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DISCIPLINING JUDGES FOR NONOFFICIAL CONDUCT: A SURVEY AND CRITIQUE OF THE LAW

Robert J. Martineau†

States have made clear in recent years, through their constitutions and judicial decisions, that judges may face discipline for improper behavior that does not relate to official judicial duties. In this article, the author explains the logical and legal bases for sanctioning such nonofficial conduct. Following an exhaustive listing of specific nonofficial acts for which judges have been disciplined, the author examines some questions about the propriety of scrutinizing a judge's conduct off the bench.

I. INTRODUCTION

One of the most remarkable developments in judicial administration during the past two decades has been the almost universal adoption of procedures for disciplining judges to supplement the traditional means of impeachment and address.¹ Some jurists and commentators argue that, particularly as to federal judges, discipline by any means other than impeachment interferes with the independence necessary for the proper functioning of a judicial system.² The overwhelming majority view, however, is

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1. I. TESITOR & D. SINKS, JUDICIAL CONDUCT ORGANIZATIONS 1-2 (2d ed. 1980) [hereinafter cited as TESITOR & SINKS]. For a succinct description of the procedures of address and impeachment, see Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 4-8 (1977).
2. *Chandler v. Judicial Council of the Tenth Cir.*, 398 U.S. 74, 136, 140 (1970) (Douglas, J., dissenting); *id.* at 142 (Black, J., dissenting); Battisti, *An Independent Judiciary or an Evanescent Dream*, 25 CASE W. RES. L. REV. 711 (1975); Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979); Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes From History*, 36 U. CHI. L. REV. 665, 667, 698 (1969). See generally K. CORR & L. BERKSON, LITERATURE ON JUDICIAL CONDUCT 47-69 (1979).

that an effective alternate means of discipline is necessary to preserve public confidence in the judicial system and that judicial independence is not sacrificed in the process.³

Particularly difficult problems arise when judicial discipline is sought for conduct that is nonofficial.⁴ Clearly, what a judge does in his official capacity, whether on or off the bench, is properly subject to some type of review by a body charged with protecting the public from official misconduct. The concept that the public must also be protected from a judge's conduct that is nonofficial — assuming it is always possible to distinguish the official and nonofficial roles — is less obvious. Two recent cases illustrate the different approaches taken by state courts reviewing the nonofficial conduct of judges. In *In re Dalessandro*,⁵ the Supreme Court of Pennsylvania refused to discipline a judge for his intimate relationship with a woman to whom he was not married.⁶ The Supreme Court of Wisconsin, in the case of *In re Seraphim*,⁷ disciplined a judge, partly because of his sexual conduct toward women who were strangers to him.⁸

This article examines the reasoning of the courts of Pennsylvania, Wisconsin, and other states in cases dealing with disciplining judges for nonofficial conduct. A discussion of the legal bases for reviewing such conduct leads to an enumeration of particular nonofficial acts that have resulted in sanctions being taken against judges by the state's disciplining body. Finally, the article describes some problems that have arisen or may soon be encountered by the disciplining bodies and suggests guidelines for the administration of judicial discipline.

II. THE LEGAL BASES FOR DISCIPLINING NONOFFICIAL CONDUCT

3. K. CORR & L. BERKSON, LITERATURE ON JUDICIAL CONDUCT 19-45 (1979).

4. The term "nonofficial" was chosen to describe a judge's conduct that does not arise from the performance of judicial duties. Such conduct could be performed by a person who is not a judge and is improper, either because it would be improper for anyone to do or is improper when done by a judge but would not be improper for others. Conduct of a criminal nature would fall into the first category; conduct that violates the Code of Judicial Conduct would be included in the latter.

The choice of the adjective "nonofficial" to describe accurately the type of conduct that is the subject of this article was particularly difficult. A number of other adjectives have been used to describe the same type of conduct, but all of them have some deficiencies for the purposes of this article. "Nonjudicial" was rejected because it may be confused with unjudicial or injudicious; "off the bench" is not appropriate because judges act in an official capacity off the bench as well as on the bench; "private" is misleading because the conduct may be public; "personal" is too broad because all conduct is, in one sense, personal in that it is done by the judge as an individual.

5. 483 Pa. 431, 397 A.2d 743 (1979).

6. *Id.* at 461-63, 397 A.2d at 758-59.

7. 97 Wis. 2d 485, 294 N.W.2d 485 (1980).

8. *Id.* at 501-03, 510, 294 N.W.2d at 494-95, 499.

The ultimate reason for any type of judicial discipline is to maintain public confidence in the judiciary.⁹ The logic behind this principle is simple: a legal system can function only as long as the public accepts and abides by decisions rendered by the courts; the public will accept and abide by these decisions only if it is convinced that the judges are fair and impartial; anything that tends to weaken that conviction should be avoided. In other words, justice must not only be done, but it must also appear to be done. For this reason, judges are commanded to avoid not only actual impropriety but also the appearance of impropriety in all of their activities.¹⁰

This reasoning has served as the basis for the establishment of various methods of judicial discipline that add to and are less cumbersome than impeachment and address. The types of discipline that may be imposed upon a judge are generally prescribed by constitutional amendment or statute, which usually provide a range of sanctions, in contrast to the impeachment process where the only sanction is removal from office. In addition to removal, other permissible sanctions are retirement, suspension, public reprimand or censure, private reprimand or censure, imposition of conditions or limitations on the performance of judicial duties, imposition of a fine, or any combination of the above.¹¹ With the addition of the State of Washington in 1980,¹² all states have now adopted constitutional provisions authorizing a court or commission to discipline judges.¹³ Congress has adopted similar provisions for the District of Columbia¹⁴ and the federal courts.¹⁵ These provisions also set forth the grounds for imposing discipline,¹⁶ which include to a large extent nonofficial conduct.

It is not surprising that states have recently undertaken to regulate the personal conduct of judges. State courts previously used their power over the admission and discipline of attorneys to establish and enforce standards of personal conduct for attorneys.¹⁷ In fact, in states in which the courts did not have ex-

9. ABA CODE OF JUDICIAL CONDUCT CANON 1. See generally Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 35 LAW & CONTEMP. PROB. 69, 70 (1970).

10. ABA CODE OF JUDICIAL CONDUCT CANON 2.

11. TESITOR & SINKS, *supra* note 1, at 4-5, 44-46; see ABA STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT; Todd & Proctor, *Burden of Proof, Sanctions, and Confidentiality*, 54 CHI.-KENT L. REV. 177, 183-89 (1977).

12. Judicial Conduct Reporter, Fall 1980, at 4, col. 1.

13. TESITOR & SINKS, *supra* note 1, at 2, 12-18.

14. *Id.*

15. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2040 (amending 28 U.S.C. § 372 (1976)).

16. TESITOR & SINKS, *supra* note 1, at 4, 40-43; Overton, *Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions*, 54 CHI.-KENT L. REV. 59, 59-61 (1977).

17. Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 318 A.2d 811 (1974); Martineau, *The Authority of a State Supreme Court to Regulate Judicial Ethics*, 15 ST. LOUIS L.J. 237, 245-46 (1971); Note, *Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice*, 43 CORNELL L.Q. 489, 492-93 (1958).

press authority to discipline judges, their conduct was regulated by virtue of their status as attorneys. The courts give as the basis for regulating the conduct of attorneys the same argument as that used for regulating judges: the preservation of public confidence in the judicial process.

A. The Code of Judicial Conduct

Virtually all states have adopted a code of conduct that is expressly or implicitly binding upon the judges of that state and is enforced through a judicial discipline process. Most states have adopted, with minor variations, the Code of Judicial Conduct¹⁸ drafted in 1972 by the American Bar Association.¹⁹ The Code of Judicial Conduct is the successor to the Canons of Judicial Ethics prepared by the ABA in 1924. Developments in the late 1960's indicated that the Canons, which were concerned primarily with the performance of a judge's official duties, were no longer adequate. The Canons were both too general and not sufficiently directed at the nonofficial activities of judges. The Code of Judicial Conduct, as ultimately approved by the ABA and as adopted in most states, obviates both of these deficiencies.

Increased concern with the behavior of judges has centered primarily in the area of their nonofficial conduct. This concern anticipated somewhat the similar emphasis on ethics in government and use of official power for personal advantage that emerged from the Watergate era. There are as many explanations for this change in emphasis as there are persons who attempt to analyze it. Certainly one major factor is the rapidly expanding power of the judiciary over the lives of the average citizens, particularly over those who are affected by judgments and decrees entered by a judge. As judicial power has expanded, so has the concern over the judges who exercise that power and their personal interests that may affect their decisions. Although all of these concerns are not necessarily justified, and interest in a judge's personal life may sometimes be unwarranted, it is clear that the emphasis in the Code of Judicial Conduct is on the nonofficial behavior of judges rather than on their official actions.

The extent to which the Code is concerned with the nonofficial activities of judges is best demonstrated by analyzing each canon of the Code seriatim. The Code contains seven canons, each divided into a general principle, an accompanying text setting forth specific rules, and a commentary. A reading of the Code shows

18. The ABA Code of Judicial Conduct is set out in full in the Appendix.

19. There is no current data on the number of states that have adopted the ABA Code of Judicial Conduct. In 1975 it was reported that 39 states and the United States Judicial Conference had adopted it in whole or in part. *Special Committee to Obtain Adoption of the Code of Judicial Conduct*, 100 A.B.A. REP. 859-60 (1975). Several additional states have subsequently adopted it.

that, of the seven canons, only Canon Three is concerned exclusively with judicial activities,²⁰ while Canon One is very general and applies to both official and nonofficial activities.²¹ The remaining five canons deal with nonofficial conduct.²² This emphasis reflects the fact that the problems that gave rise to demands for revision of the Canons of Judicial Ethics concerned nonofficial rather than official activities.²³

B. The Power to Discipline

California, the first state to create a commission with investigatory and adjudicatory powers over judicial conduct, constitutionally provides that a judge may be disciplined for action that "constitutes willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."²⁴ The last ground provides the basis for judicial discipline for nonofficial conduct. Twenty-eight states have constitutional provisions similar to California's, authorizing judicial discipline for behavior prejudicial to the administration of justice that brings the judicial office into disrepute.²⁵ Further, twenty states authorize judicial discipline for violations of the state's code of judicial conduct.²⁶ Additionally, thirty-two states authorize judicial discipline for habitual intemperance,²⁷ twenty-three for a felony conviction,²⁸ and twenty-one for an offense involving moral turpitude.²⁹ Each of these grounds potentially includes conduct that is nonofficial. Thus, a majority of states expressly permit a judge to be disciplined for his conduct as a private citizen.

C. Judicial Opinions

Perhaps even more important than the provisions of state constitutions and of the Code of Judicial Conduct are the deci-

20. See ABA CODE OF JUDICIAL CONDUCT CANON 3.

21. See *id.* CANON 1.

22. See *id.* CANONS 2, 4-7.

23. The authors of the Code divided the activities of a judge into three spheres: judicial, quasi-judicial, and extra-judicial. Thode, *The Development of the Code of Judicial Conduct*, 9 SAN DIEGO L. REV. 793, 796 (1972). For purposes of this article, however, the official/nonofficial division is more appropriate. For an analysis of the effect of the Code of Judicial Conduct on the nonofficial conduct of judges, see Volcansek, *Codes of Judicial Ethics: Do They Affect Judges' Views of Proper Off-the-Bench Behavior?*, 17 AM. BUS. L.J. 493 (1980).

24. CAL. CONST. art. 6, § 18(c).

25. TESITOR & SINKS, *supra* note 1, at 4, 40-43.

26. *Id.* at 40-43.

27. *Id.*

28. *Id.*

29. *Id.*

sions of state courts establishing general principles to govern the relationship between judicial discipline and nonofficial conduct. With one exception,³⁰ these opinions are of rather recent origin, reflecting the fact that only in the past two decades have state courts been given express constitutional authority to discipline judges. Prior to this development, few occasions arose for state courts to consider the relationship.³¹

A close examination of the language used by courts faced with the question of whether to subject a judge to punishment because of his conduct is extremely important for two reasons. First, there are so few opinions written on the subject that the language adopted in these decisions provides the only judicial gloss available to the rules of ethics for judges. Second, a comparison of the opinions shows striking similarities and patterns in the rationales adopted by most of the courts imposing discipline for a judge's nonofficial conduct.

Louisiana is the only state in which the highest court has long possessed express disciplinary authority over judges.³² In *Stanley v. Jones*,³³ decided in 1942, the court ordered the removal of a judge for misconduct. The opinion addressed the relationship between judicial discipline and nonofficial conduct in the following terms:

The record discloses beyond question, we think, that the defendant has been guilty not only of official misconduct but of gross misconduct not connected with his office —

30. *Stanley v. Jones*, 201 La. 549, 9 So. 2d 678 (1942).

31. ABA SPECIAL COMM. ON STANDARDS OF JUDICIAL CONDUCT, PRELIMINARY STATEMENT AND INTERIM REPORT (June 1970); see Cameron, *The Inherent Power of a State's Highest Court to Discipline the Judiciary*, 54 CHI.-KENT L. REV. 45 (1977); Martineau, *The Authority of a State Supreme Court to Regulate Judicial Ethics*, 15 ST. LOUIS L.J. 237 (1971). One occasion in which a court did comment on the special status of a judge was *In re Stolen*, 193 Wis. 602, 214 N.W. 379 (1927), in which the court disbarred an attorney, a former judge, on the basis of his conduct while on the bench. The court stated:

The respondent knew that his position as judge carried with it a limitation upon his freedom of action not imposed upon the ordinary practicing attorney. There are many things which he might do with propriety as a practicing attorney which would be highly improper while occupying a judicial position.

....

One sitting as a judge who voluntarily places himself under obligation to the criminal element of his judicial district, even though that obligation be merely that of debtor and creditor, and who sits in judgment upon the case of his debtor, shocks the public confidence in his court and tends to bring the general administration of justice into disrepute. This is the nature of respondent's offense.

....

Respondent's offense is one against the administration of justice. His offense has brought courts and the administration of justice into disrepute.

