1908, the Association turned its attention to preparing a statement of ethics for judges. The Association created a Committee on Judicial Ethics, chaired by Chief Justice William Howard Taft. The Taft Committee developed the *Canons of Judicial Ethics*, and the ABA annual meeting of 1924

duty applicable to both lawyers and judges.² Still, lawyers and judges spend many of their days working closely together, and the judicial code recognizes that communication is part of what makes for an effective court system. It thus creates a series of exceptions to the general prohibition of ex parte exchanges, most notably the exception permitting communication on "administrative matters."³

In trying to define good practice and bad, we readily identify as out of bounds communication that is far too weighty to ignore. *In re Cooks*⁴ is such an example. In that case, a judge was censured for failing to recuse herself after she participated in ex parte communications with both a party and that party's attorney, among other things. When visiting her mother in the hospital, Judge Cooks stopped by to see one Jane Abshire, whose case was pending. During this visit, Abshire "proclaimed to Judge Cooks that she was 'innocent.'"⁵

After the hospital visit, Abshire babysat and tutored one of the judge's children after school two or three times a week. Judge Cooks paid Abshire \$355.00 "to reimburse . . . Abshire for

adopted them. See *Forty-Seventh Annual Meeting Maintains Association's High Standard*, 10 A.B.A. J. 555, 555 (1924) (calling the Association's adoption of the *Canons* "the outstanding feature of the meeting").

2. As on most points, the model developed by the ABA is the basis for Indiana's rule:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law; [or]
- (b) communicate ex parte with such person except as permitted by law.

INDIANA CODE OF PROFESSIONAL CONDUCT Rule 3.5 (1996).

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications made to the judge outside the presence of the parties, concerning a pending or impending proceeding.

INDIANA CODE OF JUDICIAL CONDUCT Canon 3(B)(8) (1989).

3. (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

- (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and,
- (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

INDIANA CODE OF JUDICIAL CONDUCT Canon 3(B)(8)(a) (1989).

4. 694 So.2d 892 (La. 1997).

5. *Id.* at 897.

school supplies,” and Abshire bought an expensive gift for Cooks’ office.⁶ During the four months the case was pending, Abshire’s attorney, Sue Fontenot, spoke with Cooks on the telephone everyday. “Fontenot acknowledges that she talked about events as reported in newspaper accounts of the Abshire case.”⁷ After the case was decided, Abshire helped redecorate Cooks’ office and Cooks did not pay Abshire for these services.⁸

While the Supreme Court of Louisiana held that these communications did not constitute a violation of the judicial canon prohibiting ex parte communications,⁹ the court held that Judge Cooks’ failure to recuse herself constituted punishable misconduct.¹⁰ The court reasoned that, “where the circumstantial evidence of bias or prejudice is so overwhelming that no reasonable judge would hear the case, failure of a judge to recuse herself is a violation of the Code of Judicial Conduct as well as the Louisiana Constitution.”¹¹ In making this decision, the court relied on several judicial canons and said:

[B]y violating the Constitution, such a serious failure to recuse may constitute a breach of Canon 2, which states that judges should “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” and perhaps Canon 1 as well, with its more general exhortation to preserve the integrity of the judiciary through high standards of conduct.¹²

The repeated close personal contacts between the judge, the party, and the lawyer provided overwhelming evidence of the appearance of bias and prejudice.¹³

Harder cases arise. In *Subway Restaurants, Inc. v. Kessler*,¹⁴ for example, the sort of casual conversation that occurs in courthouses led the parties to trouble. In that case, Judge Russell imposed sanctions on attorney Duree. She was typing the deci-

6. *Id.*

7. *Id.*

8. *See id.*

9. *See id.* (citing LOUISIANA CODE OF JUDICIAL CONDUCT Canon 3(A)(6) (1996)). The court noted that when Judge Cooks visited Abshire, the *Abshire* case was not pending before Judge Cooks. *See id.* at 901. As for the lawyer’s later discussions, the court was plainly inclined to think that they violated the code of conduct but concluded that the evidence about the context of the calls was inadequate to prove a violation by clear and convincing evidence, the relevant standard of proof. *See id.* at 901-02.

10. *See id.* at 902-03.

11. *Id.* at 903.

12. *Id.*

13. *See id.*

14. 970 P.2d 526 (Kan. 1998).

sion when attorney Gerstle, an old friend, stopped by chambers to ask if the judge would like to “‘go out and have a beer.’”¹⁵ Judge Russell told Gerstle that she was within a few sentences of finishing something, and that she would go out when she was done. Gerstle asked several times what she was typing. Finally, Russell said, “‘Well, it’s a case called Subway versus Kessler and Banks, and you don’t know anything about it. Never been an attorney in the case, you don’t know anything about this.’”¹⁶ Gerstle replied that he did know about the case, because he represented one of the parties, Nancy Kessler, in a separate criminal action. Gerstle asked Russell what specifically she was writing. Russell replied, “‘[A] motion for sanctions against Mr. Duree.’”¹⁷ Gerstle said, “‘Mr. Duree is a great guy. He’s a really nice guy. He paid my fees to represent Nancy Kessler.’”¹⁸

Judge Russell issued the opinion regarding Duree’s sanctions, and then recused herself.¹⁹ The judge who handled the case after Russell’s recusal upheld the sanctions on the basis that Russell was unbiased when she decided the matter.²⁰ The Supreme Court of Kansas held that, while Russell should have recused herself before issuing the opinion, her successor did not abuse his discretion in denying Duree’s motion to alter the sanctions.²¹ The court noted, however, that the *ex parte* communication, generally, and “Gerstle’s professional curiosity and persistent questioning of Judge Russell as she sat behind her word processor,” specifically, were both inappropriate.²²

Friendship with a lawyer led to discipline even though the lawyer had no connection with the cases at issue. In *Judicial Proceedings Against Tesmer*,²³ Judge Tesmer asked her law professor friend to “prepare opinions on dispositive motions in cases over which she presided.”²⁴ The Supreme Court of Wisconsin held that these ongoing and persistent discussions between judge and law professor “violated the prohibition of private communications designed to influence a judge’s decision.”²⁵ In so holding, the court relied on the *ex parte* prohibition contained in its Code of Judicial Conduct. The court said:

15. *Id.* at 531.

