

Nova Law Review

Volume 31, Issue 3

2007

Article 12

The Real Costs of Judicial Misconduct: Florida Taking a Step Ahead in the Regulation of Judicial Speech and Conduct to Ensure Independence, Integrity, and Impartiality

Phyllis Williams Kotey*

*

Copyright ©2007 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <http://nsuworks.nova.edu/nlr>

THE REAL COSTS OF JUDICIAL MISCONDUCT: FLORIDA TAKING A STEP AHEAD IN THE REGULATION OF JUDICIAL SPEECH AND CONDUCT TO ENSURE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY

PHYLLIS WILLIAMS KOTÉY*

I.	INTRODUCTION.....	646
II.	THE CASE FOR INDEPENDENCE, INTEGRITY, AND IMPARTIALITY .	647
	A. <i>Perception of the Public</i>	648
	B. <i>Portrayal by the Media</i>	648
	C. <i>Experiences of the Participants</i>	650
III.	THE CODE OF JUDICIAL CONDUCT.....	652
	A. <i>The History of Judicial Discipline</i>	652
	B. <i>The Creation of the Model Code of Judicial Conduct</i>	654
	C. <i>The “New” Model Code of Judicial Conduct</i>	655
	1. <i>Format Changes</i>	656
	2. <i>Substantive Changes</i>	657
	a. <i>Canon 1—Conduct in General</i>	657
	b. <i>Canon 2—Judicial Conduct</i>	658
	c. <i>Canon 3—Personal Conduct</i>	659
	d. <i>Canon 4—Extrajudicial Conduct</i>	660
	e. <i>Canon 5—Inappropriate Political Activity</i>	661
IV.	THE SPEECH AND CONDUCT THAT THREATEN INDEPENDENCE, INTEGRITY, AND IMPARTIALITY	663
	A. <i>Categories of Judicial Speech and Conduct: The Florida Model</i>	663
	B. <i>Precepts for Regulation of Judicial Speech and Conduct</i>	664
	C. <i>Parameters of Judicial Speech and Conduct</i>	668
	1. <i>On the Bench Speech and Conduct</i>	668
	2. <i>Off the Bench Speech and Conduct</i>	669
	3. <i>Political Speech and Conduct</i>	669
V.	THE EXAMINATION OF JUDICIAL SPEECH AND CONDUCT	670

* Senior Judge and Clinical Associate Professor of Law, Florida International University College of Law. Member, ABA Judicial Division, Ethics and Professionalism Committee, Past Member, Vice-chair, Chair, Florida Supreme Court Judicial Ethics Advisory Commission. I would also like to thank linda f. harrison (lowercase preferred) of Nova Southeastern University, Shepard Broad Law Center for her comments, criticisms, and encouragement. I also wish to thank Jeanelle Ferril for her research assistance.

	A.	<i>On the Bench Speech and Conduct</i>	670
	B.	<i>Off the Bench Speech and Conduct</i>	673
	C.	<i>Political Speech and Conduct</i>	679
VI.		FLORIDA'S APPLICATION OF ITS CODE OF JUDICIAL CONDUCT	683
	A.	<i>On the Bench Speech and Conduct</i>	684
	B.	<i>Off the Bench Speech and Conduct</i>	685
	C.	<i>Political Speech and Conduct</i>	686
VII.		CONCLUSION	688

I. INTRODUCTION

“The public’s confidence in the judiciary hinges on the public’s perception of it, and that perception necessarily hinges on the media’s portrayal of the legal system.”¹ —*Justice Felix Frankfurter*

An African proverb admonishes that: “Corn can’t expect justice from a court composed of chickens.”² If the public’s perception of justice is formed by an opinion that judges are “insensitive, arbitrary, and aloof,”³ then it is understandable that the public would have no expectation of receiving justice.⁴ Like the corn, the public is consumed unceremoniously as a means to continuously feed a system that operates only to benefit itself. The speech and conduct of judges contribute to creating a public perception that judges are “incompetent, self-indulgent, abusive, or corrupt,” and, across the country, these judges are the subject of numerous complaints.⁵

The challenge to this perception of justice is the reality that judges have an affirmative duty to “uphold the integrity and independence of the judiciary” through speech and conduct.⁶ Judges also have a duty to “avoid impropriety and the appearance of impropriety in all of the judge’s activities.”⁷ Additionally, a judge should execute judicial duties impartially and diligently, ensuring that extra-judicial duties are undertaken to minimize the risk

1. John Seigenthaler & David L. Hudson, *Journalism and the Judiciary*, NJC ALUMNI MAGAZINE, Winter 1997, at 15.

2. QuotationLibrary.com, Justice Quotes, http://www.quotationlibrary.com/index.php?sid=888012143&t=sub_pages&cat=257 (last visited May 26, 2007).

3. J. Thomas Greene, *Views from the Bench: Some Current Causes for Popular Dissatisfaction with the Administration of Justice*, 14 UTAH B.J. 35, 36 (May 2001).

4. *See id.* at 35.

5. Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 431 (2004).

6. MODEL CODE OF JUD. CONDUCT Canon 1 (2004).

7. *Id.* Canon 2.

of conflict.⁸ Currently, the country grapples with maintaining an independent, honest, and impartial judiciary.⁹ However, Florida has taken the lead by amending its code to ensure that the independence, integrity, and impartiality of the judiciary are maintained.¹⁰ Like many other states, including the District of Columbia,¹¹ Florida adopted the 1990 version of the *Model Code of Judicial Conduct* to regulate the speech and conduct of judges.¹² In January of 2006, Florida adopted amendments to its code in response to the recent attacks on the independence of the judiciary.¹³ These changes are indicative of the importance in ensuring the independence, integrity, and impartiality of the judiciary.¹⁴

II. THE CASE FOR INDEPENDENCE, INTEGRITY, AND IMPARTIALITY

Public confidence in the fairness of judicial decisions is a foundation of the judicial decision-making process and a byproduct of judicial independence.¹⁵ A judge must be free to act without fear of reprisal and without favor

8. *Id.* Canon 3, Canon 4A(3).

9. *See* Greene, *supra* note 3, at 37.

10. The Supreme Court of Florida amended the Code of Judicial Conduct on January 5, 2006. *In re* Amends. to Code of Jud. Conduct—ABA's Model Code, 918 So. 2d 949, 949 (Fla. 2006) (per curiam). Florida Canons 1, 2, 3, and 5 directly correspond to Canons 1, 2, 3, and 4 of the *Model Code of Judicial Conduct*. Compare FLA. CODE JUD. CONDUCT Canons 1-3, 5 (2000), with MODEL CODE OF JUD. CONDUCT Canons 1-4 (2004).

11. *See generally* ALASKA CODE OF JUD. CONDUCT (1998); ARIZ. CODE OF JUD. CONDUCT (1993); ARK. CODE OF JUD. CONDUCT (2006); D.C. CODE OF JUD. CONDUCT (1995); FLA. CODE JUD. CONDUCT (2006); HAW. CODE OF JUD. CONDUCT (1992); IND. CODE OF JUD. CONDUCT (2006); KAN. CODE OF JUD. CONDUCT, §601A (1995); KY. CODE OF JUD. CONDUCT (2006); NEB. CODE OF JUD. CONDUCT (1992); NEV. CODE OF JUD. CONDUCT (2005); N.M. CODE OF JUD. CONDUCT (2006); N.D. CODE OF JUD. CONDUCT (1998); OHIO CODE OF JUD. CONDUCT (2005); R.I. CODE OF JUD. CONDUCT (2006); S.C. CODE OF JUD. CONDUCT (1976); S.D. CODE OF JUD. CONDUCT (2006); TENN. CODE OF JUD. CONDUCT (2006); VT CODE OF JUD. CONDUCT (2006); VA. CANONS OF JUD. CONDUCT (2006); W. VA. CODE OF JUD. CONDUCT (2006); WIS. CODE OF JUD. CONDUCT (2006); WYO. CODE OF JUD. CONDUCT (2004).

12. Forty-nine of fifty states adopted the 1972 ABA Model Code, the 1990 version, or both. Brief of ABA as Amicus Curiae Supporting Respondents at 8, *Spargo v. N.Y. State Comm'n on Jud. Conduct*, 351 F.3d 65 (2d Cir. 2003) (No. 03-7250).

13. The Supreme Court of Florida requested that its Judicial Ethic Advisory Committee (JEAC) study the proposed revisions to the *ABA Model of Judicial Conduct* and recommend any appropriate amendments of its code. *Amends. to Code of Jud. Conduct—ABA's Model Code*, 918 So. 2d at 949. The JEAC filed a report on January 31, 2005, recommending several amendments. *Id.* The amendments were published for comments and were adopted on January 5, 2006. *Id.*

14. FLA. CODE JUD. CONDUCT pmbl. (2006).

15. *See* MODEL CODE OF JUD. CONDUCT pmbl. (1990).

toward an issue or individual.¹⁶ When a judge can speak and act without fear or favor, both integrity and independence are maintained.¹⁷ Further, when a judge adheres to the restraints placed on his or her speech and conduct, impartiality is maintained.

A. *Perception of the Public*

“‘Perception is reality.’ Each person has individualistic perceptions, different ways of looking at things, yet each person is able to change his or her perception, and, thus, change reality.”¹⁸ The partition between the perception of justice and the reality of justice in our judicial system continues to grow.¹⁹ This is due to the disparity between the public’s concept of what justice is and what justice should be.²⁰ The discrepancy operates as a concept discrete and insular from what judges or lawyers believe about the judicial system.²¹ While repeated studies indicate that lawyers feel that they are being judged unfairly by society, the basis for these perceptions must be understood before they can change.²² Judges must be insulated from the external controls that operate to challenge their independence.²³ However, judges cannot escape the overarching negative perception of the legal system that appears to engulf the judiciary.²⁴

B. *Portrayal by the Media*

The coverage of courtroom dramas in the media perpetuates perceptions that threaten to become a reality for the public.²⁵ Historically, the proliferation of television legal dramas generated perceptions created by media cov-

16. See FLA. CODE JUD. CONDUCT pmbl. (2006).

17. See *id.*

18. Steven R. Sorenson, *President’s Perspective: Perception Is Reality*, 71 WIS. LAW. 61 (May 1998).

19. HARVEY LEVINE, LEVINE ON TRIAL ADVOCACY § 6.

20. *Id.*

21. *Id.*

22. Sorenson, *supra* note 18, at 62.

23. Miller, *supra* note 5, at 431.

24. See *id.*

25. Greene, *supra* note 3, at 37. In Washington, D.C., at the 2005 Annual Meeting of the American Association for the Advancement of Science (AAAS), Monica Amarelo reported in a news release that they were “seeing crime victims and jurors who have TV-fueled misconceptions of what evidence needs to be tested and how real-life investigations ought to be conducted.” Monica Amarelo, *Pathologists Say TV Forensics Creates Unrealistic Expectations*, AM. ASS’N ADVANCEMENT OF SCI. (Feb. 21, 2005), <http://www.aaas.org/news/releases/2005/0221csi.shtml>.

erage of real court cases that may contain relatively little or no truth at all.²⁶ In 2007 Florida was the venue of a poignant example of the impact on the media coverage on the perception of judges.²⁷ Circuit Court Judge Larry Seidlin made news across the country for his antics from the bench for his “witty” one liners and emotional and tearful delivery of his edicts.²⁸ Judge Seidlin was a presiding judge in some of the custody and legal proceedings that ensued after the death of Anna Nicole Smith.²⁹ His dramatic behavior led to perception that his speech and conduct were intended to attract offers for a courtroom television show.³⁰

Additionally, the new genre of television crime dramas use the latest scientific equipment that can detect, discover, diagnose, and dissect any piece of evidence with absolute certainty.³¹ As a result, these dramas threaten to generate a standard of proof beyond all doubt with the use of such scientific equipment.³² The Maricopa County Attorney conducted a study entitled *The CSI Effect and Its Real-Life Impact on Justice*.³³ The study concluded that television forensic crime dramas are having a significant impact on juries and their perception about the availability and necessity of evidence.³⁴ Consequently, the impact of the media is evident in television and real life court coverage.

26. See Greene, *supra* note 3, at 37. Leslie Abramson, a criminal defense attorney who represented the Menendez brothers, remarked that some media coverage has little regard for the truth. Leigh Buchanan Blenen, *The Appearance of Justice: Juries, Judges and the Media Transcript*, 86 J. CRIM. L. & CRIMINOLOGY 1096, 1098 (1996). She related a story about an individual who claimed on a television show that he goes to go the Los Angeles jail every three weeks to service Lyle Menendez’s hairpiece and that Menendez’s cell is right next door to O.J. Simpson’s cell. *Id.* The reality according to Abramson is that the hairpiece is not serviced at all and that Simpson was housed in an area secluded from all other prisoners. *Id.* at 1098–99.

27. This judge has since announced his retirement from the bench, effective July 31, 2007, to pursue a television career. Catherine Donaldson-Evans, *Famed Judge to Step Down*, SO. FLA. SUN-SENTINEL, June 20, 2007, at B1.

28. *Id.*

29. *Id.*

30. Catherine Donaldson-Evans, *Anna Nicole Smith Snarky ‘Judge Larry’: Aspiring TV Star or Regular Guy Running No-Jury Trial?*, FOX NEWS, Feb. 20, 2007, available at <http://www.foxnews.com/story/0,2933,253198,00.html>.

31. Greene, *supra* note 3, at 37.

32. During a recent jury selection in a drug possession case, I noted with interest as prospective jurors questioned the prosecution and defense about scientific analysis. The prospective jurors inquired about the need and expectation of fingerprint and other forensic analysis that would allow definitive determination of the weight and sufficiency of the evidence.

33. CSI: Maricopa County, *The CSI Effect and Its Real-Life Impact on Justice*, June 30, 2005, at 1, <http://www.maricopacountyattorney.org/Press/PDF/CSIReport.pdf>.

34. *Id.* at 5–7.