Id. at 619-23, 214 N.W. at 385-86.

32. See LA. CONST. art. V, § 25 (1921, amended 1974).

33. 201 La. 549, 9 So. 2d 678 (1942).

such misconduct, indeed, as makes it necessary that he be removed from office.

The record shows that he has been guilty of acts . . . which reflect such serious defects in his character as to render him utterly unfit to perform the delicate and important functions of the office which he holds.

The office of judge is one in which the general public has a deep and vital interest, and, because that is true, the official conduct of judges, as well as their private conduct, is closely observed. When a judge, either in his official capacity or as a private citizen, is guilty of such conduct as to cause others to question his character and morals, the people not only lose respect for him as a man but lose respect for the court over which he presides as well.³⁴

The validity of these statements is evidenced by the fact that they continue to be quoted with approval by the Louisiana Supreme Court.³⁵ Recently, this language was also used by the Supreme Court of Wisconsin in the case of *In re Seraphim*.³⁶

The Louisiana Supreme Court reiterated the theme of protecting the integrity of the judicial office in its 1977 decision, *In re Babineaux*.³⁷ Ruling to suspend without pay seven judges until they resigned as directors of business or financial institutions affected with the public interest, the court stated:

Judges are not merely elected public officials. Their role in the administration of justice makes them a special breed. The administration of justice requires adherence by the judiciary to the highest ideals of personal and official conduct. If judges openly flaunt the legal and constitutionally sanctioned and adopted Canons of the Code of Judicial Conduct, there is no question but that such persistent and public conduct is prejudicial to the administration of justice and that it does bring the judicial office into disrepute.³⁸

Even though the court found the judges' performances on the bench to be exemplary,³⁹ it decided that violation of the Code of Judicial Conduct was enough to necessitate discipline.

While the Louisiana court in *Babineaux* was not required to find that the judges' conduct "related to" their official duties,⁴⁰ it earlier held in another case⁴¹ that personal conduct of a judge in-

34. *Id.* at 562-63, 9 So. 2d at 683.

35. *See State v. O'Hara*, 252 La. 540, 558-59, 211 So. 2d 641, 648 (1968).

36. 97 Wis. 2d 485, 510, 294 N.W. 2d 485, 499 (1980) (quoting *State v. O'Hara*, 252 La. 540, 558-59, 211 So. 2d 641, 648 (1968)).

37. 346 So. 2d 676 (La. 1977).

38. *Id.* at 681.

39. *See id.*

40. *Id.* at 680-81.

41. *In re Haggerty*, 257 La. 1, 241 So. 2d 469 (1970).

volving violation of criminal laws regulating gambling and pornography does "relate to" the judicial office.⁴² In its decision, *In re Haggerty*,⁴³ the court found the judge's public misconduct off the bench to be "so seriously delinquent as to bring disgrace and discredit upon the judicial office and a loss of public respect and confidence in his ability to perform his official duties impartially and conscientiously."⁴⁴ Because the judge participated in activities that violated the criminal laws that the judge was sworn to uphold, the court reasoned that the misconduct related to the judge's official duties.

In addition to the courts of Louisiana and Wisconsin, courts in six other jurisdictions have wrestled with the question of whether a judge should be disciplined for misconduct in nonofficial activities. With one exception,⁴⁵ these courts have answered the question affirmatively. In most cases, the reasoning behind the decision to discipline a judge for nonofficial conduct has been that such conduct detrimentally affects the public's confidence in the integrity of the judge and, ultimately, in the judicial process. For this reason, judges are held to a higher standard of conduct than ordinary citizens or even other members of the bar.

This standard was applied by the Ohio Supreme Court in *Cincinnati Bar Association v. Heitzler*,⁴⁶ where the court stated:

[A] judge is charged with the responsibility of conforming to a higher standard of personal behavior than the ordinary person. A judge's conduct of personal behavior must be "beyond reproach." Improper conduct which may be overlooked when committed by the ordinary person, or even a lawyer, cannot be overlooked when committed by a judge. By accepting his office, a judge undertakes to conduct himself in both his official and personal behavior in accordance with the highest standard that society can expect.⁴⁷

42. *Id.* at 39-40, 241 So. 2d at 482. The judge in *Haggerty* was disciplined under the 1921 Louisiana Constitution, which allowed a judge to be disciplined only for "wilful misconduct relating to his official duty or wilful and persistent failure to perform his duty, or for habitual intemperance, or for conviction, while in office, of a felony." LA. CONST. of 1921, art. IX, § 4(B) (1968). The judges in *Babineaux* were subject to the Louisiana Constitution of 1974, which reflected the state's desire to circumscribe nonofficial conduct of judges: "[T]he supreme court may censure, suspend with or without salary, remove from office, or retire involuntarily a judge for willful misconduct relating to his official duty, [or] persistent and public conduct prejudicial to the administration of justice that brings the judicial office into disrepute . . ." LA. CONST. art. V, § 25(c) (emphasis added). Because of the alternative basis for discipline in the new constitution, the *Babineaux* court was not required to rule that the judges' conduct "related to" their official duties, as did the court in *Haggerty*.

43. 257 La. 1, 241 So. 2d 469 (1970).

44. *Id.* at 39-40, 241 So. 2d at 482 (quoting with approval the opinion of the Judiciary Commission of Louisiana).

45. *In re Dalessandro*, 583 Pa. 431, 397 A.2d 743 (1979).

46. 32 Ohio St. 2d 214, 291 N.E.2d 477 (1972).

47. *Id.* at 221, 291 N.E.2d at 482.

The Massachusetts Supreme Judicial Court has twice considered this same question. In the first case, *In re Troy*,⁴⁸ the court declared:

It is to be remembered that [judges'] service and its quality are to be gauged not only by their scholarship in the law and wisdom in its application but in the conduct of their personal affairs, the prudence in their public utterances . . . , and in their strict adherence to the Code of Judicial Ethics to which they all are now subject.

. . . Unquestionably a judge is entitled to lead his own private life free from unwarranted intrusion. But even there, subjected as he is to constant public scrutiny in his community and beyond, he must adhere to standards of probity and propriety higher than those deemed acceptable for others. More is expected of him and, since he is a judge, rightfully so.⁴⁹

In a subsequent case, *In re Morrissey*,⁵⁰ the Massachusetts court found that although the judge had not engaged in any illegal or corrupt acts, he showed indifference to the then controlling Canons of Judicial Ethics, which required that a judge's personal actions be beyond reproach. In justifying the high standards imposed on judges, the court stated:

That the standards imposed on judges are high goes without saying. Because of the great power and responsibility judges have in passing judgment on their fellow citizens, such standards are desirable and necessary and there should be strict adherence to them. Failure on the part of even a few judges to comply with these standards serves to degrade and demean the entire judiciary and to erode public confidence in the judicial process. Anyone who is unwilling to accept and abide by such stringent rules of conduct should not aspire to or accept the great honor and the grave responsibility of serving on the bench.⁵¹

The Supreme Court of Vermont has similarly recognized and enforced higher standards of personal conduct for judges. Its opinion in *In re Douglas*⁵² noted that members of the judiciary are and must be held to stringent standards of conduct due to the "extraordinary responsibility of judicial office. . . . The Canons of Judicial Conduct are standards measuring fitness for judicial office and therefore embrace tests of behavior relating to integrity

48. 364 Mass. 15, 306 N.E.2d 203 (1973).

