AMERICAN BAR ASSOCIATION

JOINT COMMISSION TO EVALUATE THE MODEL

CODE OF JUDICIAL CONDUCT

MINUTES OF THE PUBLIC HEARING AND MEETING

FRIDAY, MARCH 26, 2004

SAN FRANCISCO, CALIFORNIA

COMMENCING AT 10:08 A.M.

REPORTED BY: LORRIE L. MARCHANT, RPR, CSR NO. 10523

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MR. HARRISON: I thought I should mention that there has been some inquiry from the media in the San Francisco area requesting the opportunity to observe and presumably report about our proceedings.

The ABA, as most of you probably know, has a fairly explicit open meetings policy, which, even if we weren't otherwise predisposed to have our meetings open, requires us to have our meetings open. So I wanted to give all of you a heads-up that any embarrassing behavior, you should try to restrain yourself. Any inappropriate comments, save for later in the day.

Seriously, I don't think that -- I think the media will understand that we welcome them here, but that they should not be intrusive or, to put it another way, should be unobtrusive.

I think it would be helpful to quickly go

10:09 around the table and have the commissioners advisory
10:09 group members introduce themselves so that those of you
10:09 who are visiting for a day will know who's around the
10:09 table.
10:09 And then, of course, I think our visitors will
10:09 be introducing themselves as they offer testimony.
10:09 I'm Mark Harrison. I'm chair of the ABA Joint
10:09 Commission to Evaluate the Code of Judicial Conduct, and
10:09 I'm happy to see so many smiling faces here to share my
10:09 champagne with me.
10:09 MR. KUHLMAN: I'm neither a commission member nor
10:09 an advisor. I'm George Kuhlman. I'm the ABA ethics
10:10 counsel.
10:10 JUDGE NEVILLE: I'm Judge Cara Lee Neville,
10:10 Minneapolis, Minnesota, General Jurisdiction Trial Court
10:10 Judge and Chair of the Coalition for Justice, and I'm a
10:10 member of this commission.
10:10 MR. FITZPATRICK: Hi. I'm Tom Fitzpatrick from
10:10 Seattle, Washington. I'm a member of the commission.
10:10 I'm also a member of the Ethics Committee of the ABA.
10:10 JUDGE McKEOWN: Margaret McKeown from the
10:10 Ninth Court Circuit of Appeals, San Diego. I'm a member
10:10 of the commission.
10:10 MS. CLEAVER: I'm Dianne Cleaver from Kansas City,
10:10 Missouri. I'm the public member of the commission. I

am the Chief Administrative Officer for the Kansas City Missouri School District and a member of the commission.

MS. GRAY: Jeanne Gray. I'm the director of the ABA Center for Professional Responsibility.

MR. HILLIKER: Don Hilliker. I'm a partner at McDermott, Will & Emery in Chicago, and I'm a member of the commission.

MS. LIBBY: Eileen Libby, ABA Associate Ethics Counsel.

MR. BADAMI: I'm Jim Badami with the Association of Judicial Disciplinary Council. With my other hat on, I'm Executive Director of the Arkansas Judicial Discipline & Disability Commission.

MS. HENLEY: I'm Victoria Henley. I'm president of the Association of Judicial Disciplinary Council, and I'm the director and chief counsel for the California Commission on Judicial Performance.

MR. SCHECKMAN: I'm Steve Scheckman. I'm Vice President of the Association, and I'm the Special Counsel to the Louisiana Judiciary Commission.

MS. GREENSTEIN: And I'm Marla Greenstein, and I'm secretary for the Association of Judicial Disciplinary Council, and I'm the executive director for the Alaska Commission on Judicial Conduct.

MR. CUMMINS: Bob Cummins from Chicago.

JUDGE BOWIE: Pete Bowie. I'm a bankruptcy judge from San Diego and one of the advisors from the Judicial Conference of the United States.

JUDGE AMON: I'm Carol Amon on the U.S. District Court in the Eastern District of New York, Booklyn. I'm also an advisor from the Judicial Conference, and I'm former chair of Codes of Conduct Committee.

MR. TEMBECKJIAN: I'm Robert Tembeckjian, an administrator of the New York Commission on Judicial Conduct. I'm an advisor to the Code Evaluation Commission. I'm also a member of the board of the Association of Judicial Disciplinary Council and have been teased about being a double agent.

MR. ROSNER: Seth Rosner. I practice law in New York City in Saratoga Springs, New York. I'm an advisor to the commission, and I chair the ABA Coordinating Council of the Center for Professional Responsibility.

JUDGE ROSENBLUM: Good morning. I'm Ellen Rosenblum. I'm a state court trial judge from Portland, Oregon, where I've chaired the Judicial Ethics Advisory Committee for a number of years. I'm the liaison to this commission from the National Judicial College, and I'm the secretary of the ABA.

MS. ARGRETT: Loretta Argrett, Washington, DC. I'm

a member of the commission and a former member of the ethics committee, the ABA Ethics Committee.

JUDGE WYNN: James Wynn. I'm a North Carolina County Court of Appeals judge and, as of last week, a candidate for the Supreme Court. But none of you can vote for me, I don't think, in here. I'm also the chair of the Appellate Judge's Conference, and I sit on the Standing Committee for Judicial Independence.

JUDGE TURNEY: I'm Harriet Turney. I'm the Chief Administrative Law Judge for the Industrial Commission in Arizona, and I'm a member of this commission and a member of the ABA Professionalism Committee.

MS. GALLAGHER: I'm Eileen Gallagher. I'm a staff member with the Justice Center of the EDA.

MR. GEYH: I'm Charlie Geyh. I'm on the faculty of law school and the University of Bloomington and the reporter to the commission.

MR. HARRISON: Anybody not introduced who wants to be introduced?

I think our guests will probably introduce themselves, and we have a pretty full day of guests to hear from, and we're looking forward to hearing from you.

And my agenda, Victoria, says you're first up.

MS. HENLEY: And I just have a few preliminary

remarks. The Association for Judicial Disciplinary Council is the professional association for legal counsel serving state judicial conduct organizations. It was founded in 1980 and today has members from probably 40 states.

Each of us is here today not on behalf of our commissions, and nothing that we offer today is the official position of any of our state organizations. We are here instead with our professional association to offer your commission the perspectives and experience of professionals practicing in the field of judicial ethics, interpreting and applying the code of ethics on a daily basis in disciplinary matters and in many states in formulating advisory opinions to assist judges in conforming to ethical standards.

We also bring you experiences from the front lines, defending the code of ethics both in contested disciplinary matters and in ancillary challenges undertaken in federal and state litigation.

Although most judicial disciplinary bodies were initially modeled after the California plan and California had the first permanent judicial disciplinary body in the United States, our disciplinary systems today are more dissimilar than alike.

Each has modified and adapted to the needs of

its state and its judiciary, influenced by differences in the way judges are selected in each state, the requirements for judicial office, whether judges must stand for election and, if so, what type of election, the availability of judicial education and advisory opinions, and the degree of that state's commitment to the enforcement of high disciplinary standards.

These same issues have also influenced the adoption of the codes of ethics in each state. To your task in evaluating the model code, we bring you the breadth and variety of experiences that a model code has to accommodate.

And I wanted to just open with three areas that we have been thinking about this meeting identified that the board has particular concerns about.

The first is the importance from our point of view of maintaining the aspirational features of the Code of Ethics.

The second is a concern over perhaps diluting what we know as Canon 2 by eliminating the appearance of impropriety standard.

And, lastly, an area of concern over the possibility of changing the format of the code and what impact that has on those of us who work with the code every day.

So I wanted to offer those up as three areas that I'm sure you'll have questions about and that are areas of concern for the board and each of us.

MR. TEMBECKJIAN: Victoria, can you also identify the other members of the AJDC who are here so the commission members will know who they are.

MS. HENLEY: Sure. We have Jon Copeland here from Ohio; James Alexander from Wisconsin; Cynthia Dorfman, who is also from California; Keith Stott, who is from Arizona; Margaret Childers from Alabama; Pat Monahan from New Jersey; Brant Brantley from Mississippi; Reiko Callner from Washington; and Cathaee Hudgins from the District of Columbia.

MS. GREENSTEIN: Maybe, if I could jump it in here, I think one of the points that Victoria made in her opening remarks is to maintain the aspirational nature of the code.

And that's one thing that we've all, kind of, taken for granted and as, I think, something inherent in the Code of Judicial Conduct that is very distinct from the rules governing lawyers' conduct.

And one of the points I think we'd like to make is those of -- most of us have experience dealing with both the rules of professional conduct, at least to the extent that we have to decide whether it was conduct

done by a judge in his capacity as an attorney before he became a judge or whatever the circumstances may be, we have some familiarity with it, and many of us also serve in some capacity with our state bars in that area. So we have some familiarity with both.

But the rules governing -- of professional conduct governing lawyer conduct seem to be geared, as they should be, to client protection or consumer protection kind of orientation. It's designed with the idea of protecting the interests of the users of the lawyers' services.

And what's distinct about the Code of Judicial Conduct is it's a code for public officials. And in that way, I think it might be more similar to even newer codes that involve governing public officials' ethics and whether it's legislative ethics or in other capacities, in that you need some aspirational tone to it for two reasons: One is that there is a public accountability aspect to the codes of judicial conduct;

And the other is, especially in the area, where we're talking about judicial ethics, a need to emphasize the impartiality of this particular branch of government and that the code is designed to protect that in both its appearance and its reality, and it's essential to maintain public confidence in the judiciary

and to reinforce the judiciary's integrity in the eyes of the public.

So that's a distinction that, unless you work with the Code of Judicial Conduct every day, you might not see as being necessarily significant, but I think those of us who do use it every day -- it's viewed that the aspirational aspect of the code as being very significant.

MR. GEYH: Just for clarification, when you speak of the aspirational character of the code, am I correct in assuming that what you're referring to is just making certain that the references to "shoulds" remain in the specific code itself as distinguished from being moved simply to commentary. Is that what you're referring to?

MS. GREENSTEIN: Well, that's one aspect. And then I understand too you're considering losing the canons themselves and making them perhaps just titles of sections. And that would also dilute the aspirational character.

MR. GEYH: Even if that language was in the text itself?

MS. GREENSTEIN: Yeah. It's a bit like, you know, the "Ten Commandments of Judicial Conduct." We have the seven canons of judicial conduct, and they set out "thou shall" and this is what a judge should be. This is

what's essential to our idea of what judge is.

MR. GEYH: The first two, right? I just want to be clear. It's judicial duties -- I'm trying to recall. Judicial duties and then extrajudicial activities and political activities are the titles of the last three.

You're referring to the first two as -- is what you're referring to in asking that they're aspirational in. I'm just trying to get a sense for -- in some ways -- just to be clear about it -- I'm not challenging anything. I just want to make sure that we know what we're doing when we do it.

MS. GREENSTEIN: Yes. And all of them are "A judge shall." Okay. So they all have raised as -- I keep using this "aspirational." Maybe there's a better term to capture it.

But even Canon 5, "A judge or judicial candidate shall refrain from inappropriate political activity."

It's the basic standards as they're articulated in those canons and to get reduced to titles, I'm afraid you'll also lose that important nuance of what the canons are really all about.

MR. HARRISON: Carol.

JUDGE AMON: I have one question, Ms. Henley. You had a concern about changing the format. Could you

10:22 1 explain to me the problems that would come about as a
10:22 2 result of change in the format.
10:22 3 MS. HENLEY: Well, California, for example, in
10:22 4 1996, there was a shift that the canons stopped being
10:22 5 promulgated by the judges' professional association.
10:22 6 California was overtaken by the Supreme Court, and
10:22 7 that's pursuant to a constitutional amendment.
10:22 8 They did a revision of the code, and so now,
10:22 9 when we're referring to any conduct that straddles
10:22 10 those, we always have to refer to the canon, the older
10:23 11 canon, and, you know, the whole reorganization of that
10:23 12 has led to -- for citations, for reference, for
10:23 13 cross-referring cases -- you know, somewhat difficult.
10:23 14 You have added to that changing the entire
10:23 15 format with rules, whatever you would then have -- be
10:23 16 citing every time, you know, the whole earlier lineage
10:23 17 of that and back to the canons, which is just, you know,
10:23 18 for those of us who deal it with day after day and in
10:23 19 briefs and in case decisions, you know, something
10:23 20 belabored, you know, in terms of the presentation briefs
10:23 21 and decisions.
10:23 22 MR. HARRISON: Do any of your colleagues either at
10:23 23 the table or behind the table wish to amplify anything
10:23 24 that you've brought up? Because I've got some questions
10:23 25 and maybe some other members of the commissions do. But

I certainly want to hear from you.