16. *Id.*

17. *Id.*

18. *Id.*

19. *See id.*

20. *See id.* at 532.

21. *See id.* at 533.

22. *Id.* at 536.

23. 580 N.W.2d 307 (Wis. 1998).

24. *Id.* at 309.

25. *Id.*

Judge Tesmer's discussions with a person outside of and unconnected with the judicial system concerning dispositive motions in proceedings pending before her outside the presence and without the knowledge of the parties to those proceedings constituted *ex parte* communications as that term is used in [Code of Judicial Conduct, SCR 60.04 (1)(g)]. The *ex parte* communication prohibition set forth in the current [SCR 60.04(1)(g)] now makes explicit what was implicit in its predecessor. The affirmative statement introducing the current prohibition states, "A judge shall accord to every person who has a legal interest in a proceeding, or to that person's lawyer, the right to be heard according to law."²⁶

The court imposed a modest sanction, however, because it determined that Judge Tesmer did not know her use of Professor McCormack's assistance violated the prohibition.²⁷ Because her violation was not willful, the Wisconsin Supreme Court merely reprimanded her, the least severe of the four forms of discipline the court could impose under the constitution.²⁸

A more ordinary relationship led to a recusal order in *Deren v. Williams*.²⁹ In that case, Deren was involved in a medical malpractice suit that resulted in three trials. About two months after his second trial had concluded, Deren moved to disqualify Judge Williams.³⁰ The motion was denied solely on the basis that it was untimely filed.³¹

Deren provided the Florida District Court of Appeals an affidavit stating three reasons why he feared he would not receive a fair trial, among them that Judge Williams and plaintiff's counsel were old friends and had engaged in *ex parte* communications during the previous two trials.³² On appeal, the court could not agree whether the judge's relationship with the lawyer in question mattered. Two judges of the Court of Appeals thought that the motion to disqualify should have been granted, concluding that "the continued expression of . . . sympathy [toward the plaintiff] and the manifestation of a close friendship with opposing counsel, coupled with *ex parte* communications during trial,

26. *Id.* at 316.

27. *See id.* at 318. This requirement is grafted onto Wisconsin's Code of Judicial Ethics by statute.

28. The remaining options are censure, suspension and removal from the bench. *See id.* (quoting Wis. CONST. art VII, § 11).

29. 521 So.2d 150 (Fla. Dist. Ct. App. 1988).

30. *See id.* at 151.

31. *See id.*

32. *See id.*

would reasonably cause a litigant to be apprehensive of the fairness of the trial judge.”³³

A dissenting judge thought the untimeliness of the motion was especially pertinent, noting that Deren was well aware of his asserted grounds for disqualification throughout both trials and numerous post-trial motions.³⁴ He said, “A motion to disqualify the judge filed some 2½ years after the facts are known comes too late.”³⁵ He additionally dissented on the grounds that Deren’s assertions did not indicate a well-founded fear that Judge Williams was biased, and that the claims were so vague as to be legally insufficient.³⁶

Ultimately, the touchstones for the ground rules on communications are even-handedness and due process. The lawyer or the client who has been “back-doored” knows when it has happened. Still, during the course of a busy day in a courthouse, all sorts of administrivia passes between various actors under circumstances that no objective observer would deem to violate these goals. “Judge, my client says he’ll plead if the prosecutor recommends probation. Is that a deal you might approve?” “Yes, probably, but I’d like to hear what the prosecutor says about it. Subject to reading the presentence report it sounds all right.” While we tend to label such communications as improper, they advance the practice of litigation. Our profession not only condones these conversations, it relies on them. We usually sanction the participants when some unexpected force arises, like a runaway client who complains loudly.

II. “THEY’RE ALL A PART OF THE SAME CROWD”

Once it would have been thought utterly ordinary that judges belonged to a bar association. Indeed, someone seeking a judicial appointment or running for judge would have thought it virtually obligatory to belong to the local, state, and national

33. *Id.* at 152. The majority’s opinion is not specific about the nature of the friendship or the alleged ex parte discussions, but it does offer a useful observation on attorney-judge friendships:

Almost all who practice law recognize that most judges are capable of numbering among their friends some of the attorneys who appear before them. But few attorneys are articulate enough to explain to their clients that the fact that opposing counsel and the trial judge shared a cup of coffee at the local coffee shop during the last recess was no cause for alarm. The test has to be how does the litigant reasonably view the remarks or conduct of the judge.

Id.

34. *See id.* at 152-53.

35. *Id.* at 153.

36. *See id.*

associations. What was once thought *de rigeur*, however, is no longer taken for granted.

The model code covering judges explicitly encourages judges to participate in bar associations.³⁷ This participation is heralded by bar leaders³⁸ and judicial leaders often exhort their colleagues to participate in these activities.³⁹ Judges have special contributions to make in these forums.