Media coverage about the judicial system focuses on outrageous cases.³⁵ The coverage of high-profile cases has also contributed to negative perceptions of the legal system and of judges.³⁶ As a result, the public's perception of what really happens in the courtroom is obscured by a lens that has little semblance of reality.³⁷ These perceptions threaten to erode the integrity of the legal system.³⁸ Unfortunately, the media's focus on sensational trials and verdicts may play a role in some of the negative perceptions of justice.³⁹ However, perceptions about the integrity of lawyers may play an even larger role.⁴⁰

C. *Experiences of the Participants*

The public's perception about the impartiality of the judge may be shaped by the role of the individual in the legal system. For example, in the same trial, a victim, a juror, a plaintiff, a defendant, and a witness may each have different perceptions about partiality and the judicial system.⁴¹ Accordingly, each may have a different perception about the speech and conduct of the judge.⁴² This dichotomy becomes even more pronounced when the law-

35. LEVINE, *supra* note 19, § 6:25.14. *Court TV* brings the day to day reality of the courtroom to the general public. Every trial is not, however, carried out with the pomp and circumstance of the Scott Peterson, Robert Blake, or Michael Jackson trials. The snapshot of the media's coverage of these trials may unfairly focus on judicial speech and conduct that creates a perception that may or may not be reality. For information on each of these trials, please refer to the *Court TV* website. Information about the Scott Peterson trial can be accessed from <http://www.courtstv.com/trials/peterson/> (last visited May 26, 2007). Information about the Robert Blake trial can be accessed from <http://www.courtstv.com/trials/blake/> (last visited May 26, 2007). Information about Michael Jackson's various trials can be accessed from <http://www.courtstv.com/trials/jackson/> (last visited May 26, 2007).

36. Greene, *supra* note 3, at 35, 37. The O.J. Simpson trial reportedly supports the public belief that money can buy justice. *Id.*

37. *Id.* at 37.

38. *Id.*

39. *Id.*

40. Greene, *supra* note 3, at 36. A National Law Journal/West Publishing Company poll suggests that respect for the legal profession is declining. Randall Samborn, *Anti-Lawyer Attitude Up*, NAT'L L.J., Aug. 9, 1993, at 20. In a poll among a list of ten professions—including lawyers—only 2% of those polled said they had "the most respect for lawyers." *Id.* This number was down from 5% in 1986. *Id.*

41. A victim who has been subjected to numerous interviews that require regurgitation of a disturbing and painful event may feel re-victimized. Therefore, the individual may perceive that justice is not served when a system seeks to ensure that a defendant's constitutional rights are not compromised. If a juror is required to appear and to wait for a jury selection and trial that is riddled with delay and interruption, the juror may perceive that grave injustices exist within the judicial system.

42. Greene, *supra* note 3, at 35.

yers are added to the equation.⁴³ The prosecutor and the defense attorney may have a different perception of justice that is dictated by the role they play.⁴⁴ Each may view the speech and conduct of the judge differently in light of their roles as advocates and their beliefs about the independence, integrity, and impartiality of the judge.⁴⁵ Likewise, in a civil action, the plaintiff's lawyer and the defendant's lawyer may each have different perceptions of justice. Each may view the speech and conduct of the judge differently, in light of their roles.

The negative perception of the public regarding the judicial system and some lawyers is supported by empirical evidence.⁴⁶ By its very nature, the adversarial roles of lawyers can further distort the perception of justice. Admittedly, these diametrically opposed roles create the basic foundation for the fundamental challenge for the judge trying to positively affect public perception. Ultimately, one must concede that the perception and reality of integrity are cornerstones of an independent and impartial judiciary.⁴⁷ Therefore, if left unrestrained, the speech and conduct of judges may erode the public's confidence in the judicial system.⁴⁸

Studies have found that the public is more willing to accept an unpopular decision that is perceived as being fairly made.⁴⁹ Therefore, the opportunity to be fully and fairly heard carries great weight.⁵⁰ Moreover, a strong correlation exists between the public's "[p]erception[] of fairness in the judicial system, . . . [and] its perception[] of . . . fairness in procedure[]."⁵¹ "[B]ad judges terrorize courtrooms, impair the functioning of the legal system, and undermine public confidence in the law."⁵² Judges, whose speech and conduct blatantly and repeatedly confront procedural fairness and create patterns of misconduct, run the risk of decreasing the public's confidence to the detriment of the independence, integrity, and impartiality of the judicial system.⁵³

43. *Id.* at 36.

44. *Id.* at 35.

45. *Id.* at 36. Both are seeking to prevail. *Id.*

46. LEVINE, *supra* note 19, § 6:2. It is suggested that political rhetoric, ads, and commercials foster the perception of a "litigation crisis" severely tarnishing public perception. See Greene, *supra* note 3, at 37–38.

47. Daniel W. Shuman & Jean A. Hamilton, *Jury Service—It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors*, 46 SMU L. REV. 449, 450 (1992).

48. *Id.* at 451.

49. *Id.* at 451 n.6.

50. See *id.*

51. *Id.* at 452.

52. Miller, *supra* note 5, at 431 (quoting abstract).

53. See *id.*

The public will not and cannot be expected to adhere to the decisions of a court that lacks integrity and is not independent or impartial.⁵⁴ Independence, integrity, and impartiality cannot be assumed or presumed from a court that does not adhere to high principles in its conduct and speech on and off the bench.⁵⁵ Because the possibility exists for judicial speech and conduct to foster apprehension regarding the independence, integrity, and impartiality of the judiciary, a judge must accept some regulation.⁵⁶ In reviewing judicial misconduct in this state, the Supreme Court of Florida has been critical of the penalties imposed in some cases and has rejected some of the recommendations of the Judicial Qualification Commission (JQC) as too lenient.⁵⁷ The application of judicial discipline in Florida, a state which has adopted the American Bar Association (ABA) Model Code of 1990 and most recently adopted changes in its code in January 2006, will be used as a barometer for general application.⁵⁸

III. THE CODE OF JUDICIAL CONDUCT

A. *The History of Judicial Discipline*

The Code of Judicial Conduct is a standard of precepts by which judicial speech and conduct are measured and by which disciplinary proceedings are instituted against judges.⁵⁹ Each state has developed a standard for regulating the speech and conduct of its judges which was generally, if not specifically, derived from ABA standards.⁶⁰ Therefore, they provide an essential element to understanding the application of discipline against judges for speech and conduct that affects the independence, integrity, and impartiality of the judiciary.⁶¹

Standards of ethical guidelines were first created by the ABA for the practicing bar in 1908.⁶² At the time that these guidelines were promulgated,

54. Shuman & Hamilton, *supra* note 47, at 451.

55. See Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1, 3–4 (1988).

56. See MODEL CODE OF JUD. CONDUCT pmbl. (2004).

57. James R. Wolf, *Judicial Discipline in Florida: The Cost of Misconduct*, 30 NOVA L. REV. 349, 349–50 (2006).

58. See *In re Amends. to the Rules Regulating the Fla. Bar*, 933 So. 2d 417, 419 (Fla. 2006).

59. Wolf, *supra* note 57, at 351.

60. Shaman, *supra* note 55, at 3; see, e.g., *In re Amends. to the Rules Regulating the Fla. Bar*, 933 So. 2d at 419.

61. Shaman, *supra* note 55, at 4.

62. ABA JOINT COMM'N. TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, BACKGROUND PAPER, at 1 (2006), available at <http://www.abanet.org/yld/elibrary/memphis04pdf/ethicscanon.pdf> [hereinafter ABA BACKGROUND PAPER].

judges were not included in their application.⁶³ Therefore, a tool for regulating judicial speech and conduct did not exist.⁶⁴ This exclusion of ethical guidelines for judges was by no means an indication that the speech and conduct of judges did not warrant such regulation.⁶⁵ Moreover, this lack of guidelines for judges did not prevent the conduct of judges from becoming a subject of concern about the independence, integrity, and impartiality of a judge.⁶⁶

Also, in 1922 a commission on judicial ethics was established by the ABA “to draft a code of judicial conduct.”⁶⁷ The appointment of then Chief Justice William Howard Taft to chair this commission accentuated the importance of the charge of the commission.⁶⁸

Finally, in 1924, the Canons of Judicial Ethics were promulgated and approved by the ABA.⁶⁹ There were thirty-six canons instituted which operated as a guideline for states to adopt and were intended as a guide for ideal behavior.⁷⁰ The intentional use of these canons only as a guide attracted critics who asserted that their oratory admonitions provided little guidance in determining a standard of proscribed conduct.⁷¹ This lack of a standard for proscribed conduct resulted in the discipline of judges being neither uni-

63. *Id.* The ABA, immediately after adopting the first canons of professional ethics for attorneys, sought to establish resolutions to include judicial discipline. *Id.* Resolutions were unsuccessfully presented in 1909, and in 1917. *Id.*

64. *See id.*

65. *See* ABA BACKGROUND PAPER, *supra* note 62, at 1.

66. *See* Major League Baseball, History of the Game: Kenesaw Mountain Landis, http://mlb.mlb.com/NASApp/mlb/mlb/history/mlb_history_people.jsp?story=com_bio_1 (last visited May 26, 2007); *see also* DAVID PIETRUSZA, JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS 191–93 (1998). In 1920, Judge Kenesaw Mountain Landis supplemented his federal district judge salary by serving as the first commissioner of baseball. Major League Baseball, History of the Game, *supra*. Judge Landis was brought in to lend his reputation to baseball after scandal threatened the integrity of baseball with the infamous White Sox scandal. *Id.* Players were alleged to have participated in a scheme to throw the 1919 World Series. Major League Baseball, Chicago White Sox Timeline: 1919-World Series, <http://chicago.whitesox.mlb.com/cws/history/timeline01.jsp> (last visited May 26, 2007). Although Landis banned eight players—even though they were acquitted at trial—he was criticized for his ethics in failing to ban owner Charles Comiskey. *See* Major League Baseball, History of the Game, *supra*. As a judge, Judge Landis earned \$7,500 a year and supplemented this salary with a \$42,500 a year salary as commissioner. *Id.* He continued to work as a federal judge while working as the first commissioner of baseball. *Id.*

67. ABA BACKGROUND PAPER, *supra* note 62, at 1.

68. *Id.*

69. *Id.*

70. Shaman, *supra* note 55, at 3.

71. *Id.*

formly nor universally undertaken.⁷² Consequently, the Canons remained virtually unchanged for almost fifty years.⁷³

B. *The Creation of the Model Code of Judicial Conduct*

In 1969, the ABA commenced a comprehensive review process to evaluate and update the Canons of Judicial Ethics.⁷⁴ However, it was not until 1972 that these canons were modified to become the *Model Code of Judicial Conduct*.⁷⁵ This Model Code reduced the number of canons from thirty-six to seven and incorporated language which eliminated the hortatory language of the previous Canons of Judicial Ethics.⁷⁶ Hence, the 1972 Code indicated what a judge should do in an attempt to establish mandatory standards.⁷⁷ This Model Code had no legal effect on the judges to whom it was intended to apply, and it would be necessary for each state to enact statutes or court rules that would make it mandatory and capable of enforcement.⁷⁸ By 1990, "forty-seven states, the District of Columbia, and the Federal Judicial Conference" had adopted some form of the 1972 Model Code for regulation of judicial speech and conduct.⁷⁹

Also in 1990, a new version of the Model Code, adopted with five, not seven, canons emerged with significant changes from the 1972 Code.⁸⁰ First, gender neutral language replaced the language in the 1972 Code, which had utilized masculine references only.⁸¹ Second, a terminology section was added to explain terms utilized in an attempt to ensure uniformity in understanding and application.⁸² Third, the language of the code was revised again to address the enforcement power of the Model Code.⁸³ Therefore,

72. *Id.* at 6.

73. ANN. MODEL CODE OF JUD. CONDUCT pmbl. (2004); see LISA L. MILFORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 3 (1992).

74. CODE OF JUD. CONDUCT Preface (1972).

75. ANN. MODEL CODE OF JUD. CONDUCT pmbl.

76. See CODE OF JUD. CONDUCT (1972); ABA BACKGROUND PAPER, *supra* note 62, at 1; JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS (3d ed. 2000).

77. See generally CODE OF JUD. CONDUCT (1972).

78. SHAMAN ET AL., *supra* note 76, at 3.

79. *Id.*

80. ABA BACKGROUND PAPER, *supra* note 62, at 1; see MODEL CODE OF JUD. CONDUCT (1990). Canons 4, 5, and 6 of the 1972 Code were combined into one canon dealing with conduct. ABA BACKGROUND PAPER, *supra* note 62, at 1.

81. MILFORD, *supra* note 73, at 7. Compare MODEL CODE OF JUD. CONDUCT (1990), with CODE OF JUD. CONDUCT (1972).

82. See MODEL CODE OF JUD. CONDUCT pmbl. (1990).

83. ABA BACKGROUND PAPER, *supra* note 62, at 1; see also MODEL CODE OF JUD. CONDUCT (1990).

“should” was eliminated in favor of “shall” to emphasize the mandatory nature of the standards being established.⁸⁴ A note was added in the commentary to indicate clearly and unequivocally that mandatory enforcement and application was intended by the use of “shall” instead of “should.”⁸⁵ Most notably, a preamble section was added, which explained: 1) how to apply the code; 2) when to apply the code; and 3) why to apply the code.⁸⁶ This explanation of the underlying principles of the code was an integral part of the code’s effectiveness as a tool for regulation.⁸⁷

By 1990, forty-seven states had adopted the 1972 Code in some form. With the adoption of the 1990 Code, twenty of these forty-seven states, plus the District of Columbia, adopted the new *Model Code of Judicial Conduct* as their state’s code.⁸⁸ Two of the three states that previously had no code of judicial conduct adopted the 1990 Code, bringing the total number of jurisdictions to twenty-three.⁸⁹ While some states have adopted a combination of the 1972 and 1990 Code, only Montana—with its own code—remains as the state that has adopted neither the 1972 nor 1990 Code.⁹⁰ Consequently, the Model Code operates as an excellent tool for application and analysis of judicial conduct.

C. *The “New” Model Code of Judicial Conduct*

In September of 2003, the ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct was formed to review the Code of Judicial Conduct and recommend changes.⁹¹ In announcing the commission, then ABA President Dennis W. Archer, Jr. noted that it had been twelve years since the ABA had taken a close examination of the Code, and that in light of recent legal and political challenges and attacks on judges, some revisions may be warranted.⁹² Public meetings were held across the country in conjunction with the ABA Annual Meeting.⁹³ The final draft report has been

84. MODEL CODE OF JUD. CONDUCT pmbi. (1990).

85. *Id.*

86. *See id.*

87. MILFORD, *supra* note 73, at 9.

88. SHAMAN ET AL., *supra* note 76, at 3 n.19.

89. *Id.* at 4. Rhode Island and Wisconsin adopted codes based on the 1990 *Model Code of Judicial Conduct*. *Id.*

90. *See* MONT. CONST. art V, § 11.

91. ABA Joint Comm’n to Evaluate the Model Code of Jud. Conduct, About the Comm’n, <http://www.abanet.org/judicialethics/about.html> (last visited May 26, 2007) [hereinafter About the ABA Joint Comm’n].