MR. SCHECKMAN: I'd like to, if I might, talk about Canon 2 just for a second. And in our sense or at least my sense about how all of us as prosecutors in this field or as executive directors of commissions handle Canon 2 in charging documents in formal charges.

And I think it's important to stress that, if we are alleging a judge engaged in some misconduct, based upon Canon 2A, we look to the text of the canon and not just the canon itself.

So that in terms of canon -- in 2A, we look to the language

> "A judge shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary," not that the judge "engaged in an appearance of impropriety."

The appearance of impropriety language, without the text, I would concede, maybe doesn't have any meaning. But there is a text. And I hear judges in my home state, and I know you've heard comments as well, that, "Well, this appearance of impropriety language is vague. We don't know what it means."

And what I'd like to suggest to you, No. 1, is I think we do know what it means because there's text to

10:25 1 the canon. And that's what appearance of impropriety
10:25 2 means.
10:25 3 And, No. 2, I can tell you, in my state -- and
10:25 4 I think that there's a general consensus that -- among
10:25 5 the states -- that when a judge is accused of violating
10:25 6 Canon 2A, it is because of the language that I just read
10:25 7 to you, not that this judge engaged in an appearance of
10:25 8 impropriety -- period, no further explanation.
10:25 9 And I think if there's anything I can get
10:25 10 across today that is what I would want to tell you, that
10:26 11 it is capable of definition. There is a definition.
10:26 12 And I think that's why the courts across the country
10:26 13 have not declared the appearance language to be vague
10:26 14 and overbroad, because the text of the canon defines it.
10:26 15 MR. HARRISON: Loretta.
10:26 16 MS. ARGRETT: Yes. One of the concerns that has
10:26 17 been raised is that we're not sure whether judges have
10:26 18 been prosecuted and determined to be a violator of that
10:26 19 particular canon if that was the sole charge. And we
10:26 20 now have all of you before us; so we would really like
10:26 21 some information about this.
10:26 22 MR. SCHECKMAN: I happen to have -- I was
10:26 23 anticipating that, I guess, and so I would like to tell
10:26 24 you about some of our cases that are just 2A cases,
10:26 25 nothing else, no other -- no other canon. So it's --

it's not an add-on. It's not, sort of, ganging up or piling on.

We've had, unfortunately, a couple of cases, involving judges, who, though the evidence clearly show, let's say, that the defendant was guilty, wanted to encourage the public members of the audience to become involved in the judicial proceeding. And so there was coin flipping, guilt or innocence. "Call it. Heads or tails."

We're also had a judge who decided to conduct polls -- no jury, just a poll of the audience. Do you think this --

"If you think the gentleman is guilty, stand up. If you think this gentleman is innocent, stand up."

Now, did that conduct promote public confidence in the integrity and impartiality of the judiciary? I think that goes right to the integrity of the judiciary.

What it showed was that the public came away with the appearance that they were deciding guilt or innocence, even though it was the judge testifying, of course, that, "No, I based my decision on the evidence. I was just trying to get the public involved."

MS. GREENSTEIN: Even in my state, where we have a

very low caseload -- in Alaska, we only have 60 judges -- I've had four cases that have been just occurrence of impropriety.

To give you some ideas: One was a hiring situation, where a judge intervened and abandoned a set-up merit hire process to then hire at his discretion a family friend, and it was a totally -- it would have been allowable legally because it was a totally at-will, exempt position and he's done it from the beginning.

But because they started a merit hire process, with the advertising and hiring committee and everything and then disbanded it to do this friend hire, it gave the appearance to the public that this was to curry favor and that type of thing, and there was no other actual impropriety.

The only thing was the appearance it created to the public. And we've had, you know, three others. I can give you examples as well. But I think it's accurate to say every state has these cases, where the sole charge and the sole thing that's been proven and disciplined for is appearance of impropriety.

MR. SCHECKMAN: If I can, I'll see you. I wanted to ask some questions before I leave. So before I do --

MR. HARRISON: Go ahead.

MR. WYNN: Your answer, your statement, reminds me

somewhat of the answer I get sometimes in North Carolina as to why we continue with contributory negligence, and it's because a jury will ultimately fix it, notwithstanding explicit inequities that are occurring in the process.

And here we have an explicit statement within the canon as to the appearance of impropriety as a basis. But what you are telling me is that in reality it's practiced differently -- that we look to the text and we seek other ways in which to do it. In other words, you fixed the problem.

My question is: Are you suggesting that we undertake some measures to make this explicit too -- that, in fact, this language is defined by the text and that it has that limitation.

Otherwise, it doesn't have it inherently within the text. It's something you've done admirably to fix it. And as a judge, I'm one who is concerned about the vagueness of it, even though in your eyes, it is an invaluable text.

MR. SCHECKMAN: I would say, to the extent it's not clear, that it is necessary to look to the text because, otherwise, why is the text there?

The canons -- if you look at any of the canons, forget about -- 2 is the one that gets the most

10:30 1 debate, but if you look at the other ones, do any of
10:30 2 them really have any meaning without the text?
10:31 3 And I would suggest to you that they really
10:31 4 don't. And it's not just Canon 2. And you always have
10:31 5 to look to the text.
10:31 6 So to the extent that there's any confusion,
10:31 7 certainly a comment to that effect that it's the text
10:31 8 that gives it meaning, I think, would be very important.
10:31 9 JUDGE WYNN: One quick follow-up I want to make
10:31 10 clear. I think there's been some confusion as to what
10:31 11 is text. There are those that think that black letter
10:31 12 we call "law" is really what it is and everything under
10:31 13 it is just to explain that.
10:31 14 And then there are those that say, "Well,
10:31 15 that's just the heading, and then below it is the text."
10:31 16 But I can tell you I've heard the divergent
10:31 17 views in explaining, one way or the other, you know, the
10:31 18 purpose of that text that's up there. And is -- don't
10:31 19 you think that's something we ought to make clear? And
10:31 20 if so, how would you suggest we do that?
10:31 21 MR. SCHECKMAN: Well, to the extent there's
10:31 22 confusion, I do think that it should be made clear. And
10:31 23 I would also say that it is legitimate though, if, in
10:31 24 fact, and I know that my commission and my
10:32 25 supreme court, upon finding a violation under 2A, that a

10:32 1 judge did not uphold public confidence in the integrity
10:32 2 and impartiality of the judiciary, may then conclude,
10:32 3 rightly so, as a matter of law, that the judge then
10:32 4 engaged in an appearance of impropriety.
10:32 5 And that would be appropriate then, looking at
10:32 6 the canon itself, after evaluating and analyzing the
10:32 7 text, to then go back to the canon and say, "As a
10:32 8 conclusion of law, this was an appearance of
10:32 9 impropriety." I think that's when that phrase and
10:32 10 that -- that's when it comes in.
10:32 11 MR. HARRISON: The lady from Washington had her
10:32 12 hand up.
10:32 13 MS. CALLNER: Thank you. Reiko Callner.
10:32 14 I was going to -- I wanted to respond to this
10:32 15 part of the discussion in emphasizing and echoing what
10:32 16 Marla Greenstein had to say about the aspirational,
10:32 17 hortatory nature of the code and the difference in its
10:32 18 utility to -- governing the behavior of judges as
10:32 19 opposed to attorneys, who are, after all, adversarial,
10:33 20 engaged in pursuing their clients' interests.
10:33 21 And the judges have a very different role, of
10:33 22 course, in our justice system. So that those provisions
10:33 23 of the code that have an overall goal that we would like
10:33 24 those judges to realize as the embodiment of the justice
10:33 25 system have a value there.

10:33 And the appearance of impropriety, the protection of that and the attendant faith that the whole society has in the soundness of the justice system is something, I think, that it's very appropriate to set, not only before the judiciary but before the public at large.

And it serves a very clear purpose that way in the implementation of the code on a daily basis.

MR. HARRISON: Peter and then Margaret.

JUDGE BOWIE: I had a couple of thoughts.

First off, talking about the examples you were giving, the coin toss, for instance, the question occurs to me why that might not fall under a Canon 3, a duty to -- responsibility -- "duty to decide" kind of thing.

And Marla's instance of the employment issue, the question is whether the canon prohibits favoritism as well as nepotism. The question is why it doesn't come there. And I guess what's troubling me -- and it goes back to a 1979 published New York case, I think it is -- the name I've forgotten -- but there were judges who were appointing each other's offspring to act as -- what were they? --

MR. TEMBECKJIAN: Receivers.

JUDGE BOWIE: -- whatever they were. But they could find absolutely no quid pro quo or that the number

10:34 1 of appointments matched or that there was anything that
10:34 2 demonstrated it.
10:34 3 And I have no problem saying that that's an
10:34 4 appearance of impropriety, but I have a problem with the
10:34 5 notion that you can discipline something -- somebody, a
10:34 6 person, for allowing somebody else to conclude that
10:34 7 there's an appearance of impropriety from an act they
10:35 8 took that was otherwise lawful.
10:35 9 And that's what I'm grappling with from the
10:35 10 standpoint of discipline as distinct from a hortatory
10:35 11 standard that says "You should avoid the appearance of
10:35 12 impropriety," and -- in this context, where it's not an
10:35 13 impermissible act, and -- but now we say somebody else
10:35 14 has concluded that an appearance of impropriety arises
10:35 15 from that sufficient to warrant the imposition of
10:35 16 discipline. And then we get -- almost come back to a
10:35 17 spargo notice kind of issue.
10:35 18 MS. GREENSTEIN: Well, maybe we can explain why we
10:35 19 couldn't charge actual impropriety, at least, and that
10:35 20 may answer your question.
10:35 21 In the hiring case, the person was qualified,
10:35 22 and it was allowable to hire based on personal
10:35 23 relationship. There was nothing -- the definition of
10:35 24 nepotism did not cover this hiring. So there was not --
10:35 25 JUDGE BOWIE: Nor favoritism?

10:35 1 MS. GREENSTEIN: Nor favoritism. It did not cover
10:35 2 that. We couldn't find -- if this person, this judge --
10:36 3 if he had hired this person from the beginning, in fact,
10:36 4 we wouldn't even have had any ability to look at the
10:36 5 hire at all.
10:36 6 But because they had started a hiring process
10:36 7 that was advertised -- they put out applications, they
10:36 8 had a hiring committee, they made it look like it was
10:36 9 not -- it was going to be what in our state is called a
10:36 10 "merit hire" within the personnel structure and then
10:36 11 disbanded it to do what he could have done in the
10:36 12 beginning and hire somebody, who was -- happened to be a
10:36 13 friend of the Chief Justice, but, you know, somebody who
10:36 14 he thought was competent for this particular job and
10:36 15 just went out and hired this person that -- you know,
10:36 16 that is what created the appearance of impropriety.
10:36 17 There was no actual impropriety. And if there
10:36 18 was actual impropriety, we would have charged those
10:36 19 other things.
10:37 20 But these appearance of impropriety cases -- I
10:37 21 can't emphasize enough -- is where you can't prove
10:37 22 actual impropriety, because of how actual impropriety is
10:37 23 defined, but they so clearly created an appearance of
10:37 24 impropriety.
10:37 25 And it's -- maybe it would be helpful,

10:37 actually, if we did a summary for this group of some of
10:37 the case law. Because, as I said, I think the state
10:37 enforces it, and it would -- might be helpful for you to
10:37 see those fact patterns that are solely appearance of
10:37 impropriety violations. Because, as you said, these
10:37 two cases don't bother you. You understand why our
10:37 state supreme court disciplined people for these things.
10:37 JUDGE BOWIE: Well, no. I'm trying to distinguish
10:37 between the two. And I have no problem with the notion
10:37 of an appearance warranting disqualification or recusal,
10:37 for instance, in this instance and in the instances
10:37 you've described -- well, maybe the coin tossing, it
10:37 probably does -- but it's not a remedy in the hiring
10:38 situation. So you're looking for something else.
10:38 But my issue is with connecting the --
10:38 allowing the arising of an appearance of impropriety as
10:38 resulting in imposition of discipline as distinct from
10:38 something else and how to make that nexus and deal with
10:38 the notice. Because it can be anything then. It could
10:38 be anything without definition.
10:38 MS. GREENSTEIN: Let me just follow up that the
10:38 sanctions for these, typically, are public reprimands.
10:38 It's a typical "appearance of impropriety" sanction.
10:38 And it fits very well because what you're creating in an
10:38 appearance of impropriety is a public lack of confidence

in the integrity of that judge.