Still, there have been warning signs that judges' bar memberships may conflict with their ethical obligations. Judge William M. Aker, Jr. resigned from the American Bar Association in 1993 because he felt the need to avoid impropriety in his activities and to demonstrate that he was not swayed by partisan interests associated with bar membership.⁴⁰ Explaining his decision to resign after forty years, Judge Aker observed that litigants have

37. "A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice . . ." MODEL CODE OF JUDICIAL CONDUCT Canon 4(C)(3) (1990).

38. J. Lee McNeely, former President of the Indiana State Bar Association stated:

We have been fortunate in Indiana that, through the years, most judges on our various courts have elected to retain their membership in the ISBA. In fact, not only do our judges typically retain their membership in the Association, but they generally continue to participate in the Association's work, attend our meetings, and support our programs.

J. Lee McNeely, *Celebrate the Law Sept. 28-30*, RES GESTAE, Aug. 1999, at 5. Similarly, Chic Born, also a former President of the ISBA, has stated:

I believe that the citizenry is best served, that notions of neutral justice are best available and that there is generally more access to equal justice, when an independent judiciary exists. Bar associations play a legitimate role in protecting this judicial independence.

. . . .

To tell its side of the story, the judiciary may choose to seek the help of bar associations. Local associations are generally the best placed to respond, but the state bar association may act as well in certain cases.

S.R. ("Chic") Born, *Judicial Independence: News and Views*, RES GESTAE, Aug. 1998, at 5.

39. As for those judges who believe that the ABA has been hijacked by political interests within its membership, I suggest that the only rational course of action is not withdrawal, but engagement on the matters of direct interest to courts. Judges are the figures who can best exert influence over matters affecting the profession of law because judges are the body of lawyers that a bar association must accommodate.

Randall T. Shepard, *What Judges Can Do About Legal Professionalism*, 32 WAKE FOREST L. REV. 621, 630 (1997).

40. Williams M. Aker, Jr., *Why Judge Resigned from ABA*, NAT'L L.J., Jan. 25, 1993, at 17.

become less forgiving about judges' adherence to these duties and cited informal information that a host of organizational affiliations were now off limits.⁴¹ Finally, he observed:

The American Bar Association, consciously or unconsciously, has joined this list. It now routinely takes official positions on issues upon which I and other judges likely will be called upon to rule. The problem is exacerbated by the fact that the ABA continues to perform a screening function in the processing of federal judicial appointments and therefore is in a position to exercise very real pressure on judges.⁴²

While Judge Aker articulated his reasons for leaving the ABA, he was not the most prominent person to do so. The year before, Chief Justice William Rehnquist resigned, an act widely thought to be related to political issues.⁴³

This series of high profile decisions set in motion a discussion within the American Bar Association itself. The Appellate Judges Conference initiated a study of the participation of judges in the association, culminating in a report, the Report of the Commission on Judicial Participation in the American Bar Association, commonly called the "O'Scannlain Report" for the name of its chair, Judge Diarmuid O'Scannlain of the Ninth Circuit.⁴⁴ This report reached a number of controversial conclusions. These included a proposal that no judge should be an officer of the association or serve on its board and that judges should have a mechanism to disassociate themselves from ABA positions.⁴⁵

41. Specifically, Judge Aker stated:

In recent years litigants have become more sensitive to this obligation on the part of the judicial officers before whom they appear, and they are much more willing to file recusal motions when they have any reason to doubt a judge's impartiality in a particular matter because of some organization to which the judge belongs.

No federal judge who takes . . . ethical admonitions seriously could maintain membership in the National Rifle Association, the American Civil Liberties Union, the National Organization for Women or the Sierra Club, just to name a few of the many organizations that have agendas over which the courts more than just occasionally preside.

Id.

42. *Id.*

43. See Editorial, *And Furthermore . . .*, ATLANTA J. & CONST., May 20, 1992, at A8.

44. Appellate Judges Conference of the American Bar Association, Report of the Commission on Judicial Participation in the American Bar Association (Aug. 1991) (unpublished manuscript, on file with the American Bar Association).

45. See *id.* at 67-68.

It is difficult to assess the impact of these problems on ABA membership. It is still the rule, rather than the exception, that federal and state appellate judges belong to the association,⁴⁶ including many of those who served on the O'Scannlain Commission. On the other hand, membership by state trial judges is very modest, no more than five or ten percent of the total.⁴⁷ How much of this is attributable to political concern and how much is attributable to finances is difficult to determine.

Still, in light of these recent high-profile resignations and debates, judicial membership in bar associations remains at issue. With regard to national bar activities, the solutions are complex. Bar members remain tempted to take strong policy positions on matters unrelated to the core concerns of the trade. Accordingly, the ABA Board of Governors recently decided to urge the House and other elements of the Association to forswear on many of these points. I would say this has been met with some success.

III. THE LAWYER WHO DOESN'T LIKE ME

Most practitioners have had the experience of venturing into a courtroom where the judge seemed to harbor an animus against a particular lawyer. Perhaps more common is the experience of the attorney who concludes there is a circle of lawyers on the judge's good side, and he is not one of them. This sort of indefinite measure of the relationship between judge and lawyer rarely works its way into definable outcomes.

More pointed are those situations in which the relationship between the judge and the lawyer can be measured in some tangible and visible way. Judges rarely make remarks on the record about lawyers. I examine here situations in which the lawyer has said something about the judge.