92. *Id.* Between 1988 and 1990, an extensive review and revision of the code led to the 1990 *Model Code of Judicial Conduct*. ABA BACKGROUND PAPER, *supra* note 62, at 1.

93. About the ABA Joint Comm’n, *supra* note 91.

released and is awaiting comment from the judiciary, the bar, and the public.⁹⁴

1. Format Changes

Both format and substantive changes to the Code are being proposed by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct.⁹⁵ The format changes entail the reorganization of the information covered within the Canons and the numbering system.⁹⁶ While Canons 4 and 5 address the same information they covered in the 1990 Code, most of the information previously provided in Canons 1, 2, and 3 has been placed in Canon 1.⁹⁷ The judge's professional duties are addressed solely in Canon 2.⁹⁸ The personal conduct of the judge will now appear in Canon 3 instead of Canon 2.⁹⁹ Second, the 1990 Code generally presents an overarching principle that is followed by subsections, which discursively provides the parameters for speech and conduct.¹⁰⁰ Instead, the new code would more directly address permitted and prohibited speech and conduct.¹⁰¹ The numbering system will also be changed from lettered canons with subsections A,

94. *Id.* Mark I. Harrison, the chair of the Commission, reported that as of April 2006: The Commissioners agree that a short extension of our work will allow us to present the best possible product to the ABA House of Delegates, both to provide clear and appropriate guidance to the judiciary in the years ahead, and to assure the public that its trust in the judiciary is well-founded We are committed to finishing our work this fall, to allow full consideration of all the proposed changes in the Code before the House convenes for the ABA Midyear Meeting in Miami in February 2007.

Statement of Mark I. Harrison to ABA (April 2006) (on file with *Nova Law Review*).

95. MARK I. HARRISON ET AL., INTRODUCTORY REPORT: PRELIMINARY REPORT OF THE ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT 1 (June 30, 2005). The Joint Commission operates under the auspices of the ABA's Standing Committee on Ethics and Professional Responsibility, and on Judicial Independence, with a grant from the Joyce Foundation. *Id.*

96. *Id.* at 3.

97. *Id.* The revised Canon 1 will address "both the obligation of judges to uphold the integrity, impartiality, and independence of the judiciary and to avoid impropriety and its appearance." *Id.*

98. HARRISON ET AL., *supra* note 95, at 3. In the 1990 Code, this information is partly covered in Canon 3. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* This change is modeled after the ABA Model Rules of Professional Conduct, which is said to be "more straightforward and user-friendly." HARRISON ET AL., *supra* note 95, at 3.

B, or C to numbered canons with rules.¹⁰² A comment section will replace commentary throughout the code.¹⁰³

2. Substantive Changes

a. Canon 1—Conduct in General

“A judge shall . . . avoid impropriety and the appearance of impropriety in all of the judge’s activities,” so as to uphold “the independence, integrity, and impartiality of the judiciary.”¹⁰⁴ The addition of the language after the comma is intended to emphasize the importance of avoiding impropriety and its appearance.¹⁰⁵ It sets the tenor for judicial speech and conduct on and off the bench by stressing the importance of independence, integrity, and impartiality.¹⁰⁶ Throughout the comment to this canon, the word independence is placed before both integrity and impartiality.¹⁰⁷ Citing to over three decades of regulation of judicial conduct, the proposed changes place “the admonishment that judges avoid not only impropriety, but also its appearance in two places.”¹⁰⁸ This language, regarding impropriety and its appearance, appears in the text of Canon 1 and in Rule 1.03 in the language “substantially as [it] appear[s] in the present Code.”¹⁰⁹

102. See JOINT COMM. TO EVALUATE THE CODE OF JUDICIAL CONDUCT, ABA, ATTACHMENT B: FINAL DRAFT REPORT REDLINED TO CURRENT ABA MODEL CODE OF JUDICIAL CONDUCT (2005), available at <http://www.abanet.org/judicialethics/redlinetocurrentcode.pdf> [hereinafter REDLINE TO CURRENT CODE]. For example, rules under Canon 1 would be designated: 1.01, 1.02, and 1.03. *Id.*

103. *See id.*

104. *Id.* Canon 1.

105. *See id.*

106. See Eileen C. Gallagher, *The ABA Revisits the Model Code of Judicial Conduct: A Report on Progress*, 44 JUDGES J. 7, 7–8, (2005).

107. REDLINE TO CURRENT CODE, *supra* note 102, Canon 1 cmts. 1–3.

108. HARRISON ET AL., *supra* note 95, at 4. “The Commission . . . received numerous written communications on the question . . . of whether the ‘appearance of impropriety’ concept contained in the present Code should be retained.” *Id.* Some “urged that the concept be retained, [while] [o]thers, notably lawyers who represent judges and judicial candidates in disciplinary proceedings, voiced concerns that the concept is not clearly definable and does not provide judges and judicial candidates with adequate notice about what conduct might constitute a disciplinable offense.” *Id.*

109. *Id.*

b. Canon 2—Judicial Conduct

“A judge shall perform the duties of judicial office impartially . . . and diligently.”¹¹⁰ The redline copy of Canon 2 exemplifies the extensive revisions this Canon, which previously included only three subsections, has undergone.¹¹¹ As the title to this Canon suggests, the admonition that “a judge shall perform the duties of judicial office impartially and diligently” is the subject and principal focus of Canon 2.¹¹² The proposed changes would add seventeen additional provisions so that Canon 2 would contain twenty rules.¹¹³

Each rule addresses speech and conduct that may occur while the judge is on the bench.¹¹⁴ Most of the speech and conduct addressed in this Canon was previously addressed in Canon 3 of the 1990 Model Code, using substantially the same language.¹¹⁵ The additional language of “[g]iving precedence to the duties of judicial office” further emphasizes the intent of this Canon.¹¹⁶ Impartiality and fairness are specifically addressed in a new Rule 2.06 that provides: “A judge shall uphold and apply the law, and decide all cases with impartiality and fairness.”¹¹⁷

“Rule 2.08, ‘Demeanor and Decorum,’ contains a new Comment to accommodate” post-trial jury debriefing by delineating what must not be discussed.¹¹⁸ The Comment to Rule 2.09, “Ensuring the Right to be Heard,” adds a caution to judges to avoid coercion when “encouraging parties and their lawyers to settle disputes where possible.”¹¹⁹ In the proposal of Rule 2.10(B), judges are prohibited from “independently investigat[ing] facts in a case”¹²⁰ and the importance of an independent judiciary is once again em-

110. REDLINE TO CURRENT CODE, *supra* note 102, Canon 2.

111. *Compare id.*, with MODEL CODE OF JUD. CONDUCT Canon 2 (1990).

112. MODEL CODE OF JUD. CONDUCT Canon 2.

113. *See* REDLINE TO CURRENT CODE, *supra* note 102, Canon 2.

114. *See id.*

115. *Compare id.*, with MODEL CODE OF JUD. CONDUCT Canon 3 (1990).

116. REDLINE TO CURRENT CODE, *supra* note 102, Canon 2.

117. *Id.* at Canon 2, R. 2.06.

118. HARRISON ET AL., *supra* note 95, at 4. This is a relatively new practice and procedure by some judges. *See id.*

119. *Id.* The proposal does not address the question of “[w]hether a judge who participates in facilitating settlement of a matter pending before him or her should be permitted to hear that matter if settlement efforts are unsuccessful [but this question] has been the subject of conflicting testimony.” *Id.*

120. *Id.* The Comment to the Rule specifically includes a prohibition against the “use of electronic research methods,” including Internet research. HARRISON ET AL., *supra* note 95, at 4–5. The Comment also notes the “developing practices in . . . ‘specialized courts,’ such as drug courts, domestic abuse courts, and others, [which] encourage or require judges to engage

phasized.¹²¹ Rule 2.20 adds the duty of a judge to cooperate with judicial and lawyer disciplinary authorities.¹²²

c. *Canon 3—Personal Conduct*¹²³

“A judge shall conduct the judge’s personal affairs to preserve the independence, integrity, and impartiality of the judiciary.”¹²⁴ The revision language for Canon 3 emphasizes the applicability of the code to speech and conduct that may occur during the personal life of a judge, including disclosure of information that may be deemed private.¹²⁵ Many new commentaries have been added to this canon to provide clarity and clear guidance to the judiciary regarding personal conduct.¹²⁶ For example, the revision comment provides that judges should write letters of recommendation based on “only knowledge obtained . . . *in his or her official capacity*.”¹²⁷ While the commentary is not new, it “addresses [a] long-standing debate about the appropriate use of judicial letterhead for references.”¹²⁸

Second, “‘ethnicity’ and ‘sexual orientation’ [were added] to the list of factors that must not be the basis for discrimination in the policies of clubs and other membership entities to which judges seek to belong.”¹²⁹ While the

in communications with individuals and entities” and may violate *ex parte* provisions. HARRISON ET AL., *supra* note 95, at 5.

121. *See id.* at 4–5. The addition to “[t]he Comment to Rule 2.12, ‘Disqualification,’ states that a judge ‘should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, *even if the judge believes there is no real basis for disqualification*,” which raised the question of “whether such an application of the disqualification rule is necessary or desirable, and specifically whether such an interpretation may work a hardship on one or both of the lawyers in a proceeding.” *Id.* at 5.

122. REDLINE TO CURRENT CODE, *supra* note 102, Canon 2, R. 2.20.

123. The present language of Canon 3 provides: “A judge shall perform the duties of judicial office impartially and diligently.” MODEL CODE OF JUD. CONDUCT Canon 3 (2004). It contains subsections A-F and addresses speech and conduct that may occur on the bench or during the performance of judicial duties. *Id.* Incorporating this language and the subject matter of Canon 3 into Canon 2 will make the focus of Canon 3 off the bench speech and conduct. *See* HARRISON ET AL., *supra* note 95, at 3.

124. REDLINE TO CURRENT CODE, *supra* note 102, Canon 3.

125. *See id.*

126. *See* HARRISON ET AL., *supra* note 95, at 5–6; REDLINE TO CURRENT CODE, *supra* note 102, Canon 3.

127. HARRISON ET AL., *supra* note 95, at 5.

128. Gallagher, *supra* note 106, at 9.

129. HARRISON ET AL., *supra* note 95, at 5. The issue of membership in the Boy Scouts of America was specifically addressed as a result of the United States Supreme Court’s decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). A Massachusetts Committee on Judicial Ethics found that the prohibition against discrimination based on sex did not refer to dis-

1990 Code presently contains a “prohibition against the manifestation of bias in the court.” The prohibition does “not appear with respect to organizational memberships held by a judge.”¹³⁰

Third, the caveat remains “that a judge may belong to ‘any organization dedicated to the preservation of religious, ethnic, or legitimate cultural values of common interest to its members’” without fear of violation of this canon.¹³¹

Fourth, the comments note that attendance by the judge in violation of this canon is well established as a *per se* violation.¹³² Although, mere attendance of a judge at an event in a facility of a group that he or she could not join as a member does not violate the rule if attendance is an isolated event and could not be perceived as an endorsement of the organization.¹³³

Fifth, “a judge [must] immediately resign from an organization to which he or she belongs upon discovering that it engages in invidious discrimination . . . [but has] one year to withdraw from membership, unless he or she was successful in influencing the organization to abandon its discriminatory policies.”¹³⁴

d. Canon 4—Extrajudicial Conduct

“A judge shall conduct the judge’s extra-judicial activities . . . to minimize the risk of conflict with [judicial obligations].”¹³⁵ “[T]he text of this Rule remains largely unchanged,” but the structure has changed, revising the description of gifts to exclude “several items that are not, in common parlance, thought of as gifts, including but not limited to: ordinary social hospitality; trivial tokens of appreciation; and loans, discounts, prizes, and scholarships that judges receive for reasons generally unrelated to their being judges.”¹³⁶

crimination based on sexual orientation and, therefore, did not prohibit a judge from membership. Mass. Comm. on Jud. Ethics, Op. No. 2001-1 (2001). An Arizona Judicial Ethics Advisory Opinion found that without specific language prohibiting membership and participation in groups that prohibit membership based on sexual orientation, judges were not barred from participation in the Boy Scouts of America. Ariz. Sup. Ct. Jud. Ethics Adv. Comm., Adv. Op. 00-05 (2000).

130. HARRISON ET AL., *supra* note 95, at 5.

131. *Id.*

132. *Id.* at 6.

133. *See id.* at 5–6.

134. *Id.* at 6.

135. REDLINE TO CURRENT CODE, *supra* note 102, Canon 4.

136. HARRISON ET AL., *supra* note 95, at 6.

“Rule 4.13(A)(7) remains substantially similar to the present Code, but includes several important changes.”¹³⁷ It provides that each jurisdiction should set a specific amount for the reporting of gifts instead of simply requiring that all gifts be reported.¹³⁸ No gifts would be allowed for five years from persons who previously appeared before the court or who are likely to appear before the court in the foreseeable future.¹³⁹

First, Rule 4.14(A) would apply to waiver of charges as well as reimbursement of expenses. Second, permissible reimbursement is specifically limited to necessary travel and lodging. Third, [and the most important change is that] the condition precedent to accepting reimbursement or waiver of charges—that it not create an appearance of impropriety—has been amended to identify specifically the potential that the acceptance of gifts has for creating the perception that judicial integrity, impartiality, or independence may be compromised.

The Comment explicating this Rule is designed to provide judges with greater guidance when analyzing whether their reimbursement for attendance at a given event may be perceived as casting doubt on their integrity, impartiality, or independence. The sources of funding for an event, the reasonableness of the expenses paid, and the identity of the sponsor are all among factors that judges are urged to consider when deciding whether to attend expense-paid seminars.¹⁴⁰

e. Canon 5—Inappropriate Political Activity

“A judge or candidate for judicial office shall not engage in political . . . activity that is inconsistent with the independence, integrity, and impartiality of the judiciary.”¹⁴¹ The redline copy of Canon 5 includes both substantial rule changes and significant comments to the canon.¹⁴² These changes appear to be a manifestation of the need to ensure the independence, integrity, and impartiality of the judiciary while recognizing “the political realities of judicial selection.”¹⁴³

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 7.

141. REDLINE TO CURRENT CODE, *supra* note 102, Canon 5. The former language is “[a] judge or judicial candidate shall refrain from inappropriate political activity.” MODEL CODE OF JUD. CONDUCT Canon 5 (2004).