49. *Id.* at 71, 306 N.E.2d at 234-35.

50. 366 Mass. 11, 313 N.E.2d 878 (1974).

51. *Id.* at 16-17, 313 N.E.2d at 881-82 (footnote omitted).

52. 135 Vt. 585, 382 A.2d 215 (1977).

and propriety that condemn actions in which the average citizen can freely indulge without consequence."⁵³

Reviewing a judge's involvement in a political campaign, the Supreme Court of Michigan wrote:

We believe that [the judge's] conduct in this connection could only result in diminished public confidence in the independence and impartiality of the judiciary and that it constitutes conduct clearly prejudicial to the administration of justice.

The point, then, as also reflected in our judicial canons and opinions dealing with other judicial misconduct cases, is that a judge, whether on or off the bench, is bound to strive toward creating and preserving the image of the justice system as an independent, impartial source of reasoned actions and decisions. Achievement of this goal demands that a judge, in a sense, behave as though he is always on the bench.⁵⁴

The New York Court of Appeals, in two 1980 decisions, expressed a similar viewpoint. In *Kuehnel v. State Commission on Judicial Conduct*,⁵⁵ the court noted that the judge

fail[ed] to comprehend the basic maxim that a Judge may not so facily divorce behavior off the Bench from the judicial function. Standards of conduct on a plane much higher than for those of society as a whole, must be observed by judicial officers so that the integrity and independence of the judiciary will be preserved. A Judge must conduct his everyday affairs in a manner beyond reproach. Any conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function.⁵⁶

Another case decided by the same court, *In re Steinberg*,⁵⁷ employed similar language:

Contrary to petitioner's assertions, a Judge cannot simply cordon off his public role from his private life and assume safely that the former will have no impact upon the latter. . . . Wherever he travels, a Judge carries the mantle of his esteemed office with him, and, consequently, he must always be sensitive to the fact that

53. *Id.* at 592, 382 A.2d at 219.

54. *In re Bennett*, 403 Mich. 178, 195, 267 N.W.2d 914, 922 (1978).

55. 49 N.Y.2d 465, 403 N.E.2d 167, 426 N.Y.S.2d 461 (1980).

56. *Id.* at 469, 403 N.E.2d at 168, 426 N.Y.S.2d at 463.

57. 51 N.Y.2d 74, 409 N.E.2d 1378, 431 N.Y.S.2d 704 (1980).

members of the public, including some of his friends, will regard his words and actions with heightened deference simply because he is a Judge.

... [W]e cannot accept his further contention that conduct off the Bench may give rise to removal only when there has been some act of overt illegality or extreme "moral turpitude". We see no sound reason to distinguish between conduct "on the Bench" and conduct "off the Bench" for present purposes, since "[a]ny conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and impairs the usefulness of the individual Judge to carry out his or her constitutionally mandated function."⁵⁸

With its decisions in *Kuehnel* and *Steinberg*, the highest court in New York agreed with the position of other state courts that a judge may be disciplined for nonofficial conduct. These decisions, like those of Louisiana, Wisconsin, Ohio, Massachusetts, Vermont, and Michigan, reflect the courts' emphasis on the need to maintain public confidence in the judicial system. Without such confidence, the system cannot function effectively. Because a judge's official and nonofficial conduct affects the public's confidence in the judiciary, a judge must always abide by the highest standards.

In only one state, Pennsylvania, has the highest court held that discipline may be based only upon conduct performed in a judge's official capacity. Deciding *In re Dalessandro*,⁵⁹ the court considered the recommendation of the Pennsylvania Judicial Inquiry and Review Board that a judge be publicly censured for a number of actions, some of which involved only nonofficial conduct. Under the Pennsylvania Constitution, a judge may be disciplined for various reasons, including conduct that brings the judicial office into disrepute or that violates canons of judicial ethics adopted by the Supreme Court of Pennsylvania.⁶⁰ In a per curiam opinion joined in by only two of seven justices,⁶¹ the court held that a judge was subject to discipline only for official conduct and not for personal conduct that was not otherwise illegal. The court noted that the constitutional provisions and the Code of Judicial

58. *Id.* at 81, 83-84, 409 N.E.2d at 1382, 1384, 431 N.Y.S.2d at 707, 709 (citation omitted) (quoting *Kuehnel v. State Comm'n on Judicial Conduct*, 49 N.Y.2d 465, 469, 403 N.E.2d 167, 168, 426 N.Y.S.2d 461, 463 (1980)).

59. 483 Pa. 431, 397 A.2d 743 (1979) (per curiam).

60. PA. CONST. art. V, § 18(d).

61. Of the seven judges to hear the case, one concurred in the result, two filed dissenting opinions, and two did not participate in the consideration or decision. *In re Dalessandro*, 483 Pa. 431, 466, 397 A.2d 743, 760 (1979).

Conduct are concerned with "(1) the conduct of a judge acting in an official capacity (2) any other conduct which affects the judge while acting in an official capacity, and (3) conduct prohibited by law."⁶² Working from this basis, the court continued:

To read into the constitution or the canons prohibitions which go beyond the above categories is to enter a most precarious area of inquiry for the state — the realm in which private moral beliefs are enforced and private notions of acceptable social conduct are treated as law. Standards in these private areas are constantly evolving and escape, at any given moment, precise definition. Conduct of a judge or any public official which may be offensive to the personal sensitivities of a segment of the society is properly judged in the privacy of the ballot box

Thus, it can be seen that there are, in effect, two tribunals wherein judgments must be made concerning the conduct of a judge. For some matters that tribunal is properly the people through the ballot box. This Court as the other tribunal can only be concerned with conduct which as previously noted involves a judge acting in his official capacity or conduct which affects the judge acting in an official capacity or conduct prohibited by law.⁶³

Chief Justice Eagen wrote a dissenting opinion in which he referred to the provisions of the Code of Judicial Conduct that require a judge to avoid impropriety or the appearance of impropriety and the constitutional provision that permits judicial discipline for conduct that brings the judicial office into disrepute. He said that "[t]o read these rules of conduct as restricted to activities while a judge is clothed in a robe or 'acting in his or her official capacity' is pure sophistry."⁶⁴

In summary, the highest courts in eight states have discussed the relationship between a judge's nonofficial conduct and judicial discipline. Of these eight, seven have declared in forceful terms that what a judge does in his personal life has an impact upon the performance of his judicial duties and upon public confidence in the judicial process, and that, because of this, it is proper to base discipline on nonofficial conduct. Pennsylvania, the only state exhibiting a contrary view, did so in an opinion concurred in by only two members of a seven-member court.

62. *Id.* at 460, 397 A.2d at 757.

63. *Id.* at 460-61, 397 A.2d at 757-58.

64. *Id.* at 466, 397 A.2d at 760 (Eagen, C.J., dissenting).