And so the public reprimand is a statement by the state supreme court just acknowledging to the public that this kind of behavior -- it takes away from the respect and dignity of the court and warrants our statement of disapproval.

So just to give you a sense of where the levels of -- the levels of sanctions match these. And we wouldn't remove a judge for an appearance of impropriety. We're not talking about --

JUDGE BOWIE: Not this time. Just when he or she stands for election next time.

MR. HARRISON: Margaret. Then Tom.

JUDGE McKEOWN: I have lots of questions. So I'll start with one. Then I assume we'll be able to get back. So I'll stick with the appearance of impropriety because both Marla and Steven are talking about that.

I just wanted to clarify, Steven, I think at some point you suggested that perhaps impropriety didn't actually have any meaning, but then you, kind of, circled back to say that it does. And it seems to me that, from everything I've read in the area both on the federal and the state level, that it does have some texture and meaning that's been given to it certainly by precedence.

10:39 1 So I wanted to first clarify what you're
10:40 2 actually saying about the term "impropriety."
10:40 3 MR. SCHECKMAN: I think what I'm saying is that,
10:40 4 No. 1, putting aside the case law from everybody's
10:40 5 different jurisdictions, the text of Canon 2A does
10:40 6 provide some meaning and definition to the term
10:40 7 "appearance of impropriety."
10:40 8 But, secondly, you're absolutely correct.
10:40 9 That each one of our states, then, in case -- over the
10:40 10 last 25 years, in case after case, has defined and
10:40 11 explained what facts and circumstances will constitute,
10:40 12 quote, the "appearance of impropriety."
10:40 13 And so I think it's also -- you're right.
10:40 14 It's defined that way as well.
10:40 15 JUDGE McKEOWN: So that then is, kind of, my next
10:40 16 question. Certainly, and you gave some good examples,
10:40 17 if you have a violation under 2A, then it, kind of, is
10:40 18 almost coincidental, like a Venn diagram, they
10:41 19 overlap -- impropriety in A, impropriety in B,
10:41 20 impropriety in C.
10:41 21 And my question is, from the experience of
10:41 22 members of your association, is there also, sort of, a
10:41 23 Venn diagram that's not a perfect overlap and you have
10:41 24 the appearance of impropriety out here, but it doesn't
10:41 25 overlap 100 percent with A, B, or C, but it's something

else?

MR. SCHECKMAN: You mean when you can't fit it in anywhere else, that's where you put it?

JUDGE McKEOWN: Can it? I mean that -- is there precedent for that, or are we always putting A, B, and C under there. Is that -- am I clear? It's, kind of -- it's not really totally hypothetical in the sense of drafting and trying to --

MR. SCHECKMAN: I guess the way I would put it is -- and in following on what Marla just mentioned to you is that sometimes you can't prove the impropriety, and I'll give you an example of some case -- another set of case law that we have in Louisiana.

In our latest case in 1998, we had a judge, who engaged in an extramarital affair with a convicted felon, who she sentenced to five years at hard labor for an armed robbery. So the fellow gets out of prison, and then she engages in that affair with that person.

Now, certainly, if that affair had been ongoing during the time the case was pending before that judge, that would be -- we would be getting closer to, not the appearance of impropriety but actual impropriety.

How was that case handled? We'd have a recusal situation. We may have ex parte communications.

We may have criminal conduct. But this wasn't the case. We had somebody who possibly could come back before her on parole revocation, did not come back before her, but it was out there.

Of course, it becomes public -- the public knows that this judge now is engaged in an extramarital affair with somebody she sentenced to five years of hard labor. That is an instance, again, of a Canon 2 problem.

It's an appearance of impropriety. Why? Because the public confidence in the integrity and the impartiality of the judiciary was undermined. I don't think there's any question about that.

JUDGE McKEOWN: That was really my question. Is it always tied -- if you can't find somewhere else to put it, does it mean that there wouldn't ever be an impropriety that also didn't find itself under a violation of integrity and impartiality. And it may or may not. I don't know.

I'm just trying to understand, in your charging situations, if you ever charged Canon 2 without one of the underlying principles.

MR. SCHECKMAN: That would be -- the case I just gave you would be a situation, where we would charge solely Canon 2 and we would cite Canon 2A. We wouldn't

charge any other canon. That would be it.

JUDGE McKEOWN: Okay. I understand. Thank you.

MR. HARRISON: Tom.

MR. FITZPATRICK: I wanted to follow up on this same point and ask you, Marla, to follow up on your suggestion on this very point. Because where we, kind of, started out with this group was, well, there's this appearance of impropriety thing, but, actually, it's, kind of, a throw-in because we always charge something else specifically in the code.

Then we come to find out that this isn't really the case -- that sometimes you do just bring these charges under the appearance of impropriety. And I would very much like to see, kind of, a summary or, sort of, a, kind of, background of when you do that.

You know, I have to tell you, candidly, in listening to your couple of examples, I'm pretty underwhelmed by your prosecutorial ability to charge somebody in those fact matters that you told me, I mean -- and I'm a prosecutor.

But, I mean, you know, if the judge is having an affair with somebody -- I mean, so what? I mean -- and, you know, if the judge wants to hire somebody, so what? That's my reaction.

So I want to see what you guys are -- kind of,

10:45 1 the patterns and what you're charging them with just
10:45 2 under 2A.
10:45 3 Because I have to tell you, just from your
10:45 4 little vignettes today, you didn't persuade me that this
10:45 5 was impropriety or an appearance of impropriety.
10:46 6 MS. GREENSTEIN: Not to sound defensive, but these
10:46 7 are supreme court decisions that -- from our states,
10:46 8 that are defining this. This is not something we are
10:46 9 just charging.
10:46 10 MR. FITZPATRICK: Well, yeah. But if we want to --
10:46 11 you know, we, kind of, get to invent the world here, the
10:46 12 new world. I mean, you know, should we really be using
10:46 13 this standard as an independent basis of discipline?
10:46 14 I mean, you know, I have to say, I'm -- you
10:46 15 know, if the judge sentenced somebody, he goes off, does
10:46 16 his time, years pass, she enters into a liaison with
10:46 17 this person, I don't know that's some reason to be
10:46 18 pilloried in the public or whatever.
10:46 19 Now, I mean I don't have everything in front
10:46 20 of me, but, you know, I have to say -- I understand the
10:46 21 supreme courts are opining there, but, you know, I have
10:46 22 a little difficulty with the proposition that somebody
10:46 23 can be subject to a public scandal and/or discipline for
10:46 24 this pretty loosey-goosey term.
10:46 25 And I was a much more -- I was much more

content when I found out, yeah, but that's, kind of, throwing it in. We really actually have something specifically that we charged about. Now you guys are telling me, "Well, no, we go after people on this wonderful standard."

And Jim has been quiet. We've heard about the Arkansas commission too and appearances of impropriety. So, you know, we have some -- I don't think it's just me -- we have some heartburn on this as an independent basis.

MR. HARRISON: Seth, and then Bob, and then the lady from Alabama.

MR. ROSNER: If I understand, Mr. Scheckman, your position on the substance of -- the 2 -- Canon 2 issue, what you're really saying is that 2A simply informs the language of the canon and that they're read together.

MR. SCHECKMAN: That's correct.

MR. ROSNER: Not separately.

MR. SCHECKMAN: That's right.

MR. ROSNER: Have, as, if you will -- as prosecutors, have any of you had problems in using Canon 2 independently in charging? Have any of your members experienced any difficulties from your discipline office's viewpoint?

MS. HENLEY: Well, I don't think so.

10:48 MR. ROSNER: Have you had pause, in fact, I guess, in some of the cases, where you might have charged only under Canon 2A?

10:48 MS. HENLEY: Well, I think probably for most of us, when we're guided in our commissions and we're guided by case law and the supreme court and all those definitions about whether the conduct is conduct prejudicial and whether there's an action of impropriety, that's already two things that, you know -- it's just not done as much in, kind of, the abstract of it -- is this, you know, somehow academically wrongful conduct? And they're usually referring a great deal more to, you know, for us, 40 years of Supreme Court case law with what's a violation.

10:49 MR. ROSNER: Isn't it fair to say, though, that any judge under 2 and 2A is going to be intensively fact driven. It's like defining negligence. It's going to depend on the facts of that particular case.

10:49 MS. HENLEY: Right. And I think we can't escape the framework that, in our supreme courts, in dealing with the concept of discipline -- have all said, in large part, one thing we are doing here and the primary purpose is to enforce high standards of conduct.

10:49 I think somehow this is where this falls.

10:49 Very often we see our supreme court saying,

for example, in a situation where you do not prove an improper ex parte communication, when the judge meets with one side in chambers, there's -- you fail to establish that the case was discussed, but you'll still have the supreme court saying,

"But the problem is the judge shouldn't be meeting in chambers with one side of the proceeding that's going to be on the calendar in five minutes, you know, when the other side is not there."

There's no ex parte problem been established in terms of a communication, but this creates a real appearance problem. And part of our purpose here is enforcing high standards of conduct. And we can't, you know, let go or the supreme court won't let go

"You didn't prove an ex parte communication. It looked terrible, but we'll ignore the appearance of impropriety."

I think that's often where they end up. And it's because their purpose is not always looking and saying

"We're here to impose discipline, you know, from a, sort of, penal standpoint, but we're here to enforce high standards

10:50 1 of conduct and again, you know, embracing
10:50 2 all that that involves."
10:50 3 MR. ROSNER: So there's really a direct link
10:50 4 between this and the aspirational aspect.
10:50 5 MS. HENLEY: I think all this comes together. What
10:51 6 the purpose of discipline is and the enforcement of high
10:51 7 standards and all of that falls together.
10:51 8 MR. HARRISON: Bob and then the lady from Alabama
10:51 9 and then Peter.
10:51 10 MR. TEMBECKJIAN: Just on the two points that Tom
10:51 11 raised, an observation and then a question for my
10:51 12 colleagues.
10:51 13 In terms of the evolution of the commission's
10:51 14 understanding of the uses of -- or the application of
10:51 15 Canon 2, the points that I've been trying to make over
10:51 16 time is that Canon 2, in and of itself, is not charged
10:51 17 without some subtext, not necessarily another canon,
10:51 18 just as Canon 4 is never charged by itself without some
10:51 19 subtext to Canon 4, and any one of these canons, when
10:51 20 read independently and without reference to the subtext,
10:51 21 is as vague or difficult to fathom as any other.
10:51 22 So one does not -- one does not violate or get
10:52 23 charged with Canon 2. It's 2A or 2B or 2C as is this
10:52 24 case with Canon 3. It's not just Canon 3. It's 3A,
10:52 25 3B1, 3B2, and so forth. In that respect, no one --

10:52 1 although a court might in shorthand describe an
10:52 2 appearance of impropriety as the misconduct that
10:52 3 occurred, never without some subtext definition or
10:52 4 allegation that the judge was able to defend against.
10:52 5 And I gather that's the sense that
10:52 6 Steve Scheckman was trying to underscore.
10:52 7 MR. SCHECKMAN: Not as articulate as that --
10:52 8 MR. GEYH: I want to follow up. Are you just a
10:52 9 group in unison on that one? In other words, what I had
10:52 10 understood everybody else to say before was that there
10:52 11 were times in which there wasn't a 2A or a 2B or a 2C,
10:52 12 that there were times when none of those -- A, B, or
10:52 13 C -- were specifically met and that you needed to go on
10:52 14 the appearance of impropriety by itself.
10:53 15 MR. SCHECKMAN: It never -- would never happen.
10:53 16 Would never happen.
10:53 17 MR. GEYH: That's important to note.
10:53 18 MR. SCHECKMAN: Would never happen. My commission
10:53 19 wouldn't -- it would just never happen.
10:53 20 MR. HARRISON: I think there were a couple ahead of
10:53 21 you.
10:53 22 MR. TEMBECKJIAN: I wanted to ask the question, if
10:53 23 I could. In terms of Tom's observation that we're, sort
10:53 24 of -- we're writing a book here or we're starting from
10:53 25 scratch or what have you -- the code, the model code, is

adopted and refined state by state. And for the last 30 years it's basically been structurally intact with various modifications here and there -- most recently, I guess, the 1990 revision and then last summer's.