46. Compare ABA, JUDICIAL DIVISION MEMBERSHIP STATISTICS (Oct. 31, 1999) (812 members of the Appellate Judges Conference), with ADMIN. OFFICE OF THE U.S. COURTS, STATISTICAL REPORT FOR JUSTICES AND JUDGES OF THE UNITED STATES (Nov. 1, 1999) (160 federal appellate judges active), and SUPPLEMENT TO EXAMINING THE WORK OF STATE COURTS, 1997: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT (Brian J. Ostrom & Neal B. Kauder eds., 1998) (1,304 state appellate judges active).

47. Compare ABA, *supra* note 46 (1,761 members of the National Conferences of Special Court Judges and State Trial Judges), with EXAMINING THE WORK OF STATE COURTS 1997: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT (Brian J. Ostrom & Neal B. Kauder eds., 1998) (28,560 general and limited jurisdiction state trial judges).

Stephen Yagman, a California practitioner, is a one-man laboratory on this front. In *Standing Committee v. Yagman*,⁴⁸ Yagman filed a lawsuit pro se against several insurance companies.⁴⁹ He promptly moved to disqualify the judge assigned to hear the case on the basis of bias.⁵⁰ The motion was randomly assigned to Judge William Keller, who denied it and sanctioned Yagman for pursuing the motion "in an 'improper and frivolous manner.'"⁵¹

A few days after the sanctions order, Yagman was quoted as saying that Keller had a proclivity for sanctioning Jewish lawyers, which Yagman considered to be evidence of anti-Semitism.⁵² Yagman placed an advertisement in the *Daily Journal* asking lawyers who had been sanctioned by Judge Keller to contact Yagman's office.⁵³ Yagman told reporters that Judge Keller was "drunk on the bench,"⁵⁴ and he sent a highly critical letter to the Almanac of the Federal Judiciary.⁵⁵

Another practitioner in the Central District of California reported that "Yagman told him that, by leveling public criticism at Judge Keller, Yagman hoped to get the judge to recuse himself in future cases."⁵⁶ That practitioner described Yagman's comment in a letter to the Standing Committee on Discipline of the U.S. District Court for the Central District of California.⁵⁷ The Standing Committee and Yagman presented evidence at a two-day hearing before the district court, and the court held that Yagman had committed misconduct justifying sanctions and a

48. 55 F.3d 1430 (9th Cir. 1995).

49. *See id.* at 1433.

50. *See id.*

51. *Id.* at 1433-34 (quoting *Yagman v. Republic Ins.*, 137 F.R.D. 310, 312 (C.D. Cal. 1991)).

52. *See id.* at 1434 (quoting Susan Seager, *Judge Sanctions Yagman, Refers Case to State Bar*, L.A. DAILY J., June 6, 1991, at 1).

53. *See id.*

54. *Id.*

55. *See id.* The letter stated:

It is an understatement to characterize the Judge as "the worst judge in the central district." It would be fairer to say that he is ignorant, dishonest, ill-tempered, and a bully, and probably is one of the worst judges in the United States. If television cameras were permitted in his courtroom, the other federal judges in the Country would be so embarrassed by this buffoon that they would run for cover. One might believe that some of the reason for this sub-standard human is the recent acrimonious divorce through which he recently went: but talking to attorneys who knew him years ago indicates that, if anything, he has mellowed. One other comment: his girlfriend . . . , like the Judge is a right-wing fanatic.

Id. at n.4.

56. *See id.*

57. *See id.*

two-year suspension from practice in the Central District of California.⁵⁸

The Ninth Circuit reversed, holding that the sanctions against Yagman could not stand.⁵⁹ While the court acknowledged that “[j]udge shopping doubtless disrupts the proper functioning of the judicial system,”⁶⁰ it balanced the operation of the courts against attorneys’ First Amendment rights to criticize the judges.⁶¹ The court concluded that the possibility of voluntary recusal was not so great as to amount to a clear and present danger to fair judicial administration.⁶² The court also dismissed the notion that remarks like Yagman’s could force the disqualification of the judge at whom they are aimed.⁶³ Finally, the court stated:

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.⁶⁴

While Yagman’s comments are, unfortunately, not unique—as far as public vituperation by the lawyer is concerned—they do arise in the unusual setting of the lawyer publicly criticizing the judge to procure a recusal. More common is the situation in which the lawyer has opposed the judge in an election for confirmation.

In the case of *United States v. Helmsley*,⁶⁵ for instance, Judge Walker of the Southern District of New York held that attorney Alan Dershowitz’s criticism of and opposition to Walker’s nomination and confirmation to the federal bench were not enough to warrant judicial disqualification under federal statute⁶⁶ or the canons of judicial conduct.⁶⁷

58. *See id.* at 1435.

59. *See id.* at 1443.

60. *Id.*

61. *See id.* at 1444.

62. *See id.*

63. *See id.*

64. *Id.* at 1445.

65. 760 F.Supp. 338 (S.D.N.Y. 1991).

66. 28 U.S.C. § 455(a) (1998).

67. *See* 760 F.Supp. 338 (S.D.N.Y. 1991).