The objections of the Supreme Court of Pennsylvania to disciplining nonofficial conduct were that the Code of Judicial Conduct is concerned with official conduct and that the ballot box is the place to review nonofficial conduct.⁶⁵ Neither of these objections appears valid. The Code of Judicial Conduct, as pointed out earlier, is primarily concerned with nonofficial rather than official conduct.⁶⁶ In Canon Two, the text and the commentary expressly refer to *all* of a judge's activities, not only his official duties, as being within the purview of the Code.⁶⁷ Reliance on the elective system to enforce proper standards of judicial conduct is also ill-founded. An election does not prove that a judge has acted properly or improperly or that his conduct has or has not been prejudicial to the administration of justice; it only means that the judge received enough votes to win the election. This could be the result of any number of factors unrelated to the prior conduct of the judge, such as an absence of other candidates; a multitude of worse candidates; several highly qualified candidates splitting a majority of the votes thereby allowing a less qualified judge to receive a plurality; other issues seeming more important than a judge's record; and a judge spending more money, employing a better campaign manager, or being supported by a special interest group. Furthermore, public confidence in the judicial system entails confidence not only on the part of the participants in a judicial election, but also by others who may be affected directly or indirectly by judicial decisions. This may well include many persons not eligible to participate in the election of a judge.

III. SPECIFIC CONDUCT

During the past decade, state courts have decided many cases in which they considered whether to impose sanctions upon a judge for specific types of nonofficial conduct. An examination of these cases illustrates the different types of nonofficial conduct that have warranted disciplinary action.⁶⁸ In few of these cases is the specific conduct listed below the only misconduct with which the judge was charged. Usually an allegation of nonofficial mis-

65. *Id.* at 460, 397 A.2d at 757.

66. See text accompanying notes 20-22 *supra*.

67. ABA CODE OF JUDICIAL CONDUCT CANON 2.

68. The cases through 1978 are collected in JUDICIAL DISCIPLINE & DISABILITY DIGEST (J. Rosenbaum ed.), published in 1981 by the American Judicature Society. The author is indebted to the Society for making a preliminary draft of the DIGEST available for use in the preparation of this article.

The cases may be grouped under several headings based upon the general nature of the conduct involved. These groupings, based upon those used in the DIGEST, will be used for the purpose of setting forth the factual situations and analysis.

conduct involves repeated misconduct or is joined with allegations of official misconduct.⁶⁹ Consequently, specific acts are considered as part of a pattern of conduct, rather than individually. Several courts have held that, although individual acts considered separately may not justify discipline, the cumulative effect of all of the acts may support the imposition of sanctions.⁷⁰ Each act described below, either standing alone or in conjunction with other acts, has been found to be a ground for ruling that a judge should be disciplined.

A. *Use of Public Property*

The improper use of public property has elements of both official and nonofficial conduct because the opportunity arises only due to the judge's official position. It is classified here as nonofficial, however, because the actions do not relate to the performance of a judge's official duties but rather to the use of the position to aid a judge's private interests. Judges have been disciplined for the following conduct: (1) conducting a personal investigation of local officials using the judge's office and telephone and county employee;⁷¹ (2) charging to or seeking from a public agency reimbursement for personal travel;⁷² (3) using county funds to pay for a personal attorney;⁷³ (4) using a court employee to work on the judge's personal projects;⁷⁴ and (5) assisting another person to obtain county funds improperly.⁷⁵

B. *Speech and Associations*

A substantial number of judges have been disciplined for their speech and associations with others. Judges have argued that these activities are protected by the guarantees of the first amendment, but no court has accepted this argument. The Supreme Court of Kansas addressed the question directly in one case, in the following language:

In taking his office a judge assumes added responsibilities and is held to a higher standard of conduct than the lay person. For a judge the right to speak freely is circumscribed by the code of judicial conduct, just as that of the

69. See, e.g., *In re Inquiry Concerning a Judge (Taunton)*, 357 So. 2d 172, 177 (Fla. 1978); *In re Welch*, 283 Md. 68, 73, 388 A.2d 535, 538 (1978); *In re Seraphim*, 97 Wis. 2d 485, 513, 294 N.W.2d 485, 500 (1980).

70. *In re Inquiry Concerning a Judge (Taunton)*, 357 So. 2d 172, 177 (Fla. 1978); *In re Welch*, 283 Md. 68, 73, 388 A.2d 535, 538 (1978); *In re Seraphim*, 97 Wis. 2d 485, 513, 294 N.W.2d 485, 500 (1980).

71. *In re Inquiry Concerning a Judge (Taunton)*, 357 So. 2d 172 (Fla. 1978).

72. *Strickland v. Judicial Inquiry Bd.*, 388 So. 2d 1202 (Ala. 1980); *In re La Motte*, 341 So. 2d 513 (Fla. 1977).

73. *Louisiana State Bar Ass'n v. Funderburk*, 284 So. 2d 564 (La. 1973).

74. *In re Troy*, 364 Mass. 15, 306 N.E.2d 203 (1973).

75. *In re Carrillo*, 542 S.W.2d 105 (Tex. 1976).

lawyer is subject to the code of professional responsibility, and first amendment rights do not exempt a judge from discipline for proven judicial misconduct.⁷⁶

Judges have been disciplined for improper language, such as: (1) using abusive language to a county employee in a non-court matter;⁷⁷ (2) using abusive language to lawyers and court employees;⁷⁸ (3) using vulgar and threatening language to a member of the news media;⁷⁹ and (4) engaging in verbal (and physical) attacks on adolescents.⁸⁰ Sanctions have been levelled against judges for their improper criticism of others: (1) making a public speech accusing several persons of improper conduct;⁸¹ (2) publicly criticizing a prosecutor or public defender;⁸² (3) making disparaging remarks in public about other judges;⁸³ and (4) sending copies of letters critical of an attorney to the attorney's clients.⁸⁴ Other speech for which judges have been disciplined include: (1) voluntarily testifying as a character witness for a person previously convicted by the judge;⁸⁵ and (2) mounting a publicity campaign to abort a disciplinary proceeding against the judge.⁸⁶

Association with criminals has provided the basis for disciplining judges: (1) meeting with an escaped convict without turning him over to authorities;⁸⁷ and (2) maintaining a close and intimate association with a known felon.⁸⁸ Other types of association leading to discipline have included: (1) attending a meeting where a matter discussed was likely to come before the judge;⁸⁹ (2) keeping a close social relationship with a bondsman writing bonds in the judge's court;⁹⁰ (3) participating in⁹¹ or contributing to⁹² a candidate's campaign for office; (4) being a guest at a lunch of persons

76. *In re Rome*, 218 Kan. 198, 205, 542 P.2d 676, 684 (1975).

77. *Cannon v. Commission on Judicial Qualifications*, 14 Cal. 3d 678, 537 P.2d 898, 122 Cal. Rptr. 788 (1975).

78. *In re Bennett*, 403 Mich. 178, 267 N.W.2d 914 (1978).

79. *In re Del Rio*, 400 Mich. 665, 256 N.W.2d 727 (1977).

80. *Kuehnel v. State Comm'n on Judicial Conduct*, 49 N.Y.2d 465, 403 N.E.2d 167, 426 N.Y.S.2d 461 (1980).