142. See REDLINE TO CURRENT CODE, *supra* note 102, Canon 5.

143. HARRISON ET AL., *supra* note 95, at 7.

The redline version adds the language: “activity that is not inconsistent with the independence, integrity, and impartiality of the judiciary.”¹⁴⁴ This language embodies these overriding principles while addressing the issues that may arise in the different methods of judicial selection.¹⁴⁵ Rule 5.01 addresses the issue of speech and conduct that: 1) is false and made “with reckless disregard for the truth;”¹⁴⁶ 2) might “reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending;”¹⁴⁷ or 3) “make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of office.”¹⁴⁸ Rules 5.02, 5.03, 5.04, and 5.05 each address a different method of judicial selection.¹⁴⁹

Rule 5.02, “Permitted Political and Campaign Activities of Candidates for Judicial Office in Partisan Public Elections,” contains specific language to indicate the speech and conduct permitted.¹⁵⁰ This rule was contained in the previous code and generally adds language that clarifies the speech and conduct allowed.¹⁵¹ This rule specifically allows speech and conduct that would be prohibited by other rules.¹⁵²

Rule 5.03, “Permitted Political and Campaign Activities of Candidates for Judicial Office in Non-Partisan Public Elections,” and Rule 5.04, “Permitted Political and Campaign Activities of Candidates for Judicial Office in Retention Elections,” add identical language that specifically references non-partisan and retention elections, respectively.¹⁵³

Finally, Rule 5.05, “Permitted Political Activities of Candidates for Appointive Judicial Office,” provides guidance for speech and conduct for those seeking appointment.¹⁵⁴

144. REDLINE TO CURRENT CODE, *supra* note 102, Canon 5.

145. *See id.*

146. *Id.* R. 5.01(A)(11).

147. *Id.* R. 5.01(A)(12).

148. *Id.* R. 5.01(A)(13).

149. REDLINE TO CURRENT CODE, *supra* note 102, Canon 5.

150. *Id.* R. 5.01.

151. *Compare id.*, with MODEL CODE OF JUD. CONDUCT Canon 5 (2004).

152. REDLINE TO CURRENT CODE, *supra* note 102, Canon 5. For example, a judge or judicial candidate in a non-partisan election would be prohibited from identifying the party to which he or she belongs, but would be allowed pursuant to this rule. *See id.*

153. *Id.* R. 5.03, 5.04.

154. *Id.* R. 5.05.

IV. THE SPEECH AND CONDUCT THAT THREATEN INDEPENDENCE, INTEGRITY, AND IMPARTIALITY

A. *Categories of Judicial Speech and Conduct: The Florida Model*

A recent article by Judge James R. Wolf explores the cost of judicial misconduct in Florida by conducting a comprehensive survey of judicial discipline.¹⁵⁵ Judge Wolf identifies twenty categories of misconduct in his analysis of judicial discipline.¹⁵⁶ The twenty categories are:

1) lacking judicial temperament; 2) failing to be impartial; 3) engaging in ex parte communications; 4) violating recusal and disclosure requirements; 5) improperly communicating with the press; 6) failing to follow the law while conducting judicial duties; 7) inappropriately using contempt power; 8) misusing office for personal gain; 9) misusing office for the [benefit] of others; 10) abusing substances; 11) improper[] receiving [of] gifts; 12) . . . improper sexual conduct; 13) . . . improper behavior while practicing law; 14) violating criminal laws; 15) . . . delay[] [in] ruling; 16) exhibiting a lack of candor during official proceedings; 17) failing to file required . . . disclosure . . . ; 18) criticizing jur[ors] and . . . officials; 19) use[] [of] intimidation . . . ; and 20) . . . election misconduct.¹⁵⁷

Wolf's article does not analyze the misconduct in the context of the most recent changes to the Florida Code of Judicial Conduct or the proposed changes in the *Model Code of Judicial Conduct*.¹⁵⁸ The categories that he identifies are a comprehensive list of speech and conduct that frequently are the subject of judicial discipline.¹⁵⁹ Narrowing the categories of misconduct identified by Judge Wolf provides a more useful mechanism for a broader

155. Wolf, *supra* note 57, at 350.

156. *Id.* at 352–53.

157. *Id.*

158. *See id.* at 351. According to Wolf:

While a study of the seven canons of the Florida Code of Judicial Conduct will certainly reveal what behavior constitutes judicial misconduct warranting the imposition of discipline, such a study cannot provide an adequate framework for determining the fairness or equality of the penalties actually received by judges for their misconduct.

Id.

159. *See* Wolf, *supra* note 57, at 352–53. In his analysis of judicial discipline while referring to categories one through ten of judicial misconduct, Wolf states: “While these behaviors are given many names, they essentially involve a judge being discourteous and not treating people the way he or she would want to be treated.” *Id.* at 367.

analysis of the speech and conduct.¹⁶⁰ The twenty categories of misconduct can be reduced to three areas of misconduct: 1) on the bench speech and conduct; 2) off the bench speech; and 3) political speech and conduct.¹⁶¹ These three categories provide a consolidated framework for comparison and evaluation of the judicial misconduct, and should serve as an effective and necessary tool for evaluating the regulation of judges in order to maintain public confidence and ensure the independence, integrity, and impartiality of the judiciary.¹⁶² The examinations will necessarily include speech and conduct of judges during political activity to expose how the independence, integrity, and impartiality of the judiciary are affected.¹⁶³

B. *Precepts for Regulation of Judicial Speech and Conduct*

What a judge says can become as much the subject of discipline as what a judge does.¹⁶⁴ The same speech may violate more than one provision, and each must be examined through those rules, commentaries, and cases that discuss the prohibited behavior.¹⁶⁵ An adequate examination of judicial speech and conduct will necessarily overlap in depth and breadth of the analysis of the canons that govern such speech and behavior.¹⁶⁶ While all of the canons may provide a constructive framework for analysis when looking at judicial speech or conduct, this examination of on the bench conduct will focus on, and begin with, an analysis of Canon 3,¹⁶⁷ and then establish the implications of Canon 1¹⁶⁸ and Canon 2.¹⁶⁹ The emphasis on Canon 3 reflects its overriding precepts of independence, integrity, and impartiality, and its emphasis on specific speech and conduct.¹⁷⁰ The utility of Canon 4 as a tool for analysis is limited because of its framework, but it will be examined

160. *Id.* at 352. With fewer categories, the opportunity for comparison and analysis is greater. *See id.* (“[I]t is beneficial for analytical purposes to identify narrow categories of conduct and to create a large number of categories to ensure that the comparison of penalties is truly for like conduct.”).

161. *See generally id.* at 352–53.

162. *See Wolf, supra* note 57, at 351 (raising many issues concerning discipline for judicial misconduct and implying why such issues are grounds for public concern).

163. *See id.* at 352.

164. MODEL CODE OF JUD. CONDUCT Canon 3 (2004).

165. *See Wolf, supra* note 57, at 352.

166. *See id.*

167. *See* MODEL CODE OF JUD. CONDUCT Canon 3 (2004).

168. *See id.* Canon 1 (“A judge shall uphold the integrity and independence of the judiciary.”).

169. *See id.* Canon 2 (“A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”).

170. *See id.* Canon 3.

for compliance.¹⁷¹ Finally, Canon 5 will be used to examine political speech and conduct.¹⁷²

“A judge shall uphold the integrity and independence of the judiciary.”¹⁷³ This canon invites desirable, not actual application, to judicial speech and conduct, but has been successfully applied to judicial speech and conduct, including political activity.¹⁷⁴ The principal indictment against sole use of this canon as a disciplinary tool is that the “hortative and goal oriented” language fails to “set forth . . . the precise nature of the speech and conduct that may be subject to discipline.”¹⁷⁵

“A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”¹⁷⁶ The overriding principle of this canon is the recognition of the need to prohibit irresponsible and improper speech and conduct through regulation.¹⁷⁷ This regulation includes definitions of impropriety and the appearance of impropriety.¹⁷⁸ It is impossible to list all speech and conduct that is prohibited by this canon, but the commentary provides that “improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.”¹⁷⁹ The test for the appearance of impropriety of speech and conduct is objectively outlined as determining if “the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”¹⁸⁰ This standard allows objective application of this canon to a variety of speech and conduct ranging from an ex-

171. *See id.* Canon 4.

172. MODEL CODE OF JUD. CONDUCT Canon 5.

173. *Id.* Canon 1.

174. *E.g., In re Larsen*, 616 A.2d 529, 612 (Pa. 1992). Numerous states have consistently noted the difficulty in applying this canon via case law. *Id.* Such cases involve examples of on the bench speech and conduct. *See, e.g., In re Jacobi*, 715 N.E.2d 873, 874–75 (Ind. 1999) (finding a violation of Canon 1 for extensive ex parte contact with a town’s attorney and board president when granting its temporary restraining order); *In re Waterman*, 625 N.W.2d 748, 748–50 (Mich. 1999) (hearing cases of attorneys to whom he leased offices). For examples of off the bench speech and conduct see *Miss. Comm’n on Jud. Performance v. Blakeney*, 848 So. 2d 824, 826 (Miss. 2003) (initiating ex parte contact with deputy in attempt to obtain dismissal for defendant), and *In re Esquiroz*, 654 So. 2d 558, 558–59 (Fla. 1995) (charging a judge with a DUI in violation of Canon 1 and Canon 2). For examples of political speech and conduct see *In re Koon*, 580 S.E.2d 147, 148 (S.C. 2003) (illustrating an example of a case of inappropriate political activity), and *In re Rodriguez*, 829 So. 2d 857, 858–60 (Fla. 2002) (hearing a case on a campaign finance reporting irregularity).

175. *In re Smith*, 687 A.2d 1229, 1239 (Pa. Ct. Jud. Discipline 1996).

176. MODEL CODE OF JUD. CONDUCT Canon 2 (2004).

177. *Id.*

178. *Id.*

179. *Id.* Canon 2 cmt.

180. *Id.*

tramarital affair¹⁸¹ to failing to pay for income tax preparation, while awarding an income tax accountant fiduciary appointments.¹⁸²

“A judge [should] perform the duties of [a judge] impartially and diligently.”¹⁸³ The all-encompassing nature of this canon provides the most comprehensive umbrella for analysis of judicial speech and conduct.¹⁸⁴ This general applicability continues with the admonition that “judicial duties of a judge take precedence over all the judge’s other activities.”¹⁸⁵ “The judge’s judicial duties include all the duties of the judge’s office prescribed by law.”¹⁸⁶ In pronouncing the standards that would apply to this canon, the subsections identify the parameters as: 1) adjudicative duties;¹⁸⁷ 2) administrative duties;¹⁸⁸ 4) disciplinary duties;¹⁸⁹ and 5) those duties relating to disqualification.¹⁹⁰ Ultimately, an allegation of improper speech or conduct must generally include a violation of this canon, because it covers most aspects of how a judge should conduct judicial and extra-judicial activities.¹⁹¹

181. See *In re Flanagan*, 690 A.2d 865, 869, 880–82 (Conn. 1997) (holding that “a consensual sexual relationship” of a judge “with his married court reporter constituted a violation of [C]anons 1 and 2A”).

182. *In re Lebedeff*, N.Y. State Comm’n on Jud. Conduct (Nov. 5, 2003) available at <http://www.scjc.state.ny.us/Determinations/L/lebedeff.htm> (holding that judge’s failure to pay for tax preparation created an image of impropriety).

183. MODEL CODE OF JUD. CONDUCT Canon 3 (2004).

184. See generally *id.*

185. FLA. CODE JUD. CONDUCT Canon 3A (2006).

186. *Id.*

187. *Id.* Canon 3B; see Wolf, *supra* note 57, at 359. Judge Wolf identifies these duties in terms of the need for the judge to “maintain[] competence, . . . order, and decorum” on the bench and judicially perform duties with dignity and courtesy free of bias and prejudice. Wolf, *supra* note 57, at 359. The administrative duties also require the judge to ensure “a party’s right to be heard” without improper ex parte communication or public comments. FLA. CODE JUD. CONDUCT Canon 3B.

188. FLA. CODE JUD. CONDUCT Canon 3C; see Wolf, *supra* note 57, at 359. Generally, these responsibilities include the adjudicative duties and the need to avoid favoritism and nepotism when making appointments. FLA. CODE JUD. CONDUCT Canon 3C.

189. FLA. CODE JUD. CONDUCT Canon 3D; see Wolf, *supra* note 57, at 359. This duty specifies the responsibility of a judge to report judicial and attorney misconduct. FLA. CODE JUD. CONDUCT Canon 3D.

190. FLA. CODE JUD. CONDUCT Canon 3E; see Wolf, *supra* note 57, at 359. This duty specifies the requirements of a judge for disclosure and recusal. FLA. CODE JUD. CONDUCT Canon 3E.

191. See MODEL CODE OF JUD. CONDUCT Canon 3 (2004) (“The judicial duties of a judge take precedence over all the judge’s other activities. The judge’s judicial duties include all the duties of the judge’s office prescribed by law. In the performance of these duties, the [standards of Canon 3] apply.”).

A judge should conduct “the judge’s extra-judicial activities [as] to minimize the risk of conflict with judicial obligations.”¹⁹² This canon specifically applies to off the bench speech and conduct, and generally provides guidance to the judge when participating in these activities.¹⁹³ Complete withdrawal by the judge from all extra-judicial activities is neither advisable nor required lest the judge becomes isolated from the community.¹⁹⁴ However, this canon makes clear that the judge must accept speech and conduct limitations and expect to be the subject of scrutiny.¹⁹⁵

“A judge or judicial candidate shall refrain from inappropriate political activity.”¹⁹⁶ In recent years, the legislative branch has become involved in attempts to encroach upon and politicize the issue of judicial independence.¹⁹⁷ In 2002, the United States Supreme Court became the venue of vociferous attacks on judicial speech and conduct, especially during elections.¹⁹⁸ In *Republican Party of Minnesota v. White*,¹⁹⁹ the Court found unconstitutional a provision of the Minnesota Code of Judicial Conduct that prevented judicial candidates from announcing their views regarding disputed legal and political questions.²⁰⁰ In emphasizing the positive value of announcements on views regarding disputed legal and political questions, the

192. *Id.* Canon 4.

193. *Id.*

194. *Id.* Canon 4 cmt.

195. *Id.*

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.

MODEL CODE OF JUD. CONDUCT Canon 4 cmt. (2004).

196. *Id.* Canon 5.