Do you perceive some sense of difficulty in the individual states in adopting a new code if the model code structure, as we've been living with it for the last 30 years, is radically re-formed? If, for example, the canons are replaced by subtext and what if what is in Canon 2 now is broken up into three or four different places, what's likely to be your supreme court's reaction or take on that?

MR. BADAMI: I think in my state it would be impossible for me to guess what would happen. But precedence would be that Supreme Court would appoint a committee to review what the ABA has as a model code and then compare it to what we have and then come up with a recommendation as to what would be the most effective and helpful code for the state. And I just can't tell you -- I couldn't guess what they would do.

MS. GREENSTEIN: I'll go out on a limb with my state because I worked very closely with them. After the model -- 1990 model code, they put together -- our state supreme court put together a special committee to look at the 1990 code and compare it with ours.

10:55 It was a three-year process that we used in Alaska to tailor the improvement that the 1990 code made to the previous ones from the early '70s. And in the interim, we had a lot of case law in our state that we then incorporated, as we could, into the language of the canons too.

So my code looks very different from Steve's code. It looks a little bit more similar to California's code, but we have different language. And because it was a three-year process -- I think we started in '92, we finished in '95 -- given that the work that went into it and how the current code works in my state -- it works exceptionally well -- I can't see them taking on another monumental effort to undo something they put so much time and effort into doing just a couple of years ago.

MR. HARRISON: Miss Childers and then -- I'm losing track here -- Carol.

MS. CHILDERS: I wanted to say it's, kind of, troubling to me that there seems to be, kind of, an understanding -- and this kind of ties into the previous discussion about aspirational versus whatever -- but, kind of, an understanding that the only function of the canons is to function, kind of, as a penal code and therefore everything in it has to be structured towards

that end.

In point of fact, that is not how it's used and perhaps -- in my state it's not primarily how it's used. And every state has different ways in which they tie their canons into the disciplinary process.

Another aspect of this is that, even when it is used in a charge, when you look at the underlying philosophy and history, it was not to be seen as a means of punishing the judge but as a means of upholding the public's faith and trust in the whole judicial system and maintaining the underlying trust that's needed for the whole system to operate effectively.

So much of the adequate or the -- actually not just adequate but the excellent functioning of the judicial system in the state depends upon the people's trust in it and that there are many things that a judge can do that is not actually malum, per se, one might say, but still can be terribly, terribly damaging.

And when you look at it, though, from the standpoint of thinking that this is a penal code, then you have very much different kinds of concerns than when you look at it from that other facet of what it really is intended to do.

I would also say that one of the things I mentioned before is that it's not just used as a penal

effort or for that kind of standpoint. It's used in a disciplinary event as distinct from a disciplinary process.

We do, at least in my state, a lot of things via newsletters, via public education, and then sometimes in the process of deciding whether or not to charge, that really comes within educational -- has educational framework.

We have a lot of judges that do things that the public would misunderstand and that we would perceive to be improper, but you would never charge them or perhaps you wouldn't be able to charge them because you couldn't prove impropriety, but they themselves very easily, when they get in there and be talking with them about it can see, "Oh, yes, I can see how that looks very bad."

In other words, kind of, as a tool to maintaining the high standards of conduct, it's very useful to have a more generalized provision in there because it's something that someone, who might be very defensive and very unwilling to admit that they actually did something wrong -- they might be very willing to admit that what they did looked bad and that -- and it might very well effectively prevent there from being continuing problems and thereby elevate the entire

10:59 1 stature, you know, of the judiciary and prevent a lot of
10:59 2 public clamor about things that weren't actual -- or
10:59 3 they may have been actually improprieties but ones that
10:59 4 you couldn't actually prove.
10:59 5 And then the final thing I've noticed this
11:00 6 doing a survey of all the states that, in many states,
11:00 7 that's not what you charge. You don't charge a
11:00 8 violation of the canons. You charge -- I can't even
11:00 9 remember. In Alabama, we do charge the canons, but I do
11:00 10 know in some states that's not what you can even charge
11:00 11 except as maybe that proving something else like conduct
11:00 12 prejudicial to the administration of justice, which
11:00 13 brings the judiciary -- there are a number of states
11:00 14 that the canons aren't even what's charged except
11:00 15 perhaps as a subsidiary to charge something else.
11:00 16 MR. HARRISON: Let me just announce the order
11:00 17 because I've got lots of people wanting to talk. Peter,
11:00 18 Carol, Don Hilliker, and then Keith Stott. Those are
11:00 19 the four I've got.
11:00 20 JUDGE BOWIE: I wanted to add we talked a moment
11:00 21 about recusal as one remedy for these kinds of
11:00 22 situations. Another that the Supreme Court has followed
11:00 23 since 1927 in Tumey vs. Ohio has been reversal of the
11:00 24 decision based on appearance of impropriety.
11:01 25 Take Batson. It's a challenge of

peremptory -- use of peremptory challenges. It's all on an appearance basis. So the Supreme Court judges, just as Ms. Childers says, follow this kind of alternate approach.

What I think would be particularly helpful, particularly, given the conversation we're having, is follow up on what you offered a minute ago, Marla, and that is to take the specific Canon 2 cases that you're talking about and tell us -- go back and -- not putting you on the spot here -- but give us something that says "Here's how this case was charged under our particular state's provision or mechanism" and take it from there.

Because one of the things that's nagging at me is this constitutional notion of, sort of, ex post facto where something becomes penal by virtue of somebody's post hoc decision that there is an appearance that arose from it, when there is not something else and when there -- the other remedies that are available, such as the Tumey reversal kind of situation on due process grounds is not an adequate way to address that situation without making it penal or punitive as to a particular judge in that context. I don't know the answer.

But to aid the discussion that we're having, in particular, and the discussion we've had in our prior sessions, it would be particularly helpful for me to see

how, in these Canon 2 situations, they were, in fact, charged so that we can see how that language works versus the canon we have or the canon we're asked to look at.

MR. HARRISON: I would like to inject a couple of things at this point. Number 1, it would be very helpful if you all would make good on the offer to provide us with a memo -- and I think the point that Peter makes is very useful. I would like to know not only how the judge was disciplined, if at all, using the appearance of impropriety but how the judge was charged in that case.

The second thing, just so you're reassured, we've had a lot of discussion about this in our commission already. And as you might have inferred, one of the concerns which I'm sure you've all had frequently in your work over the years is the inevitable due process concern about the vagueness or the apparent vagueness of the standard, and you've spoken to that.

The other thing I want to mention, just to allay some maybe unwarranted concerns, we don't view this as a penal code. But we do believe -- at least speaking for myself, I think that -- and I think you would have to acknowledge that it has disciplinary enforcement purpose among others.

So we have to be conscious of the various functions that this code is going to play. Certainly aspirational, where we've got judges who are keeping us very well aware of the distinction between public servants and lawyers.

Lawyers would like to think they're officers of the court as well, but we certainly understand the reason for the distinction between holding judges to perhaps even a higher standard. That said, we also recognize that the code ultimately has to have a disciplinary enforcement component or function and it has to meet the standards necessary to justify disciplinary enforcement.

So we're fighting with that tension and trying to figure out how best to resolve it.

MS. GREENSTEIN: Can I just respond. I just didn't want to leave without the sanctioning aspect and whether it can be handled within the court system. A lot of appearances of impropriety cases are off the bench totally. So there's no court process to correct the appearance deficit.

JUDGE BOWIE: If you've got an off-the-court event, such as a violation of the law -- whether it's adultery in Louisiana, if they have a statute against adultery -- or other kind --

MR. HARRISON: I don't want to inhibit these tOte-a-tOte's, but we're got a lot of people who need to talk and want to talk, and I want to try to get as many people involved as possible.

Carol and then Don.

JUDGE AMON: Well, maybe already all too much has been said about this. But I just want to clarify, Mr. Scheckman, I think, if I understand what you're saying correctly, you would have some difficulty with a standalone rule -- let's call it, when things are divided into rules -- with a standalone rule that referenced only the appearance of impropriety? That would be very problematic? I mean you would find that problematic?

MR. SCHECKMAN: I would.

JUDGE AMON: And would that be solved, assuming you want to keep that -- that kind of thought there and in line with what the lady behind you said about aspirational -- would that be solved by the language "should"? In other words, as -- if it were to be a standalone rule, would "should" solve the problem as opposed to the "shall," on the theory that we're not talking simply about penalties and discipline, that we want to encourage high standards of conduct that might not result in discipline?

Would that solve the problem, or should the concept simply never be a standalone rule?

MR. SCHECKMAN: I don't think it should be a standalone rule. I think it needs text. I think it needs substance. I don't think going to "should" if that were to be aspirational, for instance, in our -- we using -- we have a new code based upon our -- the '90 model code, but in our older code, which used a lot of that "should" language, our supreme court said, "Fine. 'Should' is still enforceable. So 'should' is not aspirational. Otherwise," our court said, "none of the code has any meaning and it has -- and none of it then is enforceable. And what's the point?"

So I think it -- certainly there needs to be a canon, and there needs to be text that defines and explains that canon, and it all should be enforceable really.

MR. HARRISON: Don.

MR. HILLIKER: Yeah. I guess I'm going to go to the -- I guess, the third point that you raised about changes in format. And I would like to hear more about your concerns about a change in format. I know that I come to this code with not a great deal of background before I was on this commission.

I, quite frankly, found it quite confusing and

hard to follow. And, frankly, it reminded me of -- a good deal of my experiences, you know, many years ago, when we were talking about the code of professional responsibility for lawyers, which had canons, which had ethical considerations, and which had rules, and, I think, about the aspirational issues that exist for lawyers, though, certainly lawyers as public officials are in a different situation.

But I'd just like to hear more about why you think there shouldn't be a change in format. Because I do find it personally pretty confusing to follow.

MR. SCHECKMAN: One thing I can say is that we've all spent many years -- and not just this group of lawyers but our courts have spent many years working with the code. I can tell you in Louisiana our code of judicial conduct is a very workable document, as is -- all the justices of our supreme court who ultimately interpret it and impose discipline are intimately familiar with it.

When I appear in -- there's oral argument, there's no question about the meaning, where it is. And then we have established a body of case law, which, I think, is really important thing. We have a body of case law, based upon the existing code, that further defines, explains every one of the canons and the text.