81. *In re Inquiry Concerning a Judge (Taunton)*, 357 So. 2d 172 (Fla. 1978).

82. *In re Bennett*, 403 Mich. 178, 267 N.W.2d 914 (1978); *Ohio State Bar Ass'n v. Mayer*, 54 Ohio St. 2d 431, 377 N.E.2d 770 (1978).

83. *In re Sobel*, 8 N.Y.2d (a), (h), 409 N.Y.S.2d 958 (Court on Judiciary 1960); *Ohio State Bar Ass'n v. Mayer*, 54 Ohio St. 2d 431, 377 N.E.2d 770 (1978).

84. *In re Heverman*, 90 S.D. 312, 240 N.W.2d 603 (1976).

85. *In re Inquiry Concerning a Judge (Taunton)*, 357 So. 2d 172 (Fla. 1978).

86. *In re Terry*, 262 Ind. 667, 323 N.E.2d 192 (1975).

87. *In re Robson*, 500 P.2d 657 (Alaska 1972).

88. *Gremillion v. O'Hara*, 252 La. 540, 211 So. 2d 641 (1968).

89. *In re Bonin*, 378 N.E.2d 669 (Mass. 1978).

90. *In re Troy*, 364 Mass. 15, 306 N.E.2d 203 (1973); *In re DeSaulnier*, 360 Mass. 787, 279 N.E.2d 296 (1972).

91. *In re Bennett*, 403 Mich. 178, 267 N.W.2d 914 (1978); *In re Briggs*, 595 S.W.2d 270 (Mo. 1980).

92. *In re Larkin*, 333 N.E.2d 199 (Mass. 1975); *In re Briggs*, 595 S.W.2d 270 (Mo. 1980).

regularly appearing before the court;⁹³ and (5) accepting proceeds of a testimonial dinner given by attorneys in the judge's honor.⁹⁴

C. Interfering With or Seeking to Influence Litigation or Administrative Proceedings Not Pending Before the Judge

Judges have on occasion attempted to interfere with or influence on behalf of themselves or others litigation pending before other judges. This is of course improper, whether done by a judge or anyone else. Judges, however, have a greater opportunity to exercise influence because of their easier access to other judges and a greater incentive to use their influence because of the possibility that it may be successful. Sometimes a judge is disciplined for attempting to help a friend, such as: (1) making an inquiry of a grand jury investigator as to the likelihood of a friend of the judge being indicted by the grand jury;⁹⁵ (2) requesting another judge to dismiss a traffic citation received by the judge or a friend;⁹⁶ (3) arranging for special handling of a friend who was a complaining witness in a case, attempting to persuade the defendant to plead guilty, attempting to influence assignment of the case, and attending the trial and staring at the defendant;⁹⁷ (4) writing a letter on court stationery urging an administrative agency to reconsider denial of a license to a friend of the judge;⁹⁸ (5) becoming involved in a criminal case, in which a friend was the defendant, by interviewing the prosecuting witness while wearing judicial robes and arranging for a disposition of the charges;⁹⁹ and (6) attempting to expedite the processing of a friend's license application.¹⁰⁰

Other times, a judge's self-serving conduct requires discipline. For example: (1) sending letters to appellate judges about action taken in a case prior to any appellate review of the action;¹⁰¹ (2) asking a federal prosecutor whether a criminal complaint had been filed against a potential defendant and accepting payment for this action;¹⁰² and (3) seeking to influence, directly and through another person, processing and disposition of a case.¹⁰³

93. *In re D'Auria*, 67 N.J. 22, 334 A.2d 332 (1975).

94. *In re Dandridge*, 462 Pa. 67, 337 A.2d 885 (1975).

95. *In re Hanson*, 532 P.2d 303 (Alaska 1975).

96. *Spruance v. Commission on Judicial Qualifications*, 13 Cal. 3d 773, 532 P.2d 1209, 119 Cal. Rptr. 841 (1975); *In re Miller*, 223 Kan. 130, 572 P.2d 896 (1977); *In re Spitalnick*, 63 N.J. 429, 308 A.2d 1 (1973); *In re Hardy*, 294 N.C. 90, 240 S.E.2d 367 (1978).

97. *In re Del Rio*, 400 Mich. 665, 256 N.W.2d 727 (1977).

98. *In re Anastasi*, 76 N.J. 510, 388 A.2d 620 (1978).

99. *In re Maidman*, 42 A.D.2d 44, 345 N.Y.S.2d 82 (1973).

100. *Lonschein v. State Comm'n on Judicial Conduct*, 50 N.Y.2d 569, 408 N.E.2d 901, 430 N.Y.S.2d 571 (1980).

101. *In re Emmet*, 293 Ala. 143, 300 So. 2d 435 (1974).

102. *In re Morrissey*, 366 Mass. 11, 313 N.E.2d 878 (1974).

103. *In re DeSaulnier*, 360 Mass. 787, 279 N.E.2d 296 (1971).

D. Sexual Conduct

The problems involved in holding judges to a standard of personal conduct higher than that of other persons are particularly difficult with regard to sexual conduct. Although the Supreme Court of Pennsylvania has held that sexual conduct, whether private or notorious, is beyond the scope of judicial discipline,¹⁰⁴ four other courts have held to the contrary. The specific acts that courts have found to justify a finding of misconduct are: (1) engaging in sexual acts in an automobile in a public parking lot with a woman to whom the judge was not married;¹⁰⁵ (2) bringing pornographic movies and prostitutes to a stag party;¹⁰⁶ (3) taking trips with a woman to whom the judge was not married and acting in a manner that led others to believe the judge was living with the woman;¹⁰⁷ and (4) committing "unprivileged and nonconsensual physical contact with offensive sexual overtones against several women."¹⁰⁸

E. Involvement in Business Activities

Judges are often engaged in business activities of their own or in aiding those of others. In a number of cases, this involvement has resulted in the imposition of judicial discipline. Courts have held the following acts to be improper: (1) serving as a director of a business corporation;¹⁰⁹ (2) serving as auctioneer for estates that were being administered in the judge's court;¹¹⁰ (3) violating terms of a business license;¹¹¹ (4) devoting substantial time each day to private business;¹¹² (5) obtaining a real estate broker's license;¹¹³ (6) permitting a loan company, on whose board the judge served, to use in a brochure the picture and name of the judge;¹¹⁴ (7) using official title and stationery in seeking a zoning change for property in which the judge had an interest;¹¹⁵ (8) acting as a loan broker for friends;¹¹⁶ and (9) accepting a favorable car rental arrangement from a local car dealer before and after the dealer appeared before the judge in court as a litigant.¹¹⁷

104. *In re Dalessandro*, 483 Pa. 431, 397 A.2d 743 (1979).

105. *In re Inquiry Concerning a Judge (Lee)*, 336 So. 2d 1175 (Fla. 1976).

106. *In re Haggerty*, 257 La. 1, 241 So. 2d 469 (1970).

107. *Cincinnati Bar Ass'n v. Heitzler*, 32 Ohio St. 2d 214, 291 N.E.2d 477 (1972).