197. *Justice Ginsburg Snipes at Rep. DeLay*, NEWSMAX.COM WIRES, Feb. 3 2001, available at <http://www.newsmax.com/archives/articles/2001/2/2/172414.shtml>. Former Speaker of the House Tom DeLay, when he was Minority Whip, introduced legislation to limit the terms of federal judges and to restrict their review in death penalty and voter referendum cases, asserting that Article II of the United States Constitution gives Congress appellate jurisdiction. *Id.* Representative DeLay announced to a group of reporters that, “judges need to be intimidated.” *Id.* In a speech about judicial independence on February 1, 2001, Justice Ruth Bader Ginsburg responded to DeLay’s comment calling him an exterminator. *Id.* Justice Ginsburg said columnist Bob Herbert of the New York Times got it right when he said in a December 2000 column that, “[a]n intimidated judge is a worthless judge.” *Id.*; see also Debora K. Kristensen, *In Search of Judicial Independence*, 46 ADVOCATE 27, 30–32 (Idaho State Bar, June 2003).

198. See *Republican Party of Minn. v. White*, 536 U.S. 765, 768 (2002).

199. *Id.* at 765.

200. *Id.* at 788.

Court stated that candidate platforms and positions are “what the elections are about.”²⁰¹

C. *Parameters of Judicial Speech and Conduct*

The use of the canons for the examination of on the bench and off the bench speech and conduct must be preceded by determining what is meant by judicial duties.²⁰² This canon provides guidance stating that judicial duties are “all [of] the duties of the judge’s office prescribed by law.”²⁰³ Since by law a judge is capable of being called into service twenty-four hours a day, do judicial duties encompass all speech and conduct by a judge? For the purpose of analysis under this canon, judicial duties will be used in reference to speech and conduct which occur while on the bench or while carrying out a judicial function.²⁰⁴ Consequently, anything that a judge says or does in direct connection with judicial duties can and will be subject to examination under this rubric.²⁰⁵

1. On the Bench Speech and Conduct

On the bench speech may encompass the following: 1) “lacking judicial temperament;” 2) “failing to be impartial;” 3) “engaging in ex parte communications;” 4) “exhibiting a lack of candor during official proceedings;” 5) “criticizing juries and . . . officials;” and 6) “us[e] [of] intimidation.”²⁰⁶ The use of intimidation must be examined on a case-by-case basis since the speech or conduct may be indicated by a single event.²⁰⁷ Arguably, both failing to be impartial and the use of intimidation could also occur off the bench for personal advantage or some other reason.²⁰⁸ However, those instances, for the purpose of this analysis, will be characterized as “misus[e]

201. *Id.*

202. Although a definition was eventually agreed upon, the drafting committee of the 1972 canon encountered difficulty in fashioning a definition of judicial duties. MODEL CODE OF JUD. CONDUCT Canon 3 (2004).

203. *Id.* This definition also encompasses those duties provided for by common law, rule, regulation, statute, or the Constitution. *Id.*

204. *Id.* This designation will include any activity that is prescribed in a judge’s jurisdiction as a duty of judicial office. *Id.*

205. See MODEL CODE OF JUD. CONDUCT Canon 3 (2004).

206. Wolf, *supra* note 57, at 352–53.

207. See *id.* at 382–83.

208. See, e.g., *In re Holloway*, 832 So. 2d 716, 717 (Fla. 2002) (hearing in which a judge attempted to intimidate a fellow judge who was handling his friend’s case); *In re Miller*, 644 So. 2d 75, 79 (Fla. 1994) (writing letters to a newspaper about a case warranted public reprimand).

of office [either] for personal gain” or for the benefit of others.²⁰⁹ All of these categories, which were identified by Judge Wolf, provide an opportunity for useful analysis, especially when examined in the context of improper judicial speech.²¹⁰

Again utilizing the categories identified by Judge Wolf, on the bench conduct that will be examined consists of the following: 1) “Violating Recusal and Disclosure Requirements;” 2) “Failing to Follow the Law While Conducting Judicial Duties;” 3) “Inappropriately Using Contempt Power;” 4) “Delay in Ruling;” 5) “Failing to File Required Disclosure” Documents; and 6) “Use of Intimidation.”²¹¹ While there is some overlap in these categories of judicial discipline, the designation of on the bench conduct provides a common thread for analyzing the speech and conduct.

2. Off the Bench Speech and Conduct

Determining the parameters of the off the bench judicial speech and conduct that may be subject to discipline may be ascertained more easily. The off the bench designation essentially includes any other speech and conduct that does not occur on the bench and in direct connection with judicial duties. The aspects of speech and conduct that may be examined under Canon 4 will be judicial activities specifically defined as: 1) “Avocational Activities;”²¹² 2) “Governmental, Civic or Charitable Activities;”²¹³ 3) “Financial Activities;”²¹⁴ 4) “Fiduciary Activities;”²¹⁵ 5) “Service as Arbitrator or Mediator;”²¹⁶ and 6) “Practice of Law.”²¹⁷ These activities govern judicial conduct relating to participation in non-judicial activities.²¹⁸

3. Political Speech and Conduct

The final analysis of judicial speech and conduct will examine political activity.²¹⁹ Political activity will take into account speech and conduct of judges and judicial candidates in a judicial election.²²⁰ It will also examine

209. Wolf, *supra* note 57, at 353.

210. *See id.* at 352–53.

207. *Id.* at 349–50.

212. MODEL CODE OF JUD. CONDUCT Canon 4B (2004).

213. *Id.* Canon 4C.

214. *Id.* Canon 4D.

215. *Id.* Canon 4E.

216. *Id.* Canon 4F.

217. MODEL CODE OF JUD. CONDUCT Canon 4G.

218. *See id.* Canon 4.

219. *See id.* Canon 5.

220. *See id.*

speech and conduct within the context of the appointment process.²²¹ Finally, it will examine speech and conduct on behalf of another candidate within the context of an election or political appointment of a judge or any other person.²²² Political activity will include both speech and conduct because the political environment is the principal catalyst in the analysis of misconduct.²²³

V. THE EXAMINATION OF JUDICIAL SPEECH AND CONDUCT

A. *On the Bench Speech and Conduct*

The concept of limiting judicial speech and conduct on the bench can be easily justified since what a judge says and does can have serious ramifications for those who appear in court. A large percentage of the cases of misconduct occur as a result of incivility.²²⁴ Both speech and conduct are the subjects of these complaints.²²⁵ The consequences of improper speech can extend further than discipline against the judge and lead to the reversal of a conviction.²²⁶ These instances of judicial misconduct become more than legal error because they represent a departure by the judge from the obligation to “[p]erform the [d]uties of [j]udicial [o]ffice [i]mpartially and [d]iligently.”²²⁷ Judicial misconduct resulting in legal error has ramifications far greater than the cost of judicial disciplinary proceedings.²²⁸

As a rule, judges should “not be disciplined for errors of judgment or errors of law.”²²⁹ To allow discipline for anything less than egregious examples of misconduct may have the “tendency to chill . . . independence.”²³⁰ The disciplinary process should not be a substitute for the appellate process.²³¹ Conversely, failing to address legal error that is the result of inten-

221. *See id.*

222. MODEL CODE OF JUD. CONDUCT Canon 5.

223. *See id.*

224. Wolf, *supra* note 57, at 367. In Florida, complaints of incivility constitute a large percentage of the referrals to the Judicial Qualifications Committee. *Id.*

225. *See id.* at 368.

226. *See Shaman, supra* note 55, at 8–9. When legal error results in the reversal of a conviction, a question may arise whether such grounds should be the basis for judicial discipline. *Id.*

227. MODEL CODE OF JUD. CONDUCT Canon 3 (2004).

228. *See Shaman, supra* note 55, at 8.

229. *In re Tucker*, 501 S.E.2d 67, 71 (N.C. 1998) (citing *In re Martin*, 424 S.E.2d 118, 120 (N.C. 1993)).

230. Ben F. Overton, *Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions*, 54 CHI.-KENT L. REV. 59, 66 (1977).

231. *See Shaman, supra* note 55, at 8.

tional, repeated, or blatant misconduct does not promote confidence in the impartiality and integrity of the court.²³² A judge presides over little, if anything else, that is more solemn, decisive, or significant than a first degree murder case in which the death penalty is being sought.²³³ Therefore, the judge whose improper speech or conduct creates legal error that causes a reversal is significant, as evidenced in the speech of Judge Donald McCartin.²³⁴

In a decision filed on March 6, 2006, the Supreme Court of California reversed the death penalty imposed in a 1992 triple homicide, noting that at several crucial instances, the trial judge made comments in front of the jury that constituted misconduct and required reversal.²³⁵ The judge blatantly and repeatedly crossed the line from legal error to judicial misconduct.²³⁶ First, during the jury selection, the judge falsely told the jury that premeditation was a “gimme.”²³⁷ He interrupted two defense expert witnesses (a pharmacologist and a psychologist) to ridicule their testimony.²³⁸ He made objections and comments on behalf of the state, while repeatedly chastising the defense attorney.²³⁹

In announcing its decision, the court noted that “[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity.”²⁴⁰ The *Sturm*

232. See *id.* at 8–9.

233. See generally *id.*

234. See *People v. Sturm*, 129 P.3d 10, 17 (Cal. 2006).

235. See *id.*

236. See *id.*

237. *Id.* at 18. The court noted that this comment regarding premeditation was of extreme concern because the lack of premeditation was a central theme of the defendant’s case in mitigation. *Id.* The jury specifically found him guilty of felony-murder instead of premeditated murder and deadlocked ten to two in favor of life instead of death during the penalty phase. *Sturm*, 129 P.3d at 12.

238. See *id.* at 19. The judge jokingly told the pharmacology expert that his “\$4 million [in] . . . federal grants . . . [while at] the University of California . . . [had] contributed to the federal deficit.” *Id.* (internal quotations omitted). He indicated that the government had “spent too much already” on such research and that testimony about it “would be very depressing and we will need cocaine.” *Id.* (internal quotations omitted). He accused the psychologist of embellishing answers and responding incorrectly to a defense question. *Id.* at 20.

239. See *Sturm*, 129 P.3d at 20–21. During the overall presentations by the state in aggravation and defense in mitigation, the judge “*sua sponte* intervened more than 30 times during the defense case” and the state “less than five times.” *Id.* at 24 (emphasis added). The interruptions were generally negative and/or disparaging. *Id.* at 24 n.3.

240. *Id.* at 27 (quoting CAL. CODE OF JUD. ETHICS Canon 3B(4) (2006)). The *ABA Model Code of Judicial Conduct* and the Florida Code of Judicial Conduct Canon 3B(4) also contain identical provisions. Compare MODEL CODE OF JUD. CONDUCT Canon 3B(4) (2004), with FLA. CODE JUD. CONDUCT Canon 3B(4) (2006).

court stated that “[i]t was reasonably probable that the . . . penalty phase jury’s verdict would have been different had the trial judge exhibited the patience, dignity, and courtesy that is expected of all judges.”²⁴¹ This incidence of discourteous speech is an apposite paradigm of the intemperate and impartial speech that has been the subject of the discipline of judges and the reversal of criminal cases.²⁴² Maintaining impartiality requires a judge to act in absence of bias or prejudice and keep an open mind.²⁴³ The use of the code to overturn criminal cases provides an additional level of examination, thereby contemplating an additional consequence of judicial misconduct. Retrial, after fifteen years of even the penalty phase of a death penalty case, will be difficult and costly.²⁴⁴ Because Judge McCartin retired in 1993, the real cost of this judicial misconduct may never be fully realized.²⁴⁵

In 2004, Judge Faith Johnson invited the media to a party replete with a cake and balloons for the sentencing of a defendant who absconded during trial.²⁴⁶ The defendant “previously served time in prison for killing his wife . . . [and] was convicted *in absentia* of aggravated assault” for choking his girlfriend.²⁴⁷ Judge Johnson noted that each year in the United States, four million women are physically assaulted and thirty percent of female homicide victims are slain by husbands, boyfriends, or live-in partners.²⁴⁸ Judge Johnson also said that “when these kinds of stats begin to shrink, then we’ll have cause to celebrate. . . . Until then, this man’s recapture—particularly in national domestic violence month—sends the message that the law is against domestic violence.”²⁴⁹

On April 29, 2005, the Texas Commission on Judicial Conduct found that Judge Johnson violated the judicial code by not maintaining “order and decorum in [her] courtroom.”²⁵⁰ Further, they found that her actions “were

241. *Sturm*, 129 P.3d at 27 (citing CAL. CODE OF JUD. ETHICS Canon 3B(4) (2006)).

242. See Wolf, *supra* note 57, at 366–67. Examples include “lack of decorum . . . [and] dignity . . . disparaging lawyers, . . . litigants, . . . witnesses . . . [and court personnel], . . . and inappropriate humor or sarcasm.” *Id.* (internal citations and quotations omitted).

243. See MODEL CODE OF JUD. CONDUCT Terminology (2004).

244. See *Sturm*, 129 P.3d at 17.

245. See Donald A. McCartin, *A ‘Hanging Judge’s’ Second Thoughts: Fairness and Balance Aren’t Possible, So Death Penalty Should Be Scrapped*, ORANGE COUNTY REG., June 24, 2005, at editorial page.

246. Lisa Falkenburg, *Judge Defends Courtroom Party for Prisoner*, ASSOC. PRESS, Oct. 27, 2004, at 1.

247. *Id.* (emphasis added). The defendant fled during the trial proceedings. *Id.*

248. *Id.*

249. *Id.* (internal quotations omitted).

250. *In re Johnson*, No. 05-0201-DI, slip op. at 31 (Tex. State Comm’n on Jud. Conduct Apr. 29, 2005), available at <http://www.scjc.state.tx.us/FY2005PUB-SANC.pdf>.

willful and cast public discredit upon the judiciary.”²⁵¹ A public admonition was imposed against the judge, who had earlier apologized before the commission.²⁵² Similar to the misconduct in this case, many cases of judicial misconduct deal with the judge’s lack of decorum in the courtroom.²⁵³

B. *Off the Bench Speech and Conduct*

Is the private expression of a bias or prejudice by a judge analogous to an expression of bias and prejudice on the bench? Do these expressions warrant First Amendment protection that may not be available for on the bench speech and conduct? Although a judge does not abdicate all constitutional rights with assumption of the bench, some restrictions must be imposed.²⁵⁴ Once bias and prejudice are expressed publicly, even if not from the bench, the independence, integrity, and impartiality of the judiciary may be compromised.²⁵⁵ The very public nature of the judge’s role may subject any speech and conduct to scrutiny.²⁵⁶

Scrutiny of off the bench speech may be subject to scrutiny, with or without discipline, but the cost may be measured in terms of the independence, integrity, and impartiality of the judiciary.²⁵⁷ The Supreme Court of Mississippi’s five to two refusal to discipline a judge for making obviously prejudicial comments poignantly illustrates the difficulty of addressing speech and conduct that brings the independence, integrity, and impartiality of a judge into question; especially where no manifestation of bias or prejudice has been exhibited by the judge in the execution of his or her judicial duties.²⁵⁸

Judge Connie Glen Wilkerson wrote a letter to his local newspaper in response to the enactment of legislation in California that granted same sex partners the same rights granted to spouses and families.²⁵⁹ Judge Wilkerson

251. *Id.* at 32.