Judge Walker began by holding that he was not actually biased against Dershowitz or his client.⁶⁸ Walker stated that he was not concerned by Dershowitz's opposition to his appointment, because Dershowitz "was alone in expressing opposition."⁶⁹ He added that he thought it not unusual for a judge to preside over a case involving an attorney with whom he has had prior acerbic relations.⁷⁰ He wrote, "It is one of the earliest and most fundamental lessons of judging that a judge must rule on the merits without regard to the personality of the attorney or any unpleasant experiences the judge may have had with the attorney in the past."⁷¹ Walker concluded that he had no reason to question his own impartiality.⁷²

Judge Walker then discussed whether he appeared to be partial in the *Helmsley* case.⁷³ He recognized the potential for abuse by a litigant who wants to disqualify a judge simply because he fears an adverse decision, and stated that "the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over his case."⁷⁴ A judge is as much required to stay in a case when there is no reason to leave as he is to recuse himself when there is.⁷⁵ Litigants are entitled to an impartial judge, not a judge of their choosing.⁷⁶

In acknowledgement of the fact that Dershowitz's hostility toward him could be perceived as translating into his hostility toward Dershowitz, Judge Walker recited the rule that the appearance of hostility on the part of a judge *toward an attorney* is an insufficient basis for recusal.⁷⁷ Rather, "Courts have ruled

68. *See id.* at 340-41.

69. *Id.*

70. *See id.* at 341.

71. *Id.*

72. *See id.*

73. *See id.*

74. *Id.* at 342 (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1313 (2d Cir. 1988)).

75. *See id.*

76. *See id.* Judge Walker might well have also taken notice of the fact that vituperative attacks against judges by Dershowitz are a dime a dozen. For example, Dershowitz assaulted Judge Gilbert Merritt of the Sixth Circuit for his opinion in the case of alleged war criminal John Demjanjuk by calling Judge Merritt "Demjanjuk's lawyer" and declaring, "clients are calling me and asking, 'What do we have to do to get justice in the United States—kill jews?'" Ken Myers, *Under the Demjanjuk Spotlight: Unassuming Judge is Propelled to Center Stage*, NAT'L L.J., Aug. 30, 1993, at 31.

77. *See United States v. Helmsley*, 760 F.Supp. 338, 342 (S.D.N.Y. 1991) (citing, for example, *In re Cooper*, 821 F.2d 833 (1st Cir. 1987); *In re Beard*, 811

that the appearance of judicial hostility or favoritism must be toward a party to warrant recusal."⁷⁸

Finally, considering Dershowitz's criticism on its own, Judge Walker remarked that "the Second Circuit has found that hostile attacks even by a criminal defendant, much less by the defendant's lawyer, are not a sufficient basis for recusal."⁷⁹ If the rule were otherwise, Walker noted, "litigants fortunate enough to have easy access to the media could make charges that would effectively veto the assignment of judges."⁸⁰ If litigants cannot force recusal by criticism, similarly, attorneys may not do so.⁸¹ Judge Walker therefore concluded, "On all the circumstances, and given the well established judicial rejection of a rule that would permit a litigant or an attorney to disqualify a judge by criticizing him, I find no circumstances arising from Mr. Dershowitz's opposition to my nomination that require my disqualification" on the basis of the appearance of partiality.⁸²

Similarly, in *United States v. Oluwafemi*,⁸³ Judge Gleeson declined to recuse himself despite Oluwafemi's claim that his attorney, Liotti, opposed the judge's confirmation. Using the same analytical framework, Gleeson determined that, in light of significant federal precedent, "the argument that an attorney's criticisms require disqualification of the Court is particularly unpersuasive."⁸⁴

Because the touchstone of this question is the judge's possible bias or prejudice concerning a party's lawyer,⁸⁵ a claim that the lawyer has opposed the judge must arise under circumstances that are likely to produce an adverse reaction in the judge. In *Downs v. Smyk*,⁸⁶ for instance, Smyk moved to disqualify Judge

F.2d 818 (4th Cir. 1987); *Moore v. McGraw Edison Co.*, 804 F.2d 1026 (8th Cir. 1986); *United States v. Burt*, 765 F.2d 1364 (9th Cir. 1985)).

78. *Id.* (citing *In re Cooper*, 821 F.2d at 841 (holding that judge calling attorney "untrustworthy manipulator" and describing his conduct as "dirty work" did not warrant recusal)).

79. *Id.* (citing *King v. United States*, 576 F.2d 432 (2d Cir. 1978)).

80. *Id.* at 343 (quoting *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1309 (2d Cir. 1988)).

81. *See id.*

82. *Id.*

83. 883 F.Supp. 885 (E.D.N.Y. 1995).

84. *Id.* at 892 (citing *United States v. Helmsley*, 760 F.Supp. 338, 342 (S.D. N.Y. 1991)).

85. "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: . . . the judge has a personal bias or prejudice concerning a party or a party's lawyer" MODEL CODE OF JUDICIAL CONDUCT CANON 3(E)(1)(a) (1990).

86. 685 P.2d 347 (Mont. 1984).

Luedke on the basis that that the judge was biased due to Smyk's overt campaign against Luedke's election.⁸⁷ The Supreme Court of Montana dismissed Smyk's petition, because the judge was completely unaware of Smyk's opposition to his election until Smyk claimed it as a basis for recusal.⁸⁸

Sometimes, of course, similar non-relationships can beget difficult situations. In the case of *Tyson v. State*,⁸⁹ I recused myself from Tyson's appeal from his conviction for rape, after learning that my wife had discussed the case, briefly and innocently, with Tyson's attorney, again Alan Dershowitz. Almost a year later, after the Indiana Court of Appeals had affirmed the conviction and the Supreme Court, sitting without me, had denied a request to hear the appeal, Tyson claimed that my failure to participate in the decision violated his right to due process of law. His petition requesting that I participate in the appeal after it was concluded was denied.⁹⁰ The state judge who conducted the trial and the U.S. District Judge who heard the petition for a writ of habeas corpus received about the same treatment.⁹¹

IV. "JUDGE, I'M GOING TO DO A LAND DEAL."

Judges and lawyers stand at most of the economic crossroads in modern life. When a business venture is put together (or for that matter, when it falls apart), the principals usually call their lawyers for assistance. Judges are not far removed from these circles.