108. *In re Seraphim*, 97 Wis. 2d 485, 495, 294 N.W.2d 485, 503 (1980).

109. *In re Babineaux*, 346 So. 2d 676 (La. 1977); *Babineaux v. Judiciary Comm'n*, 341 So. 2d 396 (La. 1976).

110. *In re Welch*, 283 Md. 68, 388 A.2d 535 (1978).

111. *In re Troy*, 364 Mass. 15, 306 N.E.2d 203 (1973).

112. *Id.*

113. *In re DeSaulnier*, 360 Mass. 787, 279 N.E.2d 296 (1971).

114. *Cincinnati Bar Ass'n v. Heitzler*, 32 Ohio St. 2d 214, 291 N.E.2d 477 (1972).

115. *In re Foster*, 271 Md. 449, 318 A.2d 523 (1974).

116. *In re Steinberg*, 51 N.Y.2d 74, 409 N.E.2d 1378, 431 N.Y.S.2d 704 (1980).

117. *In re Seraphim*, 97 Wis. 2d 485, 294 N.W.2d 485 (1980).

F. Miscellaneous

Activities for which judges have been disciplined that do not fall into any of the above categories include: (1) filing false federal income tax returns;¹¹⁸ (2) assisting and directing law enforcement officials in making arrests;¹¹⁹ (3) borrowing money from attorneys who practice in the judge's district;¹²⁰ (4) practicing law;¹²¹ (5) failing to file a fully completed financial disclosure form;¹²² and (6) becoming a candidate for nonjudicial office.¹²³

IV. PROBLEM AREAS

Although it is clear that in a majority of jurisdictions in which the issue has arisen judges may be disciplined for their nonofficial conduct, several issues involved in so doing require additional attention and discussion. The first and most basic issue is whether a nexus exists between the private life of a judge and public confidence in the judiciary and, if so, whether the nexus justifies setting limitations on the former in order to protect the latter. Both courts¹²⁴ and commentators¹²⁵ have premised the imposition and enforcement of standards of personal conduct for judges on the need to protect public confidence in the judicial process. While a judge's private behavior and the public's confidence in the judiciary have a facial relationship, no scientific or statistical data supports any direct correlation between the two. Unless this correlation has been demonstrated, it is questionable as to whether restrictions upon the personal conduct of judges are justified.

The Florida Supreme Court has taken the position that a judge may be disciplined for personal misconduct without proof that such actions caused loss of public confidence. In *In re La Motte*,¹²⁶ the court stated:

In determining whether a judge has conducted himself in a manner which erodes public confidence in the judiciary, we must consider the act or wrong itself and not the resulting adverse publicity. . . . [I]f a judge commits a grievous wrong which *should* erode public confidence in

118. *In re Steinberg*, 51 N.Y.2d 74, 409 N.E.2d 1378, 431 N.Y.S.2d 704 (1980).

119. *West Virginia Judicial Inquiry Comm'n v. Dostert*, 271 S.E.2d 427 (W. Va. 1980).

120. *In re Anderson*, 252 N.W.2d 592 (Minn. 1977).

121. *In re Ryman*, 394 Mich. 637, 232 N.W.2d 178 (1975); *In re Piper*, 271 Or. 726, 534 P.2d 159 (1975).

122. *In re Kading*, 74 Wis. 2d 405, 246 N.W.2d 903 (1976).

123. *Morial v. Judiciary Comm'n*, 565 F.2d 295 (5th Cir. 1977); *In re Schamel*, 46 A.D.2d 236, 362 N.Y.S.2d 39 (1974).

124. See text accompanying notes 32-58 *supra*.

125. Miller, *Public Confidence in the Judiciary: Some Notes and Reflections*, 65 LAW & CONTEMP. PROB. 70 (1970); Rifkind, *A Judge's Nonjudicial Behavior*, 38 N.Y. ST. B.J. 22, 22-23 (1966); Rifkind, *The Public Concern in a Judge's Private Life*, in UNIVERSITY OF CHICAGO LAW SCHOOL CONFERENCE ON JUDICIAL ETHICS 25, 26-28 (1964).

126. 341 So. 2d 513 (Fla. 1977).

the judiciary, but it does not appear that the public has lost confidence in the judiciary, the judge should nevertheless be removed.¹²⁷

The Florida court failed to explain by what process it is determined that certain conduct *should* cause a loss of confidence in the judiciary. Because it made no reference to any other standard, the court in *La Motte* appears to be saying that whatever conduct the disciplinary body thinks should cause the public to lose confidence in the judiciary may be proscribed. Thus, a court may prohibit whatever conduct it determines is inappropriate for judges. While it may be within the power of the courts to exercise control over judges in this manner, the court in *La Motte* would have been more candid by acknowledging that it was actually enforcing its own standards and not those of the public.

The Court of Appeals of Maryland has adopted a better approach to disciplining judges for nonofficial conduct. That court employs a "reasonable person" standard for determining the effect of a judge's conduct upon the public.¹²⁸ While such a test is not completely objective, it is better than a totally subjective one. The reasonable person standard has long been used in other legal contexts, such as torts, and is a familiar standard to judges facing discipline as well as to the courts considering disciplinary measures. Because the reasonable person standard is well-known to most courts and judges, and because it is intended to reflect public reaction to a judge's nonofficial conduct, the use of this standard would better promote the basis for disciplining a judge for nonofficial conduct: maintaining public confidence in and respect for the judicial system.

Several courts have had to face the problem of whether discipline may be based on the judge's conduct prior to the time he assumed office. The American Bar Association Standards Relating to Judicial Discipline and Disability Retirement expressly state that a judge should be subject to discipline for prior conduct.¹²⁹ Courts that have considered the problem have also concluded that if personal conduct is to be considered, it does not make any difference whether such conduct occurred before or after a person becomes a judge.¹³⁰ The rationale is that the judicial

127. *Id.* at 518 (emphasis added).

128. *In re Foster*, 271 Md. 449, 469, 318 A.2d 523, 533 (1974).

129. ABA STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT 3.1.

130. *In re Ryman*, 394 Mich. 637, 642, 232 N.W.2d 178, 179 (1975); *In re Gillard*, 271 N.W.2d 785, 813 (Minn. 1978); *cf. In re Carrillo*, 542 S.W.2d 105, 110-11 (Tex. 1976) ("[T]he public, as the ultimate judge and jury in a democratic society, can choose to forgive the misconduct of an elected public official if the public knows about such misconduct prior to the election."). The court in *Carrillo* held that because the petitioner's acts of misconduct were concealed from the public, his reelection as district judge was not a showing of forgiveness by the electorate. The court, therefore, ordered the removal of petitioner from office.

discipline process is concerned with a person's ability to serve as judge and with public confidence in the judicial process. Both of these factors are affected by a judge's conduct, whether it occurs on or off the bench and before or after the assumption of judicial office. Although the sanction to be imposed may be affected by when the conduct occurred, the power of the disciplinary body to scrutinize such conduct is not affected.