252. *Id.* This is the least severe punishment that can be issued. *See id.*

253. *See In re J.Q.C. (Hammill)*, 566 S.E.2d 310, 316 (Ga. 2002); *In re Trettis*, 577 So. 2d 1312, 1313 (Fla. 1991).

254. *See* MODEL CODE OF JUD. CONDUCT Canon 1A (2004).

255. *See In re Stevens*, 645 P.2d 99, 99 (Cal. 1982). The judge was publicly censured by the Supreme Court of California for using racial and ethnic epithets repeatedly and consistently, even though he performed his duties free from any bias and the comments were generally made from his chambers. *Id.*

256. MODEL CODE OF JUD. CONDUCT Canon 1A cmt.

257. *See Miss. Comm’n on Jud. Performance v. Wilkerson*, 876 So. 2d 1006, 1019 (Miss. 2004) (Carlson, J., dissenting).

258. *See id.* at 1016.

259. *Id.* at 1008.

said that “[i]n [his] opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them.”²⁶⁰ He followed up the publication of his letter with an interview on a radio show, during which he said that his deeply religious beliefs led him to believe that homosexuality is a mental illness that requires treatment.²⁶¹

Can gay and lesbian litigants expect fair and impartial treatment on the bench from a judge who makes such comments off the bench? Should a gay parent seeking custody of a child after divorce expect the judge to be fair and impartial in deciding custody issues? How will bias be proven? Should the judicial discipline be delayed unless and until improper influence from bias or prejudice is manifested in his on the bench conduct? The answer to these questions is a resounding “yes” according to the Mississippi Commission on Judicial Performance.²⁶²

Consider the Supreme Court of Mississippi’s application of Canons 2A²⁶³ and 4A²⁶⁴ in addition to Canons 1,²⁶⁵ 2,²⁶⁶ and 4.²⁶⁷ The commentary of Canon 1 explicitly states that “[a]n independent judiciary is one free of inappropriate outside influences.”²⁶⁸ An opinion, unsupported by expert

260. *Id.* at 1009 (quoting Connie Glen Wilkerson, *Letter to the Editor*, GEORGE COUNTY TIMES, Mar. 28, 2002).

261. *Id.* at 1008.

262. *See Wilkerson*, 876 So. 2d at 1015–16.

263. “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” MODEL CODE OF JUD. CONDUCT Canon 2A. The Mississippi Code of Judicial Conduct is materially similar to this canon of the *ABA Model Code of Judicial Conduct*. Compare *id.*, with MISS. CODE OF JUD. CONDUCT Canon 2A (2005).

264. “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.” MODEL CODE OF JUD. CONDUCT Canon 4A(1)-(3). The Mississippi Code of Judicial Conduct is identical to this canon of the *ABA Model Code of Judicial Conduct*. Compare *id.*, with MISS. CODE OF JUD. CONDUCT Canon 4A(1)-(3).

265. “A judge shall uphold the integrity and independence of the judiciary.” MODEL CODE OF JUD. CONDUCT Canon 1. The Mississippi Code of Judicial Conduct is identical to this canon of the *ABA Model Code of Judicial Conduct*. Compare *id.*, with MISS. CODE OF JUD. CONDUCT Canon 1.

266. “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.” MODEL CODE OF JUD. CONDUCT Canon 2. The Mississippi Code of Judicial Conduct is identical to this canon of the *ABA Model Code of Judicial Conduct*. Compare *id.*, with MISS. CODE OF JUD. CONDUCT Canon 2.

267. “A judge shall so conduct the judge’s extra-judicial activities to minimize the risk of conflict with judicial obligations.” MODEL CODE OF JUD. CONDUCT Canon 4. The Mississippi Code of Judicial Conduct is identical to this canon of the *ABA Model Code of Judicial Conduct*. Compare *id.*, with MISS. CODE OF JUD. CONDUCT Canon 4.

268. MODEL CODE OF JUD. CONDUCT Canon 1A cmt..

testimony, that homosexuality is a mental illness may be seen as an inappropriate outside influence, especially without a commitment to follow the law.²⁶⁹ “The test for [determining whether a judge’s activities would constitute the] appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.”²⁷⁰

“‘Impartiality’ . . . denotes [the] absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.”²⁷¹ Consequently, it appears clear that impartiality is impaired by the expression of bias and prejudice off the bench.²⁷² As an extra-judicial activity, the judge’s speech—i.e., radio broadcast and newspaper editorial—does not “minimize the risk of conflict” as mandated by Canon 4, for a judge sitting in a court in which same-sex litigants may appear.²⁷³

The Supreme Court of Mississippi reasoned that a “[c]ourt clearly may not impose sanctions for violation of a Canon where doing so would infringe on rights guaranteed under the First Amendment, including the freedom of speech.”²⁷⁴ It found that there was no compelling state interest to warrant a requirement that judges not announce their prejudices, provided that the appearance of impartiality is intact.²⁷⁵ The court noted that “the objects of judicial prejudice are entitled to seek a level playing field through recusal motions, and citizens who disagree with a judge’s views are entitled to voice their disagreement at the ballot box.”²⁷⁶

First, the appearance of impartiality cannot be intact since the conduct²⁷⁷ would “create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities . . . is impaired.”²⁷⁸ Second, recusal as a result of the “judge’s extra-judicial activities”²⁷⁹ creates a certain “risk of conflict with judicial obligations”²⁸⁰ that is in direct conflict with the Canon 3A provision which states “[t]he judicial duties of a judge take precedence

269. See Miss. Comm’n on Jud. Performance v. Wilkerson, 876 So. 2d 1006, 1008 (Miss. 2004).

270. MODEL CODE OF JUD. CONDUCT Canon 2A cmt.

271. *Id.*

272. See generally *id.*

273. *Id.* Canon 4.

274. Miss. Comm’n on Jud. Performance v. Wilkerson, 876 So. 2d 1006, at 1010.

275. *Id.* at 1015.

276. *Id.* at 1016.

277. I.e., the bias expressed.

278. MODEL CODE OF JUD. CONDUCT Canon 2A cmt.

279. *Id.* Canon 4. I.e., the bias expressed.

280. *Id.*

over all the judge's other activities."²⁸¹ Therefore, the agreement or disagreement by voters about clearly improper conduct should not come into operation if the Code of Judicial Conduct is enforced properly.²⁸²

Canon 2A provides, *inter alia*, that "[a] judge . . . shall act *at all times* in a manner that promotes public confidence in the integrity and impartiality of the judiciary."²⁸³ There is no allowance for off the bench conduct that erodes public confidence in the "integrity and impartiality of the judiciary."²⁸⁴ Neither bias nor prejudice is proper judicial conduct and both are expressly prohibited on the bench.²⁸⁵ Public confidence is eroded, and not promoted by, manifestations of bias and prejudice.²⁸⁶ "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."²⁸⁷ Undoubtedly, "[e]xpressions of bias or prejudice . . . may cast reasonable doubt on the judge's capacity to act impartially," and must be avoided.²⁸⁸

The Supreme Court of Louisiana reached a much different result regarding off the bench conduct that was determined to be a manifestation of bias and prejudice.²⁸⁹ Judge Timothy C. Ellender wore a black afro wig, shackles, an orange prison jumpsuit, and black makeup to a private Halloween party held at a public restaurant owned by his brother-in-law.²⁹⁰ There was no further allegation of misconduct regarding the costume.²⁹¹ Though

281. *Id.* Canon 3A. The Mississippi Code of Judicial Conduct is identical to this canon of the *ABA Model Code of Judicial Conduct*. Compare *id.*, with MISS. CODE OF JUD. CONDUCT Canon 3A.

282. See generally MODEL CODE OF JUD. CONDUCT Canon 3A-B.

283. *Id.* Canon 2A (emphasis added).

284. *Id.*

285. *Id.* Canon 3B(5). Canon 3B(5) provides that:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status

Id. The Mississippi Code of Judicial Conduct is identical in this prohibition. Compare MODEL CODE OF JUD. CONDUCT Canon 3B(5), with MISS. CODE OF JUD. CONDUCT Canon 3B(5).

286. See MODEL CODE OF JUD. CONDUCT Canon 1A cmt.

287. *Id.* Canon 4A(1)-(3).

288. *Id.* Canon 4A cmt.

289. See *In re Ellender*, 889 So. 2d 225, 232-33 (La. 2004).

290. *Id.* at 227.

291. See *id.* at 227-28.

charged with violations of Canons 1,²⁹² 2A,²⁹³ 2B,²⁹⁴ 3B(5),²⁹⁵ and 3E,²⁹⁶ Judge Ellender entered into a stipulation and was found in violation of Canons 1 and 2A.²⁹⁷ In affirming the recommendation of the Louisiana's Commission on Judicial Conduct, the court found that the judiciary was brought into disrepute by the judge's conduct and sentenced him to a year's suspension without pay.²⁹⁸ Specifically, the court considered ten factors previously utilized by the court to determine the proper sentence it should impose.²⁹⁹ These factors provide a useful framework for analysis.³⁰⁰

292. *Id.* at 228. "A judge shall uphold the integrity and independence of the judiciary." MODEL CODE OF JUD. CONDUCT Canon 1. "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." *Id.* Canon 1A. The Louisiana Code of Judicial Conduct is identical to this canon of the *ABA Model Code of Judicial Conduct*. Compare *id.* Canon 1, with LA. CODE OF JUD. CONDUCT Canon 1 (2006).

293. "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." MODEL CODE OF JUD. CONDUCT Canon 2A. The Louisiana Code of Judicial Conduct is identical to this canon of the *ABA Model Code of Judicial Conduct*. Compare *id.*, with LA. CODE OF JUD. CONDUCT Canon 2A.

294. "A judge shall not lend the prestige of judicial office to advance the private interests of the judge . . ." MODEL CODE OF JUD. CONDUCT Canon 2B. The Louisiana Code of Judicial Conduct is identical to Canon 2B of the *ABA Model Code of Judicial Conduct*. Compare *id.*, with LA. CODE OF JUD. CONDUCT Canon 2B.

295. MODEL CODE OF JUD. CONDUCT Canon 3B(5). "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . and shall not permit staff, court officials, and others subject to the judge's direction and control to do so." *Id.* Canon 3A(4) of the Louisiana Code of Judicial Conduct is materially similar to Canon 3B(5) of the *ABA Model Code of Judicial Conduct*. Compare *id.*, with LA. CODE OF JUD. CONDUCT Canon 3A(4).

296. MODEL CODE OF JUD. CONDUCT Canon 3E.

Recusation. The judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned and shall disqualify himself or herself in a proceeding in which disqualification is required by law or applicable Supreme Court rule. In all other instances, a judge should not recuse himself or herself.

LA. CODE OF JUD. CONDUCT Canon 3C. The Louisiana Code of Judicial Conduct is materially similar to Canon 3E of the *ABA Model Code of Judicial Conduct*. Compare MODEL CODE OF JUD. CONDUCT Canon 3E, with LA. CODE OF JUD. CONDUCT Canon 3C.

297. *In re Ellender*, 889 So. 2d 225, 227 (La. 2004).

298. *Id.* at 231, 233, 233 n.2. The judge was also ordered to pay the costs of investigation and prosecution. *Id.* at 227.

299. *See id.* at 232. The Supreme Court of Louisiana adopted a non-exhaustive list of ten factors to consider in imposing discipline on a judge:

(a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent, and frequency of occurrence of the acts of misconduct; (c) whether the misconduct occurred in or out of the courtroom; (d) whether the misconduct occurred in the judge's official capacity or in his private life; (e) whether the judge has acknowledged or recognized that the acts occurred; (f) whether the judge has evidenced an effort to change or modify his

The Supreme Court of Louisiana deferred six months of the one year suspension on the condition that the judge receive racial sensitivity training.³⁰¹ In a concurring opinion, the court specifically noted that:

Those who would write off Judge Ellender's lapse in judgment as a harmless prank requiring only a token sanction do not understand how deeply such an act resonates throughout the African-American community as a harsh reminder of a not too distant past . . . Requiring Judge Ellender to undergo racial sensitivity training sends the message not only to Judge Ellender but to the rest of the country that racial slurs and stereotyping, whether intentional or merely thoughtless, will no longer be tolerated in Louisiana . . . [Such training] could be beneficial in preventing similar infractions of the judicial code of conduct and [in] promoting the impartial administration of justice to all our citizens.³⁰²

It is of value to note that this court, unlike the Mississippi court and commission, specifically found it appropriate to punish the judge in spite of the fact that no evidence existed that the judge had been unfair and partial in his treatment of blacks.³⁰³ The disparity between Mississippi's finding that there had been no violation and Louisiana's imposition of a one-year suspension is troubling.³⁰⁴ It is important to note that both of these states reached their diametrically opposed results using canons that essentially mirror the *ABA Model Code of Judicial Conduct*.³⁰⁵ There is no clearinghouse or national review of a state court's application and imposition of its code of judicial conduct.

Some speech and conduct is so prejudicial as to warrant the kind of discipline administered in Louisiana.³⁰⁶ However, the disparity between the Mississippi and Louisiana courts cannot be reconciled.³⁰⁷ The disparity in disciplinary actions from state to state creates great difficulty in establishing

conduct; (g) the length of service on the bench; (h) whether there have been prior complaints about this judge; (i) the effect the misconduct has upon the integrity of and respect for the judiciary; and (j) the extent to which the judge exploited his position to satisfy his personal desires.

In re Chaisson, 549 So. 2d 259, 266 (La. 1989) (citing *In re Deming*, 736 P.2d 639, 659 (Wash. 1987)).

300. See *Ellender*, 889 So. 2d at 232.

301. *Id.* at 233.

302. *Id.* at 236 (Lombard, J., concurring).

303. *Id.* at 232-33.

304. Compare *Miss. Comm'n on Jud. Performance v. Wilkerson*, 876 So. 2d 1006, 1016 (Miss. 2004), with *Ellender*, 889 So. 2d at 234.