11:08 1 And certainly that would make -- if there is
11:09 2 wholesale changes, that would make -- it would make it
11:09 3 much harder for all of us, in terms of working with the
11:09 4 document, to then -- "Okay. Now we have a whole new --
11:09 5 whole new code, and we have to compare the preexisting
11:09 6 case law, and we have to" -- it's going to make it hard.
11:09 7 MR. HILLIKER: That same thing happened with
11:09 8 lawyers.
11:09 9 MR. SCHECKMAN: Sure.
11:09 10 MR. HARRISON: Just to play devil's advocate,
11:09 11 Steve, I mean, having been around 43 years in the
11:09 12 practice, I've heard that every time there was a
11:09 13 significant change in any substantive body of law, you
11:09 14 know, for a commercial code, you know, a corporation
11:09 15 act, as Don points out, the rules of professional
11:09 16 responsibility.
11:09 17 And the thing that concerns me -- and I -- I'm
11:09 18 not telling any tales out of school -- I told this to
11:09 19 the commission on the first day of our first meeting --
11:09 20 and Keith can vouch for this -- my only experience with
11:09 21 the code previously was either as the lawyer for a
11:09 22 respondent judge or judges or as special counsel of the
11:10 23 commission.
11:10 24 And with all due respect, I found it a
11:10 25 nightmare to work with. Because you've got aspirational

stuff mixed in with normative stuff and, you know, for the -- it may be a hardship for you if it changed, but I dare say it would be a big improvement for the people who don't work with it every day and who have to have a clear explication of the rules they're supposed to follow and, where appropriate, the distinction between what are the rules that we've really got to adhere to and what are the aspirational things which inform those rules -- that's what prompted us to at least put this down as a tentative formulation.

And I have to confess -- probably prematurely -- I, for one, am not persuaded by the simple fact that it would be a change that would be awkward for people who are very conversant with it and experts in using it, unless you could explain to me why on the merits it's better, not simply because it's less convenient to have to deal with a changed format.

MR. SCHECKMAN: Well, I would suggest to you that I do think it is workable and, not to criticize you, but that --

MR. HARRISON: I'm criticized by experts all the time.

MR. SCHECKMAN: I think, in fact, we find it not difficult to work with and, certainly, we may be dealing with it every day, but I think the proof is in the

11:11 pudding that our courts, our respective supreme courts, also find it a workable document.

I have not -- which is not to say there aren't some criticisms and people may want to tweak a particular -- some of the text, particularly in light of the White case, but overall it's a workable document, and I have never heard a complaint from my justices that it's confusing, they don't understand it. That has never come up.

MR. HARRISON: Keith Stott, I preempted you. I had you on my list. And I don't want to do that. Because I'll be in trouble back in Arizona.

MR. STOTT: Well, Mark, I don't know if you'll be in trouble. I'm a little frustrated because, as we go around and start switching issues. When I raised my hand, it was to reply to one issue and now it's a different issue.

It reminds me of, when I was a child, I enjoyed old-fashioned merry-go-rounds. You know, it depends on when you happen to hop on that merry-go-round what horse happens to be being -- you can ride.

All commissions are the same. They're all quite different. And the members of this body, the Association of Judicial & Disciplinary Council, are quite different. And who you happen to be talking to

will give you -- you know, you'll hear a certain kind of reply.

For example, Steve prosecutes cases all the time. That's all he does. I never prosecute a case. I have an attorney who'll prosecute the case. So it's a great variety of experience we bring into this.

And what I was going to say earlier and tie it into this is that my greatest concern -- and I think from what you've said, Mark, you -- this body may, in fact, have this in mind, but I'll get it off my chest by saying it. I do hope that you will keep in mind the various contexts in which the code is actually applied.

Our office, for example, receives 350 complaints a year against judges. Only on average two of those cases will end up in formal proceedings, where we're ever really concerned about charging, which means the rest of the work we do is all aspirational, guiding judges, helping them.

We may issue reprimands, informal sanctions, we may issue advisory letters, which are no longer sanctions at all in the state of Arizona. And so we're applying the code in a variety of situations, where we're trying to help judges and instruct judges.

In addition to that work in our state, last year I personally was involved in about 140 to 160 -- it

11:14 varied last year and the year before -- of giving advice
11:14 to judges, where very often what we end up doing is --
11:14 the judge would call and say,
11:14 "Well, can I do this?"
11:14 And we'll talk for a while, and he says,
11:14 "Well, where does it say in the code I
11:14 can't do this?"
11:14 And I'll say,
11:14 "It doesn't say in the code you can't
11:14 do it."
11:14 "Well, I can go ahead and do it,
11:14 right?
11:14 "Well, how's it going to look to the
11:14 public?"
11:14 And he'll say,
11:14 "Well, it's not going to look very
11:14 good, is it? If the test is what appears
11:14 on the front page of the paper, then maybe
11:14 I shouldn't do it."
11:14 That's how the code gets applied in a very
11:14 different way, and you shouldn't lose sight of this
11:14 difference between the prosecutorial side, which takes
11:14 up a lot of time but a minimum number of cases
11:14 throughout the system, and the aspirational part, which
11:14 is very important in education.

11:15 And I have to tell you, in dealing with 350 members of the public each year, who are really coming in because they saw appearances of impropriety, and having to explain to them why they weren't appearances of impropriety is a very difficult task. So please keep this mind how this is applied.

The one other issue having to do with the context is you should also keep in mind that our state constitutions guide what we do as well. And in Arizona we have a provision that's very similar to what actually appears in the constitutions of other states, if not, whatever their particular basis is for establishing their rules. And we have a number of provisions that say judges may -- and I'm paraphrasing -- may be prosecuted for these reasons. But the last one is "for conduct that brings the judiciary into disrepute."

So you can't avoid the appearance issue. You have to give --

MR. HARRISON: Keith, I gather that a substantial number of the matters that you deal with result in reprimands, many of which are private, correct?

MR. STOTT: Yeah. That will vary from state to state, but the reprimands in our state are private as are the admonitions.

MR. HARRISON: Do you think that the judges who

receive reprimands view those experiences as aspirational?

MR. STOTT: Well, it depends across the range of that.

MR. HARRISON: Well, I mean I'm not being -- I'm not trying to be cute. I mean I've represented judges, who have gotten reprimands, sure, for whom it was devastating. And so it may have been a motivation to improve their conduct. But it was also a very difficult experience.

And so I mean I'm a little -- I'm having trouble with all of the references to the application of the code to fulfill its aspirational goals because, for the judges who are affected by those prosecutions -- and they view them as prosecutions -- it isn't just aspirational. I can tell you that.

MR. STOTT: Yes. And one of the biggest disadvantages is we don't know what counsel tells their client. And sometimes what they tell their clients isn't exactly what we --

(Laughter.)

The point I want to make is that sometimes we have -- in our state, we have clear definition, for example, of what an admonition is. Some judges just sweat over getting those; yet it's very clear they're

11:17 warnings.
11:17 MR. HARRISON: I always tell them you're
11:17 soft-hearted, Keith, and that they shouldn't worry.
11:17 MR. STOTT: That's actually the truth. That's why
11:17 you win your cases.
11:17 JUDGE McKEOWN: Marla, could you include some
11:17 standpoint of -- some are from state constitutions and
11:17 others are statutory, I know, that perform that, sort
11:17 of, quote "basis" on which you then sometimes apply the
11:17 canons and sometimes don't. But it would be helpful if
11:17 you would give us some --
11:18 MR. HARRISON: Let's see. Who have I -- I think
11:18 this gentleman back here. Let me see if I can find your
11:18 name here.
11:18 MR. MONAHAN: I'm Pat Monahan from New Jersey.
11:18 MR. HARRISON: Okay. Before you start talking, who
11:18 else was in line here? Okay.
11:18 MR. MONAHAN: Actually, Keith stole a lot of my
11:18 thunder because it is true for us too that the matters
11:18 that go to public hearings are just a drop in the bucket
11:18 compared to the majority. We have maybe five or six a
11:18 year out of 300 complaints, more or less.
11:18 But what I want to focus on, if I may, is the
11:18 training aspect of the code of judicial conduct.
11:18 When we have a new judge come in, either I, as

in the case of most -- when we have new municipal court judges appointed -- or Justice Handler, retired Justice Alan Handler, as the chairman of our committee -- one or both of us train the new judge group in what they're supposed to do, from the ethical point of view, what conduct becoming an officer is.

And so we take the code of judicial conduct, and we start logically, as the code does, with the primary value, which is public confidence in the integrity and the impartiality and the independence of judiciary. And then you look at what judges should do to preserve that value, and that is what it segues right into.

I don't follow all of this business. I went through Catholic grammar school; so I know about parsing the catechism and what's a mortal sin, what's a venial sin, and what's not. But I've got to tell you, to my mind, that Canon 2, that's a general rubric that encompasses A through C. And that's a conclusion of law that a court or a commission or somebody reaches after seeing the facts underlying the thing.

Everybody's got noticed pleading just as in courts. And you say, "Hey, here's my conclusion of law." But for the code you've got the general rules of what it is to be a good judge and, by definition, what

it would be -- to violate those rules is not a good judge.

Then you move into specifics, on the bench conduct and conduct off the bench. And ours is a little different than yours because we didn't adopt what you did the last time around or our court didn't adopt the whole thing -- lock, stock, and barrel.

So I really urge you not to play around with -- and forgive me if that's sounds pejorative. It's not meant that way or disrespectful. But please, you know, when you think of it, think not only of the training -- because I'm an old guy and I can't learn new tricks very well -- but we also have judges who have been in office for a long time and they know the code as it is. Now they have to switch to a different mode of thinking. They've been there. They know it. They don't need to start learning a new thing.

And the way you have it now is good. It's logical. It segues from the general to the specific through various things judges do.

And that's all I have to say. Thank you.

MR. HARRISON: Ellen, are you next?

JUDGE ROSENBLUM: Yeah. I think so.

Of course, in Oregon, where I come from, we took this out of our code in 1996, and we seem to be

doing okay without it. But that's not really the point I wanted to make.

As we all know, over 80 percent of the judges in the country are elected and, when you're up for election, even an admonition or a letter of reprimand or whatever is -- can be quite devastating.

I don't know how many states make those public, but apparently some do. And even if they don't, which -- often they will come to the attention in some way, shape, or form of the electorate, which maybe isn't a bad thing, but I know judges who actually have said to me that they wished that they could have had an opportunity for a hearing rather than receiving an admonition or a reprimand. Because, at least that way, their name could have been cleared.

So I think that, when you view the code as more than, you know, simply disciplinary, I would agree, but at the same time the repercussions can be great.

And I would suggest that we consider a separate -- proposing a separate, more hortatory type of statement as many bar associations have done, who have adopted more of a rule approach to their disciplinary code, a code of professionalism, or whatever you want to call it, that is truly aspirational and that can sit next to the disciplinary rules such that we're all, you

know, protected in the due process format and, as well, still strive to meet those aspirational standards.

MR. HARRISON: Jim. Then Bob.

MR. WYNN: I just go back to the point Keith made earlier. I wanted to get a clarification on it.

I think generally, when you look at the code, almost all judges want to do what's right. So when you send them any kind of a letter, be it advisory or admonition, they're going to do everything they can to do it.

What we're dealing with now is a whole different environment. We are dealing with candidates and judges who want to change something. They want to do that extra judicial activity that you say they can't do.

You send this letter saying, "I advise you not to do it."

What do you do when they say "Shove it. I'm going to do it anyway."

Is there a disciplinary procedure that follows that? Because that's where we are. I mean that's where we are with -- in the cases that are coming before the court now, is we have a kantry of people who are coming up, and they want to challenge these things. They want to do those extra judicial activities. They want to do

11:23 those things that you say are an appearance of impropriety.

And they say, "No, it's not. I can do these things."

And what do you you do when you send an advisory letter -- and you may not even gotten to that point yet but, as I say, most people, who are going to say, "I'm going to do it," they're going to do it -- but what do you do? Is there a procedure that -- if you send that letter, and he says, "You can take this letter and you can shove it. I don't accept it"?

MALE SPEAKER: There are three or four points you made, and it's hard to respond.

JUDGE WYNN: Respond to the last one. What happens when he gets the letter, and he says, "No, I'm not going to respond to that"?

MALE SPEAKER: Well, you're talking about in a political context?

JUDGE WYNN: In any context. You've got a judge, you send him a letter, and you say "I advise you that you're not to do this."

And he says, "I'm going to advise you you can take this letter and you can shove it."

What do you do?