Thus, discussions about business events and opportunities abound in the venues where lawyers and judges ply their trade. When lawyers and judges join hands in such matters, however, the results are almost always disastrous.

The warnings to judges are fairly straightforward. The provisions of Indiana Judicial Conduct Canon 4 advise on business activities generally and state:

- (1) A judge shall not engage in financial or business dealings that:
 may reasonably be perceived to exploit the judge's
 judicial position; involve the judge in frequent transac-

87. *See id.* at 348.

88. *See id.*; *see also Oluwafemi*, 883 F.Supp. at 892.

89. 622 N.E.2d 457 (Ind. 1993).

90. *See id.* at 461.

91. *See* ALAN M. DERSHOWITZ, REASONABLE DOUBT 145 (1996) ("Moreover, the trial judge, Patricia Gifford, made numerous rulings she never would have gotten away with had the case been nationally televised."); *Tyson Appeal Denied*, INDIANAPOLIS NEWS, Mar. 7, 1994, at A8 ("I'll be glad when we can get this case out of Indiana," said Dershowitz.).

tions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.⁹²

Similarly, Canon 3(E) provides for disqualification in particular matters where the judge has a direct interest.⁹³ But what about instances in which the judge has no interest in the matter itself, but has a business relationship with a lawyer involved in the case?

Several cases demonstrate this problem. In *In re Lemoine*,⁹⁴ Judge Lemoine, who was elected as a part-time city judge, was censured for frequently engaging in financial dealings with attorneys who were likely to appear before him, among other things.⁹⁵ Due to the part-time nature of his office, he continued to practice law in the same community where he was a judge. He shared office space with attorney Harold A. Vandyke, III, and the building where they worked bore a sign reading, "Lemoine-Van Dyke Law Center."⁹⁶ Another attorney, Michael A. Brewer, began renting office space from Judge Lemoine after his appointment. Lemoine and Van Dyke generally split attorney's fees between them, either on a 50/50 or a 55/45 basis.⁹⁷ Two and a half years after Judge Lemoine took the bench, he entered into a formal agreement with Brewer, whereby Lemoine agreed to pay Brewer's overhead and incidentals in exchange for a share of the legal fees Brewer earned.⁹⁸

During his tenure, Judge Lemoine presided over thirty-two cases in which one of the litigants was represented by either Van Dyke or Brewer. While Lemoine did not share fees in any of those cases, he recused himself in only one.⁹⁹ The Louisiana Supreme Court publicly censured Judge Lemoine for misconduct stemming in part from his business dealings with Van Dyke and Brewer.¹⁰⁰ The court said that it would have been inclined toward a more severe sanction had Judge Lemoine not lost his seat on the bench during an intervening election.¹⁰¹ Sometimes democracy works faster than the disciplinary system.

92. INDIANA CODE OF JUDICIAL CONDUCT Canon 4(D)(1) (1989).

93. "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." *Id.* Canon 3(E)(1).

94. 686 So.2d 837 (La. 1997), *modified on reh'g* by 692 So.2d 358 (La. 1997).

95. *See id.* at 838.

96. *Id.*

97. *See id.*

98. *See id.*

99. *See id.* at 838-39.

100. *See id.*

101. *See id.* at 846.

In *In re Means*,¹⁰² Family Law Master Means was reprimanded for declining to disqualify himself in a case involving a litigant represented by an attorney who co-owned a corporation with Means.¹⁰³ The Means family home was located on corporation land, and Master Means paid no rent. When Means declined the other party's motion to disqualify, that party complained to the Judicial Investigation Commission, who found probable cause to believe that Means violated Judicial Canon 5(C)(1).¹⁰⁴ The Supreme Court of Appeals of West Virginia agreed with the Commission and reprimanded Master Means for failing to disqualify.¹⁰⁵ Reasoning that "it is impermissible for a judge to have continuing financial and business dealing with a lawyer who appears before the judge," the court determined that the joint ownership of the corporation and the location of Means' home on corporation property "is an impermissible financial and business interest under the . . . Canon."¹⁰⁶

A lesser financial interest played a role in *In re Drury*.¹⁰⁷ Judge Drury was removed from office for taking a \$2,000 loan from an attorney, failing to disclose it, and continuing to preside over cases at which the attorney appeared.¹⁰⁸ The judge contacted an attorney who regularly appeared in his court, Yosha, about obtaining a loan.¹⁰⁹ He borrowed the money, but failed to report it in his Statement of Economic Interests until the Indiana Commission on Judicial Qualifications brought charges against him.¹¹⁰ During the four-year period that Drury owed Yosha, he continued to preside over cases in which Yosha's firm represented the litigants. The Indiana Supreme Court held that "by soliciting, accepting and failing to report the . . . loan," Drury violated Judicial Canons 1, 2, 3(C), 5(C)(1), and 5(C)(4)(c).¹¹¹ In other words:

[Drury] should not have sought or accepted the loan. Once he did accept it, he should have disqualified himself from all cases in which Yosha's law firm was involved. At the least, [Drury] should have disclosed the loan to the

102. 452 S.E.2d 696 (W.Va. 1994).

103. *See id.* at 697.

104. *See id.*

105. *See id.*

106. *Id.* at 698-99.

107. 602 N.E.2d 1000 (Ind. 1992).

108. *See id.* at 1001.

109. *See id.* at 1002.