305. Compare *Wilkerson*, 876 So. 2d at 1016, with *Ellender*, 889 So. 2d at 232.

306. See *Ellender*, 889 So. 2d at 233-34.

307. Compare *Wilkerson*, 876 So. 2d at 1016, with *Ellender*, 889 So. 2d at 233-34.

and enforcing standards for regulating speech and conduct.³⁰⁸ A salient distinction in the treatment of the cases may be the First Amendment issue of regulating the speech of Judge Wilkerson versus the conduct of Judge Ellender.³⁰⁹ Undoubtedly, it is this kind of disparity in disciplinary actions that erodes the public's confidence in the integrity and independence of the bench.³¹⁰

C. *Political Speech and Conduct*

The regulation of the political activity of judges invites an even greater opportunity for disparate treatment as speech and conduct are examined.³¹¹ On May 10, 2006, the Texas Commission on Judicial Conduct issued a public admonition to Supreme Court of Texas Justice Nathan L. Hecht regarding comments he made to the press last year in support of the nomination of White House Counsel Harriet Miers to the United States Supreme Court.³¹² Court records reveal that Justice Hecht, "by his own admission, participated in approximately 120 media interviews concerning Miers' nomination."³¹³ Justice Hecht also appeared on several television and radio news and talk shows to discuss Miers' nomination.³¹⁴

The commission found that Hecht's actions constituted "persistent and willful violations" of two canons of the Texas Code of Judicial Conduct.³¹⁵ The first violation was found based on Canon 2B which states that "[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others."³¹⁶ The second violation was found based on Canon 5(2) which provides that "[a] judge or judicial candidate shall not authorize the

308. See generally MODEL CODE OF JUD. CONDUCT (2004); *Wilkerson*, 876 So. 2d at 1016; *Ellender*, 889 So. 2d at 233-34.

309. Compare *Wilkerson*, 876 So. 2d at 1016, with *Ellender*, 889 So. 2d at 233-34.

310. See MODEL CODE OF JUD. CONDUCT Canon 1.

311. See *id.* Canon 5.

312. *In re Hecht*, Nos. 06-0129-AP & 06-0130-AP, slip op. at 1, 4 (Tex. State Comm'n on Jud. Conduct May 10, 2006), available at <http://www.dallasnews.com/sharedcontent/dws/img/05-06/0524hecht.pdf>.

313. *Id.* at 2.

314. *Id.* "At that time, Hecht jokingly said to *Texas Lawyer* that he had been acting as a 'PR office for the White House' and had been filling in gaps about Miers' background to the press, countering some conservatives' skepticism about her qualifications." John Council, *Commission on Judicial Conduct Admonishes Justice Hecht*, TEX. LAW., May 23, 2006.

315. *Hecht*, Nos. 06-0129-AP & 06-0130-AP, slip op. at 4.

316. TEX. CODE OF JUD. CONDUCT Canon 2B (2004). The *ABA Model Code of Judicial Conduct* is identical to the Texas canon. Compare TEX. CODE OF JUD. CONDUCT Canon 2B, with MODEL CODE OF JUD. CONDUCT Canon 2B (2004).

public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party.”³¹⁷

The commentary to Canon 2B of the *Model Code of Judicial Conduct* provides that “[j]udges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquires.”³¹⁸ Justice Hecht, in his defense, asserted that “I believe that my statements on matters of national public interest did not offend canons of judicial ethics and were fully protected by the First Amendment as core speech.”³¹⁹ Hecht further stated that “[a]s best I can determine, the Commission’s action is unprecedented despite many judges, over the years, providing factual information and endorsements to the judiciary committee and the public concerning nominees to the federal bench.”³²⁰

Judges are often in the position to be able to knowingly comment on the qualifications of a judicial candidate.³²¹ While such comments may raise the specter of political involvement, they are allowed nonetheless.³²² Justice Hecht’s statements in his defense accurately depict allowable judicial participation in Texas.³²³ However, the Commission identifies the public use of the judge’s name as the nature of the violation.³²⁴ Specifically, the Commis-

317. TEX. CODE OF JUD. CONDUCT Canon 5(2). Texas judges face partisan elections and are allowed to participate in limited partisan activities. See generally *id.* Canon 5. While there is no analogous canon in the Model Code, the *Model Code of Judicial Conduct* does provide that “[a] judge or candidate subject to public election . . . , except as prohibited by law, [may], when a candidate [is up] for election, publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.” MODEL CODE OF JUD. CONDUCT Canon 5(C)(1)(b)(iv).

318. *Id.* Canon 2B cmt.

319. Council, *supra* note 314 (internal citations omitted).

320. *Id.* (internal citations omitted).

321. See generally MODEL CODE OF JUD. CONDUCT Canon 5 cmt.

322. See *id.* An Oklahoma advisory opinion, in looking at the appropriateness of judicial participation, developed five factors to be considered when determining the limitations on a judge’s participation in the selection of another judge:

1. The judge must have personal knowledge of the person being recommended;
2. The judges’ recommendation should: (a) be and appear to be directed only to the factors relevant to performance of the judicial office; (b) be factual, evenhanded, succinct and discreet;
3. A judge should not lend his or her name to any publicity campaign for any candidate;
4. A judge should avoid pleading for a candidate of the judge’s choosing in opposition to others under consideration;
5. A judge should not provide a letter of endorsement for a candidate if the judge could reasonably expect that the endorsement will be publicly announced or public distributed in support of the endorsed candidate.

Jud. Ethics Op. 2002-1, 73 P.3d 277, 278 (Ok. Jud. Ethics Advisory Panel 2002).

323. *In re Hecht*, Nos. 06-0129-AP, 06-0130-AP, slip op. at 4 (Tex. State Comm’n on Jud. Conduct May 10, 2006).

324. *Id.*

sion concluded that “Justice Hecht allowed his name and title to be used by the press and the White House in support of his close friend, Harriet Miers, a nominee for the office of United States Supreme Court Justice.”³²⁵

In addition to the cost of the misconduct to the independence, integrity, and impartiality of the judiciary, there are obvious conflicts about what constitutes misconduct affect the judge.³²⁶ A judge must expect scrutiny and accept restrictions on speech and conduct with the assumption of judicial office.³²⁷ The aftermath of *White*³²⁸ has been assertions that speech or conduct alleged as improper are a valid exercise of First Amendment rights.³²⁹

The Texas court, in issuing the public admonition against Justice Hecht, focused on two issues.³³⁰ First, “[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.”³³¹ The second issue was that “[a] judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party.”³³² There does not appear to be a connection between the misconduct alleged and the “announce clause” of *White*.³³³

An additional, yet unexamined, cost of judicial misconduct is that of criminal prosecution. Even from its inception, the code was intended and designed to provide guidance.³³⁴ The preamble of the code specifically provides that “[i]t is not designed or intended as a basis for civil liability or criminal prosecution.”³³⁵ Therefore, the decision by the Court of Appeals of

325. *Id.* at 3–4.

326. *See generally Hecht*, Nos. 06-0129-AP, 06-0130-AP, slip op. at 4.

327. MODEL CODE OF JUD. CONDUCT Canon 2A cmt. (2004).

328. *Republican Party of Minn. v. White*, 536 U.S. 765 (2002). *See also Weaver v. Bonner*, 309 F.3d 1312, 1323 (11th Cir. 2002) (striking down a Georgia provision of the Code of Judicial Conduct that issued a “cease and desist request which prohibits a judicial candidate from engaging in certain speech” on First Amendment grounds); *Spargo v. N.Y. State Comm’n Jud. Conduct*, 244 F. Supp. 2d 72, 92 (N.D.N.Y. 2003).

329. Post *White*, Texas eliminated the “announce clause” of the Code of Judicial Conduct. Council, *supra* note 314 (internal citations omitted).

330. *Hecht*, Nos. 06-0129-AP, 06-0130-AP, slip op. at 3. On October 20, 2006, a three judge panel heard Judge Hecht’s appeal of his punishment by the commission and exonerated him of any wrongdoing. *In re Hecht*, 213 S.W.3d 547 (Tex. Spec. Ct of Rev. 2006).

331. *Id.* (citing TEX. CODE OF JUD. CONDUCT Canon 2B (2004)). The *ABA Model Code of Judicial Conduct* is identical to the Texas Canon. Compare TEX. CODE OF JUD. CONDUCT Canon 2B, with MODEL CODE OF JUD. CONDUCT Canon 2B (2004).

332. *Hecht*, Nos. 06-0129-AP, 06-0130-AP, slip op. at 3 (citing TEX. CODE OF JUD. CONDUCT Canon 5(2) (2004)).

333. *See White*, 536 U.S. at 765.

334. MODEL CODE OF JUD. CONDUCT pmb1.

335. *Id.* This provision was intended to insure that judges remain independent and not sit in fear. *See also Lofton v. State*, 944 S.W.2d 131, 134 (Ark. Ct. App. 1997).

New York to reinstate a criminal prosecution against former Supreme Court of New York Justice Gerald P. Garson introduces the prospect of an additional cost of judicial misconduct.³³⁶

In 2003, Justice Garson was suspended without pay as a result of his indictment on criminal charges that directly related to his judicial duties.³³⁷ Garson was charged with one count of bribery and six counts of accepting benefits for “violation of his duty as a public servant.”³³⁸ The violation of public duty alleged in the six counts was misconduct in violation of the New York Rules of Judicial Conduct.³³⁹ The nature of the six violations entailed speech and conduct on the bench, off the bench, and during political activity.³⁴⁰

The allegations of misconduct were based on two sections of the New York Rules of Judicial Conduct, Part 100.3(B)(6), which provides in pertinent part that “[a] judge shall not initiate, permit, or consider ex parte communications;”³⁴¹ and Part 100.2(C), which provides that “[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.”³⁴² The prohibition against personal solicitations and partisan behavior has been upheld.³⁴³

336. *People v. Garson (Garson II)*, 848 N.E.2d 1264, 1274 (N.Y. 2006).

337. *In re Garson (Garson I)*, 793 N.E.2d 408 (N.Y. 2003). He is no longer on the bench. *See Garson II*, 848 N.E.2d at 1265.

338. *Garson II*, 848 N.E.2d at 1265.

339. *Id.*

340. *See id.* The first of six violations for judicial misconduct was improper ex parte communication during a case in which the judge met with the attorney for one of the parties and instructed him on how to proceed in order to prevail in exchange for a box of expensive cigars. *Id.* at 1265–66. The second and third allegations of misconduct consisted of the judge requesting and receiving a referral fee on behalf of his wife from a lawyer to whom clients had been referred. *Id.* at 1266. The fourth, fifth, and sixth counts alleged payments to the judge for referrals by the judge. *Garson II*, 848 N.E.2d at 1266–67. The sixth allegation of misconduct also included an allegation that the judge instructed the attorney to “make a check out” to the judge’s wife’s judicial campaign committee because she needed \$25,000. *Id.* at 1267.

341. N.Y. RULES OF THE CHIEF ADMINISTRATOR OF THE COURTS, pt. 100.3(B)(6) (2006). *Model Code of Judicial Conduct* Canon 3(B)(7) is identical in its prohibition. *Compare* N.Y. RULES OF THE CHIEF ADMINISTRATOR OF THE COURTS, pt. 100.3(B)(6), *with* MODEL CODE OF JUD. CONDUCT Canon 3B(7) (2004).

342. N.Y. RULES OF THE CHIEF ADMINISTRATOR OF THE COURTS, Part 100.2(C). *Model Code of Judicial Conduct* Canon 2B is identical in its prohibition. *Compare* N.Y. RULES OF THE CHIEF ADMINISTRATOR OF THE COURTS, pt. 100.2, *with* MODEL CODE OF JUD. CONDUCT Canon 2B.

343. *See Garson II*, 848 N.E.2d at 1274.

VI. FLORIDA'S APPLICATION OF ITS CODE OF JUDICIAL CONDUCT

The Supreme Court of Florida has been critical of the recommendations of discipline of its Judicial Qualifications Commission, sending a clear message that leniency sends the wrong signal to judges who violate the Code of Judicial Conduct.³⁴⁴ The conduct identified and the penalties imposed provide some insight into the level of severity that is assigned to certain speech and conduct.³⁴⁵ There are three basic penalties available to the Supreme Court of Florida for judicial misconduct: 1) reprimand;³⁴⁶ 2) suspension;³⁴⁷ and 3) removal.³⁴⁸ Each of these sanctions may be accompanied by payment of a fine, cost of investigation, and/or cost of prosecution.³⁴⁹

The Supreme Court of Florida "requested that the Judicial Ethics Advisory Committee . . . study the 2003 revisions" that had been made to the Model Code and recommend appropriate amendments to be considered by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct.³⁵⁰ The changes passed by the Supreme Court of Florida on January 5, 2006, embraced the desire of the Court to act further to ensure the independence, integrity, and impartiality of the judiciary and to ensure consistency with existing provisions of the Model Code.³⁵¹

344. Wolf, *supra* note 57, at 350.

345. *Id.* at 351.

346. *Id.* at 354. A reprimand can be issued with or without a requirement that the judge appear before the court. *Id.* A reprimand without a required court appearance is analogous to an admonition. *Id.*

347. Wolf, *supra* note 57, at 354. A suspension may be issued with or without pay, generally depending upon the nature of the alleged misconduct. *Id.* Lawyer misconduct action can also involve disciplinary sanctions. *Id.*

348. *Id.* at 353. Prior to 1996, the court was limited to reprimand or removal for judicial misconduct. *Id.* at 391 (referring to FLA. CONST. art. V, § 12(a)(1)).

349. Wolf, *supra* note 57, at 388–89.

350. *In re Amend. to Code of Jud. Conduct—ABA's Model Code*, 918 So. 2d 949 (Fla. 2006). In 2003, the Commission was formed by ABA President Dennis W. Archer, Jr. *Id.* at 949 n.1.

351. The agenda of the ABA's Annual Meeting in Hawaii included consideration of the proposed changes recommended by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. ABA 2006 Annual Meeting of the Judicial Division, Meeting Program, <http://www.abanet.org/jd/meetings/2006annual/pdf/tableofcontents.pdf>. A final report is due for consideration by the ABA House of Delegates in February, 2007. ABA Joint Comm'n to Evaluate the Model Code of Jud. Conduct, Report (Oct. 31, 2006), available at <http://www.abanet.org/judiciaethics/commissionreport.html>.