MALE SPEAKER: Then we would probably initiate

proceedings against that judge.

MR. WYNN: And what is the basis of the charge?

MALE SPEAKER: Well, I don't know.

MR. WYNN: Your letter was premised on, let's say, Canon 2 alone. It is an appearance of impropriety, but it's not enough in that context to charge, but it's enough for you send a letter to say "I advise you not to do this because it appears to be an appearance of impropriety."

He says, "You can take that letter and shove it."

What do you do?

MALE SPEAKER: In our state we have a procedure, where the judge can come back before the commission, if he wants to, and talk to the commission and explain his conduct. But what you're talking about for us would be primarily a below-the-line kind of procedure, an informal procedure. We'd discuss it with the judge.

JUDGE WYNN: And if he ignores you. I still can't get to that point. If he ignores you, are you just -- that's just the end of it?

MALE SPEAKER: Well, it's contextual. I can't give you a black-and-white answer. It all depends. You know, if the judge is -- if we're talking about a political election and he ignores us, that's one kind of

proposition. Maybe we have to go up to the supreme court on something like that.

If it's a violation of some minor provision of Canon 3 and he ignores us, we'd handle that in a different way. I mean it depends. I can't give you a black-and-white --

MS. GREENSTEIN: I can give an example of very low-level thing, where I just had -- we get these calls all the time. We have an appointed system in our state; so it's not elected. We have a vacancy on the superior court, and a district judge called me and said,

"I'm thinking of applying for the superior court position. I want, you know -- so-and-so appears in my court all the time. I want to ask her to be a reference."

And we put together some guidelines for judicial applicants, where we said that judges should not actively solicit support for their selection. So I said,

"It would be better to just list her as a reference on your application rather than approach her and ask her. Because this is somebody who might feel, you know, pressured."

So we had this conversation.

And I said,

"So tell me why you want to ask her.

He said,

"To give her some notice and, you know, make sure she's on the right page."

And I said,

"Well, can you think of this from her point of view?"

And we have this dialogue, and he ended up deciding, "Oh, I probably won't approach her."

But had he done that -- we had this conversation, it was educational -- had he gone ahead and approached her anyway, it's nothing we would do anything about.

This is just one of those just things that we apply the code in a conversation. We have dialogue. We come up with something that I would recommend, and they take it or leave it, for most of these, kind of, minor things. And that's a daily thing.

MR. SCHECKMAN: And, Judge, if I can add to that, in our experience, in the more minor cases that don't go to charges, where it has come before the commission and our commission may issue a caution letter or an admonishment, short of a hearing, short of charges, most

of the time -- I'm not saying a judge wouldn't be upset receiving it -- but upon reflection, it's usually pretty educational.

I've never seen anybody that then would say, in turn, using your words "Shove it. I'm going to go ahead and proceed with the conduct I wanted to proceed." In fact --

MR. WYNN: Except in Alabama.

MR. SCHECKMAN: Well, that's the Alabama exception, right.

The other thing is -- the other thing I would add, though, is all of our states have advisory ethics opinion services, and we work them different ways who's responsible. And that is another way that judges will ask for advice.

And I find -- I've had judges call me, and I tell them how to go ask for that advice. And the only -- the only -- the only catch that, I guess, is sometimes judges have said to me,

"Well, but if I ask for the opinion and it's contrary to the way I want to proceed, then I won't be able to do it. So maybe I won't ask for it then."

And so that does happen. But it never gets -- I've never seen a situation where any judge would say,

"Shove it." It just hasn't happened.

MR. CUMMINS: As some of you know, I came to this deliberation informed by about 30 years involved in this stuff, and when Mark initially chatted with me about the change of format, I thought -- my first reaction was, sort of, like I've heard here.

But then I reflected on the eight years when I was drafting complaints against judges in Illinois, and I realized that, you know, we started out and it was a seamless process, with a couple of rules, supreme court rules, that were nothing like the code of judicial conduct. And it was only later that Illinois adopted the code of judicial conduct.

Frankly, I believe there's a great deal of efficacy to restructuring the code now on -- I believe in it because I think it will make the system work better. And I say that from the standpoint of not the folks that are professionals in the subject of judicial discipline because, you know, after you fuss with it for a while, you can jump from Canon 2 to Canon 5 to Canon 3 in those complex fact situations.

But it ain't useful for judges, who have to be educated as well as disciplined in response to certain conduct of -- but at the same time I think it would be extremely bad judgment to eliminate the hortatory

aspects of this code. They've got to be incorporated in that rule structure.

I believe that this can all be accomplished and that -- you know, I come from a state, Illinois -- we were the last state in the United States to adopt the code of professional responsibility. It took us until 1980. We've got a supreme court that has had a history of being overly deliberate.

I think that ultimately folks will respond if it is a good document, and that's what we're trying to achieve here. But I would not give up the very important aspect of, having taught the new judge seminar in Illinois for a decade or so, it is a tool for education as well as a tool for discipline, which should only comprise a small part of the application of this document.

So where I come out is we've got to maintain the hortatory aspects but we ought to restructure the code to make it a more workable document. It's as simple as that.

MR. HARRISON: Margaret.

JUDGE McKEOWN: Just a couple of comments. I totally am empathetic to your notion of maintaining the aspiration because I think that's a very important part of the code. And what I think all these examples

11:31 illustrate is you can find an example for everything.

11:31 We ought not be drafting to the lowest common denominator when we're drafting a code that is there for the public interest. And in that way I don't think it should be so, you know, squeezed out, so to speak, that what you have there is just the thinnest of provisions that judges need to abide by.

11:32 So I think we need to keep in mind what we're doing. I keep hearing that judges find this code hard to follow. I haven't heard that from any judges, actually. So I haven't made up my mind on that point. I have to follow it every day and so do all the rest of the judges in here.

11:32 And it's not clear to me that it needs an absolute major restructuring as opposed to some reorganization and changes. So it seems to me that we could -- you know, in looking at that, it's also not clear to me that the supreme courts wouldn't adapt.

11:32 But I think we need more information on that for our commission, frankly, as to whether there would be practical -- other practical difficulties.

11:33 And you might give some more thought to that from your perspective, but I think we need to hear it from the state supreme courts.

11:33 And then a final note is that you have brought

11:33 1 up, I think, three really important points that we are
11:33 2 focusing on now, but I would invite you to go back and
11:33 3 think if there are some areas that you see in terms of
11:33 4 advisory requests, discipline, or otherwise, that you
11:33 5 think might merit a change, either in the language or in
11:33 6 an addition -- an example would be, when they added the
11:33 7 section in on "You shouldn't belong to discriminatory
11:33 8 clubs," you know. That, kind of, was a sign of the
11:33 9 times, so to speak. It was not there early on.
11:33 10 I don't think that we know, from an overall
11:33 11 perspective, if there are trends that are working their
11:33 12 way through the various state commissions and judicial
11:34 13 bodies that might be of value to us for you to suggest
11:34 14 this is an area you might look on opening up.
11:34 15 For example, Judge Wynn talks about outside
11:34 16 activities. That's an area that some judges have talked
11:34 17 to me about that they feel things are too restrictive,
11:34 18 and you're in this bind, where you are supposed to be
11:34 19 out in the community but then, when you get out in the
11:34 20 community, you run smack into this restrictions in the
11:34 21 code.
11:34 22 So if it's not too much trouble, I'm --
11:34 23 certainly would welcome, as I'm sure the other members
11:34 24 of the commission would, down the road, if you have any
11:34 25 other specific suggestions that you think we ought to

take a look at.

MR. HARRISON: I want to make sure that all of the guests who are here have had a chance to talk. We have 15 or 20, 25 minutes left before we break. And we've heard from several of you, but I want to make sure that those of you from the AJD -- I've lost track of the letters -- have had a chance to speak if you have something to offer. Because we really want to hear from you if you do.

Commission members, questions? Comments?

We're exhausted. Maybe I should open the champagne and get things rolling.

MS. HENLEY: Do you have someone coming from the California Supreme Court Commission -- Committee on the --

JUDGE McKEOWN: We have from the judges association.

MS. HENLEY: I thought perhaps you had someone coming from the committee that the supreme court established to review the code.

MS. GALLAGHER: We don't. I think we were trying to get somebody from the supreme court, but they couldn't make it.

MR. HARRISON: Bob.

MR. TEMBECKJIAN: One of the topics that we've been

11:35 1 discussing around the table at the commission is the
11:36 2 issue of whether or not there should be some reflection
11:36 3 in the model code as to the differences when a judge is
11:36 4 dealing with a pro se litigant versus both sides being
11:36 5 represented.
11:36 6 I'm not sure how to characterize what it is
11:36 7 that we're grappling with on this issue, but do any of
11:36 8 you have any comments or concerns or suggestions on if
11:36 9 and how the code should address the subject of pro se
11:36 10 representation and should there be a difference in the
11:36 11 way a judge behaves.
11:36 12 MS. GREENSTEIN: What I can add from my state is
11:36 13 our state supreme court is, through case law, giving
11:36 14 guidance to judges, where one side is pro se, and -- in
11:36 15 overturning, you know, dismissals of cases or summary
11:36 16 judgments and those kinds of things to allow more leeway
11:36 17 for pro se and actual some judicial assistance in the
11:37 18 process.
11:37 19 So I think judges initially felt that it was
11:37 20 fair to treat both the pro se and the representative
11:37 21 litigant identically and that the case law has changed
11:37 22 that so that now judges are actually required to assist
11:37 23 pro se litigants to a certain extent by giving them
11:37 24 leeway in terms of the form of their pleadings and not
11:37 25 requiring strict adherence to certain evidence rules and

those things.

The only way that I can see it being a code issue would be if there would be an appearance of bias on the part of the judge for that kind of activity. And I'm not sure that the text of the code is the place to do it.

It certainly might be something in commentary to say that judges' assistance to pro se to ensure that unrepresented litigants have a fair hearing, you know, is not an indication of bias towards that litigant or something like that. But that's the only way I can see it coming up.

I will say that the lawyers in our state like it when the judges assist the pro se litigants. I mean they've never felt -- we've had sessions on this, and I think Cindy Gray will be able to speak to this better because I know AJS did a whole study on the pro se litigants and their effects on the court.

But there's no -- in our state, there is no reluctance to have the judges more involved in those situations. It actually helps the process.

I'll say, though, that pro se litigants are a great source of complaints with our commission about how they were treated, rightly or wrongly, by judges and, particularly, after they lose their case and then they

want to go every avenue.

And then the second thing and something we're dealing with in Louisiana with the --

MR. HARRISON: Excuse me, Steve. What are the -- is there a predominant theme among those complaints?

MR. SCHECKMAN: Generally, bias and prejudice, fairness. The judge is close friends with the lawyer, or there was campaign contributions from the lawyer or the law firm and, of course, they couldn't be treated fairly and maybe they lost on summary judgment -- the whole host of complaints.

They don't understand the proceedings in the technical side of it, and they certainly, if somehow in some way if somebody -- if not the judge but somebody on court staff could at least be able to walk them through that kind of -- the procedures without engaging in or being accused of engaging in ex parte communications.

The other thing that we're dealing with is the expansion of drug courts, which is, sort of, an offshoot of the pro se litigant because that person keeps coming back into court often without counsel. And then the judge is -- it's become more like a social work court. And so there's those types of issues.

I've had judges, who are friends of mine, who talk to me about that all the time. And certainly

there's not a hearing in the sense of the merits, but there's ongoing proceedings of "How are you doing? Did you pass your tests today?" et cetera. And I think there is -- the more we go in that direction in drug courts and other areas, the more we're going to need some special rules because, certainly, there are some ex parte communications going on. No doubt about it.

MR. FITZPATRICK: And what shall we do with that, Steve?

MR. SCHECKMAN: I think there needs to be some exceptions in that and I'm not here to suggest exactly how that should -- what the language should be, but there certainly needs for -- to be some exception, but when you have -- when you, all of a sudden, are switching to a rehabilitative model and you have judges who are judging but at the same time you're really, sort of, establishing a one-on-one relationship in making and encouraging.