110. *See id.*

111. *Id.* at 1004.

other parties and attorneys involved in any lawsuit over which [he] presided which involved Yosha's law firm.¹¹²

As a result of this and other misconduct, Drury was removed from the bench.¹¹³

Public confidence in the profession is gravely impaired where judges and lawyers are casual about their economic dealings. While the temptations are considerable, we should not subject citizens to a system in which it is apparent that the leading participants have their own finances at stake.

V. "TAKE BOTH CONTRIBUTIONS AND DECIDE THE CASE ON THE MERITS"¹¹⁴

Generally, we lawyers and judges think of judicial ethical issues as exclusively involving whether the judge had an interest in the outcome of the litigation or had a special relationship with the party. We have tended to pass over a judge's relationship with the party and, therefore, we have tended to pass over the related question of campaign contributions by lawyers.

Without dwelling at length on the details of modern American judicial campaigning, let me set the background by mentioning a few aspects of this problem. First, the skyrocketing cost of running for public office has hardly passed the judiciary by. In the thirty-nine states where judges are elected at some level, the cost of judicial races is rising at least as quickly as congressional races and presidential campaigns.¹¹⁵ Candidates for the bench now pay for sophisticated ads, consultants, and polls through contributions from the tobacco industry, casinos, insurance companies, doctors, and other businesses.¹¹⁶

112. *Id.*

113. *See id.* at 1011.

114. I take this title from the presumably apocryphal story about the Texas judge who was visited one day by a lawyer with a major case long pending in front of him. "Your Honor," said the lawyer, "my client believes his case is being well-handled and wishes to see it ably completed but he's worried about the upcoming election and wants to make a \$10,000 contribution to your campaign." The judge thanked the lawyer for this offer and went off to ponder the ethics of the encounter. He finally decided he had an obligation to report it to counsel for the opposing party. That lawyer responded, "Judge, my client also likes the way you have been managing this case and would no doubt want to contribute \$10,000 to your race." After lengthy consideration, the judge reached an equitable and ethical solution: take both contributions and decide the case on the merits.

115. Sheila Kaplan & Zoe Davidson, *The Buying of the Bench*, NATION, Jan. 26, 1998, at 1.

116. *See id.*

Second, modern campaign reporting requirements and the computerization of records have made it possible to document what judges have known for a long time—that the great bulk of the funds used to run for judicial office come from lawyers and the client groups they represent. Perhaps more obviously, we can now document that money tends to flow from a particular side of the plaintiff-defendant division existing in civil law.¹¹⁷

Analyzing this problem as lawyers and judges has led us to ignore the apparent conflict even under circumstances where many in the public would do otherwise. In *River Road Neighborhood*,¹¹⁸ for example, the City of San Antonio was an appellant in a case in which South Texas Sports, Inc. was an appellee. The City of San Antonio moved to disqualify two justices on the Court of Appeals. The motion was based on the fact that one justice had received approximately 21.7% of his total campaign contributions from one of South Texas Sports' owners while another justice had received 17.1% of his total campaign contributions from the chairman of South Texas Sports' board of directors.¹¹⁹

The challenged justices refused to recuse themselves and instead referred the matter to the other members of the court who decided, en banc, to deny the motion.¹²⁰ The court reasoned:

City does not assert that either of the two challenged Justices is related to any party in this case or that either has been counsel in this case. There remains only the question concerning disqualification because of "interest."

"It is a settled principle of law that the interest which disqualifies a judge is that interest, however small, which rests upon a direct pecuniary or personal interest in the result of the case presented to the judge or court." It is not contended that either of the challenged Justices may gain or lose anything of a pecuniary or personal nature because of any judgment which might be rendered in this case.¹²¹

117. For example, in Texas, Chief Justice Thomas Phillips raised \$486,809 of his 1996 re-election funds from corporate defense lawyers; \$213,016 from energy and natural-resource companies; and \$159,498 from finance, insurance and real estate firms. In Ohio, Justice Evelyn Stratton raised \$74,885 from finance, insurance and real estate firms; \$134,900 from lawyers and lobbyists; and \$16,476 from medical interests. Finally, in a high-profile Alabama race, businesses determined to defeat incumbent Justice Kenneth Ingraham contributed more than \$668,704 to opponent Harold See's campaign. See *id.* at 1-2.

118. 673 S.W.2d 952 (Tex. App. 1984).

119. See *id.*

120. *Id.* at 953.

121. *Id.* (citation omitted).

Alabama has addressed the issue of disclosure along the same lines. In *Ex parte Kenneth D. McLeod Partnership*,¹²² Katie McLeod filed a complaint against the Kenneth D. McLeod Family Limited Partnership and Monroe McLeod, her former husband. Several weeks later, Monroe McLeod contributed to the trial judge's campaign for election to the state appellate court, and the trial judge included the contribution in her "Summary of Contributions and Expenditures" filed with the Secretary of State.¹²³ The case was tried without a jury and was decided unfavorably for Katie. Katie then filed a motion for a new trial based, in part, on Monroe's campaign contribution.¹²⁴ The trial court denied the motion.