A. *On the Bench Speech and Conduct*

The concept that removal from office should occur only as a result of speech and conduct that is “fundamentally inconsistent with the responsibilities of judicial office”³⁵² is consistent with the examination of the penalties imposed in Florida and throughout the country.³⁵³ Judge Shea of Florida was removed after an accumulation of minor and ostensibly innocuous incidents which created an antagonistic environment and evidenced conduct unbecoming a member of the judiciary.³⁵⁴ A standard for removal based on a pattern of misconduct is consistent with national trends for disciplining on the bench bias and prejudice.³⁵⁵

In Florida, abuse of judicial power is as likely to lead to removal from the bench as it was ten, twenty, or thirty years ago.³⁵⁶ An abuse of judicial power on the bench that may lead to removal can include: 1) lacking judicial temperament;³⁵⁷ 2) failing to be impartial;³⁵⁸ 3) engaging in ex parte communication;³⁵⁹ 4) failing to follow the law;³⁶⁰ 5) improper use of contempt

352. Wolf, *supra* note 57, at 384.

353. *In re Shea*, 759 So. 2d 631, 638–39 (Fla. 2000); *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997); *In re Johnson*, 692 So. 2d 168, 173 (Fla. 1997) (stating judge backdated and falsified court documents); *In re Graham*, 620 So. 2d 1273, 1274 (Fla. 1993) (ruling judge removed for using position as judge “to make allegations of official misconduct and improper criticisms against fellow judges [and] elected officials,” “imposing improper sentences and improper use of contempt power,” and “[a]cting in an undignified and discourteous manner”); *In re Santora (Santora I)*, 592 So. 2d 671 (Fla. 1992) (stating chief judge made racist and stereotypical comments to press); *In re Damron*, 487 So. 2d 1, 7 (Fla. 1985); *In re Crowell*, 379 So. 2d 107, 108 (Fla. 1979) (finding repeated abuse of contempt for authority and continual arrogant and arbitrary behavior).

354. *Shea*, 759 So. 2d at 639. Shea also intimidated two attorneys into withdrawing from representation of a client with whom he had a conflict. *Id.* at 632.

355. See SHAMAN ET AL., *supra* note 76, §3.07.

356. In 1997, in *Johnson*, the Supreme Court of Florida ordered removal of the judge for knowing and repeatedly falsifying court records by backdating pleas accepted in driving under the influence (DUI) cases. *Johnson*, 692 So. 2d at 173. Removal was ordered in spite of an otherwise unblemished judicial record. *Id.* 173–74 (Shaw, J., dissenting). In 1986 in *In re Damron*, the Supreme Court of Florida found that removal was warranted for a pattern of misconduct by soliciting judicial favors for judicial acts, ex parte communication, and threatening litigants and others. *Damron*, 487 So. 2d at 7. In 1979 in *Crowell*, the Supreme Court of Florida ordered removal of judge for “a pattern of conduct over a long period of time, involving persistent abuse of the contempt power, which demonstrates a lack of proper judicial temperament and a tendency to abuse authority of office.” *Crowell*, 379 So. 2d at 110.

357. See *Shea*, 759 So. 2d at 638.

358. *In re McMillan*, 797 So. 2d 560, 562 (Fla. 2001).

359. *Damron*, 487 So. 2d at 7; *In re Leon*, 440 So. 2d 1267, 1268 (Fla. 1983).

360. See *Johnson*, 692 So. 2d at 173.

power;³⁶¹ and 6) intimidation.³⁶² On the bench conduct that consists of violating recusal and disclosure requirements, as well as delays in ruling, has generally resulted in reprimand or even more informal procedures such as a reminder.³⁶³

B. *Off the Bench Speech and Conduct*

The Supreme Court of Mississippi found that manifestations of bias and prejudice made through off the bench speech did not warrant judicial discipline and were protected by the First Amendment in the absence of bias and prejudice on the bench.³⁶⁴ However, Florida and other states have not been so predisposed.³⁶⁵ In *In re Santora (Santora I)*,³⁶⁶ a newspaper article included remarks by the judge regarding interracial dating, integration, racial inferiority, blacks on welfare and in the criminal justice system, using racial slurs, and telling racial jokes.³⁶⁷ The Supreme Court of Florida was petitioned for the removal of the judge as Chief Judge of a circuit court.³⁶⁸ The petition alleged that “Judge Santora’s public statements have eroded public confidence in the judiciary and cast doubt on his impartiality. They also have caused growing social and racial turmoil in this community. These tensions seriously threaten the effective functioning of the judiciary.”³⁶⁹

361. *Crowell*, 379 So. 2d at 110.

362. *See Shea*, 759 So. 2d at 632; *Damron*, 486 So. 2d at 4, 6 (finding threatening behavior by the judge while on the bench).

363. *Wolf*, *supra* note 57, at 380–81.

364. *Miss. Comm’n on Jud. Performance v. Wilkerson*, 876 So. 2d 1006, 1010 (Miss. 2004).

365. *See In re Santora (Santora I)*, 592 So. 2d 671, 671–72 (Fla. 1992); *In re Cerbone*, 460 N.E.2d 217, 218 (N.Y. 1984) (stating that judge was removed for announcing he was a judge and threatening retaliation with racist remarks and profanity during bar room fight); *Kuehnel v. State Comm’n on Jud. Conduct*, 403 N.E.2d 167, 167–68 (N.Y. 1980) (stating that judge was removed for using ethnic remarks during altercations and “gross lack of candor”); *In re Rabren* (Ala. Ct of Judiciary Aug. 1, 1986) (unpublished opinion); *see SHAMAN ET AL.*, *supra* note 76, § 3.07 (stating that judge was removed for making racist remarks while waiting for court to begin).

366. *Santora I*, 592 So. 2d at 671–72.

367. *Id.* at 673–76 app. Although the Court removed Judge Santora as chief judge, it also issued a reprimand in the disciplinary proceeding. *In re Santora (Santora II)*, 602 So. 2d 1269, 1270 (Fla. 1992); *see also In re Bourisseau*, 480 N.W.2d 270 (Mich. 1992) (stating judge made racist remarks to press); *but see In re Nakoski*, 742 A.2d 260, 261 (Pa. Ct. Jud. Discipline 1999) (refusing to discipline for judge’s affirmative response to instructor’s question whether it was not against the law to be a black man).

368. *Santora I*, 592 So. 2d at 672.

369. *Id.*

The petitioners include[d] three past presidents of The Florida Bar, the current president of the Jacksonville Bar Association, the president-elect of the Jacksonville Bar Association, six past

While the judge was immediately removed as Chief Judge, he was permitted to remain as a circuit judge after being reprimanded for his comments.³⁷⁰

The removal of judges for manifestations of bias and prejudice appears to be utilized if accompanied by additional egregious behavior, such as lack of candor during the proceeding,³⁷¹ or threatening to retaliate on the bench based on the bias expressed.³⁷² It is difficult to justify a position that bias and prejudice manifested from the bench cannot be “assumed . . . to have an effect on the judge’s treatment of litigants and not to reflect racial bias on the part of the judge merely because the judge does not repeat the remarks in the presence of the litigants or in the courtroom.”³⁷³ However, willingness to manifest bias and prejudice on the bench can be viewed as more noxious and problematic, indicating a lack of fitness and a fundamental inconsistency for service as a judge.³⁷⁴ Moreover, additional incidences warranting removal of judges for off the bench speech and conduct include criminal offenses.³⁷⁵

C. Political Speech and Conduct

The Supreme Court of Florida has been diligent in its desire to ensure that judicial campaigns are legal and ethical.³⁷⁶ An extensive guide was pro-

presidents of the Jacksonville Bar Association, the current president of the Clay County Bar Association, two members of The Board of Governors of The Florida Bar, and two members of the Board of Governors of the Jacksonville Bar Association, among others.

Id. at 672 n.2.

370. *Santora II*, 602 So. 2d at 1270.

371. *See Kuehnel*, 403 N.E.2d at 168.

372. *See In re Cerbone*, 460 N.E.2d 217, 218 (N.Y. 1983).

373. SHAMAN ET AL., *supra* note 76, §3.07.

374. *See Wolf*, *supra* note 57, at 369.

375. *See In re Berkowitz*, 522 So. 2d 843, 843–44 (Fla. 1988) (stating judge continued to practice law after assuming office, and committed trust account violations that encompassed hundreds of checking transactions, judge failed to file accurate tax returns, and judge’s testimony on campaign irregularities was deceptive); *In re Garrett*, 613 So. 2d 463, 463–65 (Fla. 1993) (stating judge was removed for shoplifting despite exemplary record of public service). In *In re Ford-Kaus*, the judge was removed and disciplined by the Bar for conduct that occurred prior to her election to the bench. 730 So. 2d 269, 272–77 (Fla. 1999). Specifically, she mishandled and over-billed for a case immediately before taking the bench. *Id.* Based on that, the Supreme Court of Florida found her conduct inconsistent with the responsibilities of a judicial officer and that she is presently unfit to hold judicial office, stating that her conduct demonstrates “a pattern of deceit and deception.” *Id.* at 277.

376. JUDICIAL ETHICS ADVISORY COMM., AN AID TO UNDERSTANDING CANON 7 (2006), available at http://www.flcourts.org/gen_public/courted/bin/canon7update.pdf. Since 1976, the Supreme Court of Florida has authorized the Judicial Ethics Advisory Commission to write “advisory opinions to inquiring judges [and judicial candidates] concerning the propriety of . . . judicial and non-judicial [speech and] conduct.” *Id.* at 1. (quoting Petition of the Committee on Standards of Conduct for Judges, 327 So. 2d 5 (Fla. 1976)).

duced, titled *An Aid to Understanding Canon 7*, which details acceptable political behavior.³⁷⁷ Prior to each election cycle, the bench and bar join in encouraging the participation of all judicial members and judicial candidates in a forum in each circuit where there is a contested judicial election.³⁷⁸ While the use of removal from office has been limited, “the [C]ourt has stated that a candidate should not profit by their misdeeds.”³⁷⁹ The wide variety in each state’s method of judicial election makes regulation difficult.³⁸⁰ The challenge is to construct a canon that adequately addresses the issues that are unique to the various methods of judicial selection.³⁸¹

The difficulty of regulation is evident at the state level as well as the national level.³⁸² The various types of violations have included: 1) misrepresentation regarding candidate or opponent;³⁸³ 2) inappropriate promises;³⁸⁴ 3) campaign financial irregularities;³⁸⁵ 4) partisan politics;³⁸⁶ and 5) endorsing or supporting other candidates.³⁸⁷

377. *See id.*

378. *See Running for Judge? Plan to Attend These Candidate Forums*, FLA. BAR NEWS, May 15, 2006, at 5.

379. Wolf, *supra* note 57, at 391.

380. *See* ANN. MODEL CODE OF JUD. CONDUCT Canon 5 (2004).

381. *See id.*

382. *See* Wolf, *supra* note 57, at 351 (quoting CYNTHIA GRAY, A STUDY OF JUDICIAL DISCIPLINE SANCTIONS 1 (2002)).

383. *In re Alley*, 699 So. 2d 1369, 1369 (Fla. 1997) (reprimanding a judge for “misrepresent[ing] her qualifications and those of her opponent” in judicial election campaign and injecting party politics into nonpartisan election).

384. *In re McMillan*, 797 So. 2d 560, 562 (Fla. 2001). Removal warranted for:

(1) making explicit campaign promises to favor the State and the police in court proceedings; (2) making explicit promises that he would side against the defense; (3) making unfounded attacks on incumbent county judge; (4) making unfounded attacks on the local court system and local officials; and (5) improperly presiding over a court case [despite personal] direct conflict of interest.

Id.

385. *See In re Pando*, 903 So. 2d 902 (Fla. 2005) (finding that during the course of the judge’s unsuccessful 1998 election campaign and her successful 2000 election campaign, the Judge: “(1) accepted loans from family members and friends in excess of the \$500 statutory limit; [and] (2) misrepresented the source of these loans in submitting and certifying her campaign finance reports during the course of the campaigns”); *In re Rodriguez*, 829 So. 2d 857, 859 (Fla. 2002) (reprimanding a judge for campaign finance activities and reporting practices, such as knowingly accepting campaign contribution loan of \$200,000 from a non family member and filing misleading campaign); *McMillan*, 797 So. 2d at 562–64.

386. *In re Angel*, 867 So. 2d 379, 383 (Fla. 2004) (holding that the partisan political activity during campaign for judicial office warranted a public reprimand).

387. *In re Glickstein*, 620 So. 2d 1000, 1002–03 (Fla. 1993) (writing letter endorsing retention in office of fellow member of judiciary, where letter is written on office stationery and identified author as member of judiciary and is published in newspapers, warrants public reprimand).

VII. CONCLUSION

“[P]ublic sentiment is everything. With public sentiment nothing can fail; without it nothing can succeed.”³⁸⁸ —*Abraham Lincoln*

The real costs of judicial misconduct are measured in the way in which the speech and conduct of judges threaten to erode the independence, integrity, and impartiality of the judiciary.³⁸⁹ Each act of misconduct by a judge contributes to the public’s perception about judges and their role.³⁹⁰ Three justifications arise repeatedly for limiting judicial speech and conduct. First, limitations on judicial speech and conduct are necessary “to avoid the appearance of partiality, favoritism, or other misuse.”³⁹¹ Second, regulation of judicial speech and conduct promotes confidence in judiciary.³⁹² Finally, limiting judicial speech and conduct prevents judges from being distracted while performing their duties.³⁹³ Therefore, the case for preserving the independence and impartiality of the judiciary creates a foundation for the need of rules regulating judicial speech and conduct.³⁹⁴

The model rules provide a substantive and procedural framework creating a standard for judging speech and conduct.³⁹⁵ These standards provide guidance to judges regarding improper and proper speech and conduct.³⁹⁶ They are “intended to establish standards for ethical conduct of judges” in both their judicial and personal roles.³⁹⁷ Canons 1 and 2 of the Model Code are clearly aspirational, but provide a standard that has been utilized for judicial discipline.³⁹⁸ Canons 3, 4, and 5 address specific conduct both on and off the bench and provide commentaries to provide further directions and examples for their application.³⁹⁹

Ensuring the independence, integrity, and impartiality of the judiciary must continue to be an important societal aim. The continued regulation of judges operates to encourage judges to adhere to high ethical standards. The

388. 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 27, LINCOLN-DOUGLAS DEBATE AT OTTAWA (Roy P. Basler et al. eds., 1953).

389. *In re Leon*, 440 So. 2d 1267, 1269 (Fla. 1983).

390. *See id.*

391. SHAMAN ET AL., *supra* note 76, §10.02 .

392. *Id.*

393. *Id.*

394. *See* MODEL CODE OF JUD. CONDUCT pmb1. (2004).

395. *See id.*

396. *See id.*

397. *Id.*

398. *See id.* Canons 1-2.

399. *See* MODEL CODE OF JUD. CONDUCT Canons 3-5.

2007]

THE REAL COSTS OF JUDICIAL MISCONDUCT

689

proposals for revisions to the Model Code recognize the need for regulation to ensure the independence, integrity, and impartiality of the judiciary. The additions and amendments being proposed provide clear, concise, and consistent guidance to judges. The independence, integrity, and impartiality of the judiciary rest with continued regulation and discipline.