This approach would appear to be sound in view of the purpose of the judicial discipline process. It must be kept in mind, however, that the standard of conduct to which a judge may be held should be the standard corresponding to the status or position that he held at the time of the acts under review. Thus, a judge who is alleged to have engaged in improper conduct while a lawyer must be judged by the standard of conduct then applicable to lawyers and not the standard applicable to judges. To do otherwise would put future judges in the impossible position of having to comply with standards of conduct for positions they do not yet hold and in fact may never hold. Similarly, when higher standards of conduct for judges are adopted, a judge's conduct should be measured against the standard in effect when the conduct occurred rather than the standard in effect at the time of the disciplinary proceeding.¹³¹

Some judges may claim that they are being held to standards so vague and arbitrary that they can never be certain whether any particular act involves the appearance of impropriety, is prejudicial to the administration of justice, or brings the judicial office into disrepute. To a limited degree this may be true, but general standards are not of themselves improper or unenforceable and are certainly not unconstitutional.¹³² It would be unreasonable to expect a code of judicial conduct to contain an exhaustive list of narrow prohibitions that would provide the exclusive basis for judicial discipline. At the same time, neither state judicial discipline agencies nor state courts have shown any desire to serve as grand inquisitors, examining every aspect of a judge's personal life in the hope of finding some weakness or misconduct. Most judges have no difficulty in acting within appropriate, albeit undelineated bounds, both on and off the bench. The somewhat vague and flexible standards of judicial conduct, therefore, pose no threat to the vast majority of judges.

131. *In re Inquiry Concerning a Judge* (Taunton), 357 So. 2d 172, 181 (Fla. 1978); *In re Littell*, 260 Ind. 187, 197, 294 N.E.2d 126, 131 (1973); cf. *In re Seraphim*, 97 Wis. 2d 485, 497, 294 N.W.2d 485, 491 (1980) (respondent's conduct was prohibited at time it was engaged in; only issue was authority of court to discipline respondent on basis of that conduct).

132. *Halleck v. Berliner*, 427 F. Supp. 1225, 1240 (D.D.C. 1977); *Keiser v. Bell*, 332 F. Supp. 608, 614-15 (E.D. Pa. 1971); *Napolitano v. Ward*, 317 F. Supp. 78, 81 (N.D. Ill. 1970).

V. CONCLUSION

A system of judicial discipline separate from the traditional methods of impeachment and address is operative today in all state judicial systems and the federal system. While there is no question that judges are subject to discipline for official misconduct, judges have also been disciplined for personal, nonofficial conduct in a substantial number of jurisdictions. The ultimate basis for subjecting a judge to discipline for nonofficial conduct is the same as that for official conduct — to maintain public confidence in the judiciary and the judicial process.

The administration of a system of discipline for judges is not without its problems. It is not always clear exactly what types of specific conduct will merit the invocation of punishment because most of the decisions rendered in this area of the law have involved a combination of various forms of misconduct. It is therefore unclear which types of conduct standing alone will constitute a punishable offense.

Another problem with the administration of a disciplinary system for judges is the lack of any empirical or statistical data to support the inference adopted by courts that misconduct on the part of judges brings the judicial office into disrepute or interferes with the administration of justice. It sometimes appears as if particular courts have merely imposed their own moral standards of what is or is not proper conduct. Those who administer judicial discipline should keep in mind that they are not empowered to enforce their personal views of proper conduct for judges and that the sole purpose of judicial discipline and of restrictions on the nonofficial activities of judges is to preserve public confidence in the judicial system. Courts should strive to develop a more objective standard or test, which will lend itself to consistent and just application and at the same time provide adequate warning to the members of the bench.

APPENDIX

CODE OF JUDICIAL CONDUCT*

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

CANON 3

A Judge Should Perform the Duties of His Office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. ADJUDICATIVE RESPONSIBILITIES.

*Excerpted from Model Code of Professional Responsibility and Code of Judicial Conduct, August, 1980, copyright 1981 by the National Center for Professional Responsibility and the American Bar Association.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

Commentary: The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and business-like while being patient and deliberate.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Commentary: The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief *amicus curiae*.

(5) A judge should dispose promptly of the business of the court.

Commentary: Prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with him to that end.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Commentary: "Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by DR7-107 of the *Model Code of Professional Responsibility*.

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of

evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording, or photographing of investigative, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Commentary: Temperate conduct of judicial proceedings is essential to the fair administration of justice. The recording and reproduction of a proceeding should not distort or dramatize the proceeding.

B. ADMINISTRATIVE RESPONSIBILITIES.

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

Commentary: Disciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary body.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensation of appointees beyond the fair value of services rendered.

Commentary: Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

C. DISQUALIFICATION.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Commentary: A lawyer in a governmental agency does not neces-

sarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

Commentary: The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1) (d) (iii) may require his disqualification.

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

Commentary: According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance

company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

D. REMITTAL OF DISQUALIFICATION.

A judge disqualified by the terms of Canon 3C(1) (c) or Canon 3C(1) (d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Commentary: This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. When a party is not immediately available, the judge without violating this section may proceed on the written assurance of the lawyer that his party's consent will be subsequently filed.

CANON 4

A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

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

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

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

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

Commentary: As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged

to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Extra-judicial activities are governed by Canon 5.

CANON 5

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties

A. Avocational Activities. A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

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

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

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

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

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

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

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

C. FINANCIAL ACTIVITIES.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

person treated by a judge as a member of his family, who resides in his household.

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

Commentary: Canon 3 requires a judge to disqualify himself in any proceeding in which he has a financial interest, however small; Canon 5 requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of his judicial duties; Canon 6 requires him to report all compensation he receives for activities outside his judicial office. A judge has the right of an ordinary citizen, including the right to privacy of his financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of his duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

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

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

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

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

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

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

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

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

G. Extra-judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Commentary: Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake

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

CANON 6

A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

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

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

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

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

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office

A. POLITICAL CONDUCT IN GENERAL.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

Commentary: A candidate does not publicly endorse another candidate for public office by having his name on the same ticket.

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2);

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on

his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

B. CAMPAIGN CONDUCT.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than [90] days before a primary election and no later than [90] days after the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

Commentary: Unless the candidate is required by law to file a list of his campaign contributors, their names should not be revealed to the candidate.

[Each jurisdiction adopting this Code should prescribe a time limit on soliciting campaign funds that is appropriate to the elective process therein.]

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

Compliance with the Code of Judicial Conduct

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5C(2), D, E, F, and G, and Canon 6C;

(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

B. Judge Pro Tempore. A judge *pro tempore* is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge *pro tempore* is not required to comply with Canon 5C(2), (3), D, E, F, and G, and Canon 6C.

(2) A person who has been a judge *pro tempore* should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

C. Retired Judge. A retired judge who receives the same compensation as a full-time judge on the court from which he retired and is eligible for recall to judicial service should comply with all the provisions of this Code except Canon 5G, but he should refrain from judicial service during the period of an extra-judicial appointment not sanctioned by Canon 5G. All other retired judges eligible for recall to judicial service should comply with the provisions of this Code governing part-time judges.

Effective Date of Compliance

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may:

(a) continue to act as an officer, director, or non-legal advisor of a family business;

(b) continue to act as an executor, administrator, trustee, or other fiduciary for the estate or person of one who is not a member of his family.