On appeal, Katie argued that the trial judge should have disclosed the campaign contribution to her as she did not learn of the contribution until after judgment had been entered, thus denying her the opportunity to move for recusal. The Alabama Supreme Court disagreed, holding that the trial judge did not abuse its discretion in denying Katie's motion. Since the judge's disclosure form was on file with the Secretary of State's office, the contribution was a matter of public record and discoverable by Katie's counsel.¹²⁵ Moreover, the court said:

Furthermore, [requiring the trial judge to disclose the contribution] would wrongly expand the duties of judges and would place an unreasonably heavy burden on the judiciary. . . . If a judge failed altogether to publicly disclose the contributions she has received, or if she actively concealed them, then an appearance of impropriety would exist. But the judge in this case publicly reported the contribution and in no way attempted to cover up the fact that Monroe McLeod had made a contribution to her.¹²⁶

Continued public and media pressure on this topic has led to renewed efforts at reform. In 1997, ABA President Jerome Shestack established a blue-ribbon task force to study ethics issues created when lawyers contribute to political campaigns. This task force was aptly named the Task Force on Pay to Play.¹²⁷

122. 725 So.2d 271 (Ala. 1998).

123. *Id.* at 272.

124. *See id.*

125. *See id.* at 273.

126. *Id.*

127. *See* ABA President Shestack Names "Pay to Play" Panel Members to Study Lawyer Campaign Contributions (visited Nov. 22, 1999) <<http://www.abanet.org/media/sep97/payplay.html>>. "Pay to Play" is a phrase used to describe a situation where contributions are a quid pro quo for eligibility to bid on government contracts or to receive legal work from cities and states. *See id.*

In its report to the ABA, the Task Force urged several proposals regarding contributions to judicial campaigns. Among these proposals was a recommendation to amend the Model Code of Judicial Conduct to require judges to recuse themselves from hearing a case in which a litigant or lawyer contributed to the judge's campaign in an amount exceeding a specified limit if the lawyer for the opposing side moves for such recusal.¹²⁸

As with the problem of the lawyer who makes negative comments about the judge in order to obtain a change of judge, the political campaign contribution rules can be used in the same way. And they are. In *Ex parte Bryant*,¹²⁹ for example, the petitioner was involved in a criminal trial and his case was assigned to Judge Galanos. The petitioner filed a motion seeking to have Judge Galanos recused, which was denied. On the Saturday before his trial, Judge Galanos notified the State that the petitioner had contributed \$500 to the judge's campaign.¹³⁰ The petitioner then amended his motion to have Judge Galanos recused based upon this information. Judge Galanos again denied the motion.¹³¹

On appeal, the petitioner contended that Judge Galanos should have recused himself because the petitioner contributed to the judge's campaign. Noting the somewhat odd circumstances, the appellate court nonetheless determined that the petitioner was entitled to the protections afforded by the Canons of Judicial Ethics even though he was the party who made the campaign contribution.¹³² Still, the court held that the motion was properly denied. In so holding, the court said: "The test for recusal is not whether the judge is impartial but whether another person 'might reasonably question the judge's impartiality.'"¹³³ Thus the fact that a defendant made a campaign contribution to a judge does not mandate the recusal of the judge from any proceeding involving the defendant.¹³⁴

An alternative approach is the general limitation on the amount of money that a candidate can raise and spend in a judicial election. As the Ohio experience demonstrates, however, this method can be constrained by First Amendment considera-

128. *ABA Task Force On Political Contributions Urges Disclosure Among Other Recommendations Addressing "Pay to Play"* (visited Nov. 22, 1999) <<http://www.abanet.org/media/jul98/play798.html>>.

129. 675 So.2d 552 (Ala. Ct. App. 1996).

130. *See id.* at 553.

131. *Id.*

132. *See id.* at 554.

133. *Id.* at 555.

134. *See id.*

tions. In 1995, the Ohio Supreme Court amended its judicial canons to establish spending limits for judicial candidates. The limits ranged from \$500,000 for someone seeking to become chief justice of the state, to \$50,000 for candidates to a county or municipal court.¹³⁵ Several judges from Ohio's common pleas courts filed suit seeking to enjoin and declare the canons unconstitutional. The federal district court enjoined enforcement of the canon setting limits on campaign expenditures.¹³⁶

The Court of Appeals for the Sixth Circuit affirmed the district court's decision, relying on *Buckley v. Valeo*.¹³⁷ The Sixth Circuit balanced Ohio's interest in alleviating corruption and the appearance of corruption with First Amendment considerations and determined that the expenditure limitations were not narrowly tailored to redress the problem.¹³⁸ The court said: "Simply put, there are other avenues available to Defendants to prevent corruption or the appearance of corruption, but, a limitation on campaign expenditures is not one of them."¹³⁹

At the end of the day, it is difficult to see how our profession can manage to deal with this problem so long as there are elected judges. The judiciary has been reluctant to affirm the constitutionality of restraining judicial candidates from promising particular results in the cases they will hear if elected.¹⁴⁰ If we cannot enforce such restraint, it seems unlikely that we will successfully curb donations from lawyers to judicial campaigns.

CONCLUSION

Lawyers and judges do so many things that help make ours a decent and prosperous society, like achieving compensation for the injured, combating discrimination, and punishing crime. We accomplish these ends through a working relationship characterized by both distance and close-order cooperation. How well we perform this unique balancing act makes an important difference in public and client confidence in what we do. Our profession and the legal system will be most likely to thrive if lawyers

135. Richard Carelli, *High Court Rejects Vote Spending Limit*, CINCINNATI ENQUIRER, at A8.

136. See *Suster v. Marshall*, 149 F.3d 523, 525 (6th Cir. 1998), cert. denied, 119 S. Ct. 890 (1999).

137. 424 U.S. 1 (1976).

138. See *Suster*, 149 F.3d at 533.

139. *Id.*

140. See Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1074-76 (1996) (discussing *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224 (7th Cir. 1993)).

and judges alike regularly take the time to examine the best ways to order our relationship.