And, you know, sometimes the person tells you, yeah, "I just got high yesterday." And are you going to revoke them, or what are you going to do? Are you going to give them another chance? And there are a lot of conversations going on.

MS. GREENSTEIN: There's also recusal issues for when they fail in the program.

MR. SCHECKMAN: Right. I can't tell you I have the answers. I just know it's an offshoot of the pro se issue.

MR. ROSNER: The thrust of the first question that triggered this dialogue was not so much from the viewpoint of complaining pro se litigants but whether or not the commission or the code can draw a line beyond which a judge should not go in trying to be helpful to those pro se litigants. And that's the hardest part of it, you know, where a judge does go -- clearly go beyond what's appropriate.

And I have no way to define that either at this point either. The complaints then come from counsel who appear in the proceeding. And I think that's one of the things, at least, that we were -- that the commission was wrestling with. Is there a way to draw a line in areas, where, again, it's so fact specific?

I think what's so hard about this whole area is it's a problem for the justice system. It's not purely an ethical problem for judges in the court. I mean it's unfortunate it's something that's not being solved at every other point along the way that would make it so you don't, all of a sudden, say is it okay for a judge basically not to be impartial and not appear

to be impartial at all times in all proceedings.

And if we had sufficient resources in the courts to have training for pro se's, more advisors in family court, and people that could help people through the process and -- so that you don't end up dealing with this in ethical rules, I think that would be preferable for everybody.

Because it is hard and, once you cross that and you say, okay, now we make a rule -- and even us dealing with litigants, it is -- it's the family law situation, where one is represented by counsel and one is not. And this spouse who's not represented by counsel feels that huge amounts of, you know, leeway is being given to the unrepresented pro per, who takes advantage of the system and constantly doesn't do something and the judge is accommodating.

And that's our complaint, and it's also where, you know -- when you start to draw that line and say, "It's okay to provide some assistance." I think it's -- that's very, very hard to articulate in the abstract.

MR. HARRISON: Did you have a followup that you wanted to ask the --

JUDGE McKEOWN: Yeah. Mr. Scheckman was talking about drug courts. And I think both drug and family courts are two areas where the ex parte possibilities

are more prominent. And we do have a rule on ex parte, but I think we need to -- considering how do you leave an out for that.

So just to add to your -- our shopping list from you, if you had some examples as to whether, in some of the states that you represent these -- for example, drug court or others -- are dealt with by local rule, you know, that permit certain kinds of ex parte contact, it may be that the kind of exception we would write, obviously, wouldn't be tailored to everything, but might permit something like "except as otherwise permitted by" or something like that.

But, again, to draft that appropriately, I think it would be helpful for us to know some examples, not of what the rules are but of the form that they take. You know, whether they are parts of the codes of procedure or whether they're, sort of, for example, internal court rules or something like that and how courts have already been getting around the ex parte problem.

Because that's, I think -- you know, we're probably not -- you're not going to see us redrafting this thing for at least another ten years. We might be dead by the time it gets redrafted again. So we'd like to have some flexibility in there.

MS. HENLEY: I think that was -- the ex parte is permitted by law. Primarily small claims court comes to mind. It's a whole system that developed and evolved and has its own rules. So that you don't have to anticipate, in writing the code, something that particularly would be evolution, in drug courts and various other programs, are changing before the rules and structures have really been set into place.

JUDGE McKEOWN: But that's an example where, when you say something is permitted by law, I think what most people think of is not -- although sometimes court rules are said to have the force and effect of the law, but where they're informal court rules and they're not really law per se, we may or may not want to make that a provision, but we need to make it knowledgeable.

JUDGE NEVILLE: In the case law that's evolved in Alaska, have they separated out the judge's ability to assist procedurally, say, in evidence going in, as opposed to or while maintaining impartiality substantively on the case? Have they integrated those two anywhere in there?

MS. GREENSTEIN: Yeah. There is a prohibition against getting involved in the substance, for sure. It is all allowing more leeway --

JUDGE NEVILLE: Have you written that into your

code now, or is it simply case law, or is it --

MS. GREENSTEIN: No. It's simply the case law. And as the cases come down, you know, I compile them. And it would be nice to have pro se litigant guidelines for judges, and AJS has put some work into doing that. So, once again, I would encourage you to talk to Cindy about that.

MR. HARRISON: I would just like to add and then I'll recognize -- are any of the states represented here aware of -- any of the people from the states represented here aware of either opinions or rules that were designed to address the issue we're talking about? Pro se litigants?

FEMALE SPEAKER: Yeah. I was teaching for a couple of years, when we had the funding to do that, at the institute for the court employees that are -- an administrative officer of the courts would run -- and was teaching the ethics section.

The -- one of the most pressing issues for court employees, as for judges, in this evolving arena, where people can't afford to be represented in cases they must go to court for, is the distinction between access to justice and the prohibition against giving legal advice. It's a confoundingly gray area for everybody who has to look at it.

11:48 And there is at least a set of charts that I found very useful that I will provide to this group, which was a schematic way of trying to distinguish between the two in a number of different contexts. I believe, it was implemented at the Justice Institute, and I had their permission to use it at that program before, and I'll contact them again. But it was a nice way of at least ordering your thoughts in terms of when "Am I crossing the line? When am I not?" And it might be useful.

MR. HARRISON: I think we need all the help we can get in that area because I -- the exchange between you and Marla -- I don't know how you can draw a line, when a judge is helping a litigant get evidence in -- how you divorce that from substance is beyond me.

So I think it's going to be a tough, tough rule -- if we're going to try to draw a rule, it's going to be difficult. Anybody else either on the commission advisory group or guests?

Keith.

MR. STOTT: Just one final thought for me on this. I for one and -- I'm sure all of us on this body here -- this association -- I appreciate your taking another look at the code. It's not that we're averse to change. And you've heard our concerns.

But one final idea is that I would hope, as you talk about restructuring, that you not borrow all the labels from the rules of professional responsibility. There may well be a great value -- and I can see a great value -- in restricting the use of the term "canons" to the judiciary.

Not only does it make it easier in terms of citing things, when we're back and forth in different things, but just the idea that maybe the judiciary is special enough to talk about canons.

MR. HARRISON: Charlie read your mind because he leaned over to me half an hour ago and said, you know, we ought to think about preserving some of the language which distinguishes the code from the model rules.

MR. GEYH: Sure. And make the organization better but -- preserve some of that language would be helpful.

MR. HARRISON: Well, unless anybody --

MS. CLEAVER: After listening to all this, just a couple of comments. I too think it's very important to maintain the aspirational aspects of the code. Again, the esteem in which judges are held in our society -- and we need to keep holding them in that esteem -- I think makes that very important.

The other thing on the issue of the appearance of impropriety. I think that it's something that

11:51 members or individuals outside the justice system have
11:51 to deal with all the time. I think public officials,
11:51 both elected and nonelected, traditionally get skewered
11:51 in the media all the time for what is, in essence, the
11:51 appearance of impropriety, you know.
11:51 I've gone on boards where they give you the
11:51 guidelines for being on this board and then it's added
11:51 something about avoiding the appearance of impropriety.
11:51 I mean I think that's everywhere. And I think the
11:51 public has some level of understanding of what that
11:51 means.
11:51 I understand, again, in the judicial system,
11:51 there is a need and certainly an attempt always to be
11:51 very precise about everything. And it gets difficult
11:52 with the appearance of impropriety. That's something
11:52 that it's hard to be real precise about.
11:52 At the same time, I think it's something that
11:52 the rest of the world, and, again, people, who are
11:52 public officials whether elected, or not have to deal
11:52 with all the time.
11:52 So I think that it is preferable to keep
11:52 something in the way of guidelines, some guidance, in
11:52 the code than not try to address it all because it is
11:52 difficult to be as precise as we would like to be with
11:52 it.

11:52 MR. HARRISON: Yes, sir.

11:52 MALE SPEAKER: I'm a judicial educator. I work for the center of Judicial Education and Research.

11:52 MR. HARRISON: What is your name, sir?

11:52 MR. CATHCART: Rod Cathcart. And so I have a lot of experience with, sort of, the education framework for the code. And -- but I work with the California code. And I think most of the people here are talking about codes of particular states.

11:53 And we're talking here about the model code, and I presume you want model code to have an impact on the codes of various states. And I think in one area, where the code is not really used a lot, has to do with the public. Judges use the code, but the code isn't really that user friendly and -- for an ordinary member of the public.

11:53 And so I think you have a really good opportunity here to think about the language that you're using if you're using words like "pro se." And a member of the public reads that, they might not know, "Oh, it's referring to me because I'm representing myself."

11:53 You have a real opportunity here to amend the code in a way. Because I think that, when foreign visitors come into our courts and they see -- like, in San Francisco, when the court says "No more gay

11:54 marriages" and people stop performing them in City Hall across the street -- this is a system that works because it preserves public trust. And having a canon that the public understands will further that goal.

MR. HARRISON: Thank you very much.

Others? Well, thank you all very much for coming and for participating. We really appreciate it. I think it was a very helpful and useful session for us, and I hope you will feel free to keep bombarding us with your thoughts and ideas and stuff you volunteer to provide to us. That would be particularly helpful.

So if there's nobody else who wants to speak, we'll take a recess. The commission and advisory group will reconvene for lunch in this room. Is that -- no? Well, we'll figure it out.

(Recess was taken from 11:55 a.m. to 1:06 p.m.)

13:06 MR. HARRISON: Our next guest is no stranger to these proceedings. Cindy Gray is from the AJS, as all of you know, and I've asked her for some proposals to amend the code, and we're going to talk about that.

The floor is yours.

MS. GRAY: Thank you. Thank you very much for allowing me to come here, and I want to express the appreciation of AJS in your openness to have everyone

13:06 1 come and talk to that -- and talk to you and contribute
13:06 2 to the process of evaluating the model code of judicial
13:06 3 conduct.
13:07 4 It's great that the ABA, years ago now, took
13:07 5 it upon itself to establish national standards, the
13:07 6 place that everyone starts when they want to see what
13:07 7 the rule is. And it's great also that the ABA realizes
13:07 8 it's a living document and needs to be looked at every
13:07 9 once in a while and invites others to participate in the
13:07 10 process.
13:07 11 Just to give you a little idea of what the
13:07 12 Center for Judicial Ethics does, to give a context for
13:07 13 the proposals, I try to keep track of everything that
13:07 14 goes on around the country in the area of judicial
13:07 15 ethics and discipline. So it's all the codes of all the
13:07 16 states, the disciplinary rules of all the states, the
13:07 17 decisions that are coming down, the discipline
13:07 18 decisions, and also the hundreds of advisory opinions
13:07 19 that are issued every year, and the newspaper stories
13:07 20 that show up when I do my Westlaw search in the ALLNEWS
13:07 21 database.
13:07 22 And then when I get that information -- and
13:07 23 there's a lot of it every week -- there's something new
13:07 24 every week -- I do different things with it. One, I
13:07 25 provide support for the conduct commissions that are

13:08 1 members of this center. And you saw those folks here
13:08 2 this morning. They get something from me weekly. They
13:08 3 get more stuff from me every other month. And then
13:08 4 they're encouraged to call me when they have questions
13:08 5 just so they -- to keep them up-to-date of the
13:08 6 developments across the country of what's happening in
13:08 7 the cases and other kinds of developments.
13:08 8 I also -- the advisory committees across the
13:08 9 state also will contact me when they need assistance, if
13:08 10 there's a new issue in -- developing, they'll ask me for
13:08 11 help in keeping -- doing research in those areas.
13:08 12 And then I provide a lot of judicial
13:08 13 education. I travel across the country, speaking to
13:08 14 judges at judicial conferences or special seminars,
13:08 15 provide curriculum materials that others can use. The
13:08 16 state justice institute has provided us with some
13:08 17 support to come up with some special grant materials.
13:08 18 Then just help people come up with ideas and things that
13:09 19 can help in judicial education programs.
13:09 20 And then our Web site, as well, has links to
13:09 21 the conduct commission Web sites, links to the advisory
13:09 22 opinion Web sites, and every week we have a new story on
13:09 23 a new development in judicial ethics.
13:09 24 Then every other year -- and this is the
13:09 25 year -- we have a conference, a national college, in

October in Chicago. And everyone who's interested in the area is invited to attend it.

It started out, kind of, being mainly for conduct commissions, but we found that there are lots of judges who want to attend, members of advisory committees and judicial educators, who are interested in the topics.

And so they come, and it's very interesting. And it will be very interesting to see what it's -- going to be on the program for this year -- what topics are discussed. Looking forward to seeing what I plan to do.

So the -- so that's sort of the background. I also, like the folks that spoke this morning, deal with the code every day. I don't charge it, and I don't prosecute it, but I do refer to the code every day.

The -- we've submitted some proposals to you in writing, and I'll just describe the process that we used to come up with these proposals.

The Center for Judicial Ethics has an advisory committee. Its members are board members of AJS, like Judge Dorfer (phonetic) from Massachusetts and other members and then members, staff members of judicial conduct commissions that are members of this center. And they are, whenever I need advice, the folks I turn

to.

So what we did in this process is we just started discussing this and we also asked the executive committee of the American Judicature Society which ones of them would like to be kept informed.

So I came up with some draft proposals, sent it out to all of them, inviting their comments. There were some no one had a comment on; so we just assumed that meant they liked it, and we kept those.

But there were some that produced some controversy; so we set up a couple of conference calls and came up with these proposals.

And so that's what was presented to you. Most of this -- proposals aren't big changes in the code. Most of them aren't something that was -- you know, might have been wrong under 1990 and we're proposing it to be okay or vice versa. They're not that kind of changes.

And most of it isn't anything I came up with. It's based on changes states have made in their codes when they've adopted the model or adapted the model for their own state. Information from advisory opinions, language sometimes have lifted from advisory opinions or case law.

And some of it is areas where there have

13:11 1 been -- there's been a lot of judicial discipline, but
13:12 2 the judges are generally being charged under some of the
13:12 3 general provisions of the codes; so this is a way of
13:12 4 adding some more specific language addressing some of
13:12 5 the chronic problems.
13:12 6 There are areas where it's just a matter of
13:12 7 emphasizing something, adding some emphasis to the code.
13:12 8 And then there are areas, where there have been lots and
13:12 9 lots of requests for advisory opinions across the
13:12 10 country to the advisory committees.
13:12 11 And so some of the language is meant to
13:12 12 address the code provisions that apparently -- that a
13:12 13 lot of advisory opinions have covered, and those are
13:12 14 areas where judges seem to need guidance because they're
13:12 15 asking the questions and -- so those are the kinds of
13:12 16 changes we proposed in the code.
13:12 17 During this process we considered some other
13:12 18 issues and weren't able to necessarily reach consensus
13:12 19 on them -- yet at least.
13:12 20 And we did mention the issue of format.
13:12 21 There's going to be a change in format. Some of the
13:13 22 reaction -- or might be a change in format. Some of the
13:13 23 reaction was the sort of reaction you've heard today.
13:13 24 And we did -- but we didn't discuss it in depth because
13:13 25 I think it's a hard thing to talk to people about in

13:13 abstract without seeing what the change is going to be.
13:13 I must admit. My first reaction was no.
13:13 That's a terrible idea. But I realize that part of that
13:13 is a resistance to change. And when I saw some of the
13:13 drafts that were floating around, where the format
13:13 change was implemented, it made a lot more sense to me
13:13 when I just heard it in the abstract.
13:13 So I think the sooner that it's clear what
13:13 that means or maybe what it doesn't mean, the format
13:13 change, the easier it will be for people to relate to it
13:13 and open their minds to it a little bit.
13:13 We also discussed the issue of problem-solving
13:13 courts and whether we could come up with language from
13:13 that. We didn't come up with anything. We weren't sure
13:13 that a model code -- a national code is a way to address
13:14 what is very -- the -- each kind of court seems to be
13:14 very different in each locale. And it's also a very
13:14 evolving area. It's something like general language
13:14 allowing a sort of thing would be better.
13:14 We also discussed coming up with language
13:14 about pro se litigants or self-represented litigants and
13:14 didn't really come up with anything. The idea was -- we
13:14 thought that there are a lot of things that judges want
13:14 to do they're already allowed to do under the code.
13:14 It's an area that they have a lot of discretion in, and

so it wasn't necessarily thought it was necessary to change the code.

But we're interested in seeing what other people's ideas are in this area and what they may be able to come up with.

So that's my presentation, although -- I mean I can go on and talk about other things or I can answer questions. Whatever you'd like to do.

Are there any questions about any of my proposals?

MR. HARRISON: Loretta.

MS. ARGRETT: I have a question. You said that, in considering what you might -- you would propose, you looked at those areas where there had been requests for opinions. Could you point out -- it would be helpful for us to know which of those areas have generated the most requests for opinions.

MS. GRAY: Letters of recommendation -- lots of questions about that -- requests for advice about that; family members' political activities -- lots of requests for advice about that; in civic and charitable activities, particularly fundraising -- lots of advisory requests for that; and also involvement in things like domestic violence task forces and similar types of organizations.

That and disqualification -- those and disqualification are the areas where most requests for advisory opinions arise.

It's not an area that, except for disqualification, where there's a lot of discipline. But it's an area where judges are very aware of the restrictions in the code and, on the other hand, they're very aware that they would also like to be out and around and doing things.

So they're asking first, before they go ahead and do it. And I think that's great. And so as much guidance as they can give, obviously, the better, although the advisory committees will always still be there to answer the unresolved questions.

MS. ARGRETT: Thank you.

JUDGE BOWIE: I have several. And I suppose we can start at the top, partly because this is an area I've been playing around with and trying to craft in the disqualification area.

And one of your suggestions is defining a spouse to include a domestic partner or other individual who maintained a shared household and conjugal relations. And that's -- we've been trying to grapple, a couple of us have, with how to work that in. Because it's obviously a reality that exists in the world today

and in the country.

And so have you had any experience or do you know of any code which have adopted some kind of language to extend the reach of the zone of disqualification, in particular, to --

MS. GRAY: I think the language I used was based on the Alaska code and maybe Massachusetts as well. So I don't know which one I chose or if it was a blending of the two. But there are at least Alaska and Massachusetts -- either defines spouse or includes disqualification to do that. And I can write myself a note to send that to you, which states those are.

JUDGE BOWIE: I would be interested to know that.

MS. GRAY: I think it is Massachusetts.

JUDGE BOWIE: Also you raised the question of letters of recommendation. And just having been on the bench for 16 years, I've wrestled with that notion, in part, because the premise of allowing a judge or authorizing a judge to ethically submit a letter of recommendation to somebody is that there's some information that judge knows about that person that is information that's not generally available to the public and pertains to -- whoever the recipient is -- understanding of this particular person.

So if it's somebody who had been my law clerk,

for instance, and worked with me for a year or two or three and then goes on to apply to law firms or whatever and puts me down as a reference, and then they want a letter. The question I have is the use of letterhead in that particular context.

Because if the premise is it's my knowledge rather than who I know, what -- what's the relevance of authorizing it, as your draft language would, the use of the letterhead of the office in that context, and anybody reading it is likely to put it together with the rTsumT anyway, which says that, during this period of time so-and-so clerked for me. So they're going to know who I was, but it's not because I'm a judge or my judge's office but rather that I have this knowledge that is the premise to support the recommendation.

MS. GRAY: The -- judges are allowed to write letters of reference if they have personal knowledge. And they are occasionally asked -- probably because they are a judge -- and they don't really have any additional information, and they know to say "No" in those circumstances.

The language about using the stationery is, kind of, a compromise, and it does reflect some of the advisory committees in some states. In some states there's a strict rule you can't use judicial letterhead

to write letters of reference regardless. In others, they're allowed to, even if it is their neighbor and not someone they know personally.

So this is, kind of, a compromise, a way of using -- and it just -- it's not inconsistent with the judge's job to provide letters of reference for staff. And so use of judicial letterhead under those circumstances is appropriate, although if the judge is uncomfortable, they don't have to use the letterhead.

MR. HARRISON: Harriet.

JUDGE TURNEY: Disqualification. You have a specific recommendation that the judge shall disqualify him- or herself within the preceding three years the judge was associated in private practice of law with any firm or lawyer currently representing any party.

I'm curious about the three years. And one of the reasons I raise this is because I'm involved in administrative law, and we have a finite number of lawyers. And we have -- we draw from that pool, and we have a rule now -- it's basically one year -- but I'm curious about your thinking about the three years and how that really is going to work in a practical sense.

MS. GRAY: We thought it was important to address the issue since it's an issue that obviously raises for any judge, except those that are coming out the

13:21 1 government or law professors, and the advisory opinions
13:21 2 on this subject are again split. Some say it depends.
13:21 3 Some say one year, some say two years, some say
13:21 4 three years. I don't -- we just came up with
13:21 5 three years. I don't know why.
13:21 6 Frankly, I think it's important to address it
13:21 7 and give a specific list, and I think it may have been
13:21 8 that three years seemed to be, sort of, the average that
13:21 9 the advisory opinions were coming up with.
13:21 10 But I think it's important to address it and
13:21 11 that there be a specific cutoff, but I don't know that
13:21 12 it would be strong protest if we said "two" or something
13:21 13 like that.
13:21 14 MR. HARRISON: Bob.
13:21 15 MR. FITZPATRICK: I had two questions, Cindy.
13:21 16 One, on page 9 of your materials, you guys got
13:21 17 rid of the provision about consulting with the
13:21 18 disinterested expert. Why did you do that?
13:22 19 MS. GRAY: Well, a number of states have done that.
13:22 20 And the problem with the rule is that judges seem to
13:22 21 only sometimes read the exception and don't seem to
13:22 22 notice they're supposed to give the other side notice
13:22 23 of -- before they do it and then of what the information
13:22 24 is and allow them an opportunity to respond.
13:22 25 And the -- and it really is a better idea

13:22 rather than having a judge call someone up and ask for
13:22 advice, which is how this seems to be interpreted, to
13:22 just let it be done on the record.
13:22 For one thing, the -- the issue of
13:22 disinterested expert is an interesting -- what is
13:22 disinterested in, and it's much more likely that the
13:22 disinterest can be obvious if it's done through an
13:22 amicus brief or some other process rather than -- and
13:22 allow the parties ahead of time to protest if they
13:22 consider this particular expert not to be disinterested.
13:22 So it just -- a number of states have found
13:23 this a problematic area. So it's based on what they've
13:23 done with their code. So it just seemed a good idea to
13:23 allow getting in information from experts but from doing
13:23 it in a different way.
13:23 MR. FITZPATRICK: Thank you. My second question
13:23 really is on page 15 of your materials, and it's talking
13:23 about, in a sense, the judge participating in the
13:23 improvement of the law.
13:23 You guys came up with, kind of, a narrow
13:23 formulation compared to the existing code language that
13:23 basically says it's got to be the working of the courts.
13:23 And also the judges, for instance, shouldn't sit on
13:23 commissions of the legislative or exclusive branch like
13:23 dealing with corrections or that kind of stuff.

13:23 Could you share with us, kind of, why this formation and how you came up with that.

MS. GRAY: Again, it's partly a reflection of a lot of the advisory opinions in the area that -- that, while it's important that the other branches of government work well and that judges want to contribute to that, for them to sit on a commission established to help out law enforcement or something like that is a problem as far as impartiality and the independence of the judiciary. It also, sort of, invites the same kind of meddling the other way around.

So while judges can share information and appear before these types of commissions, to actually have them involved in the process raises a lot of -- a lot of problems that can reflect -- may reflect on their impartiality and independence. It can create an appearance more, necessarily, than the fact, but the appearance is definitely an area that's of importance in voluntary activities like this.

MR. HARRISON: Jim and then Ellen and then Peter again.

MR. ALFINI: Mark, I'd just like to, for the record, acknowledge the very significant and important work that AJS has done in the field of judicial ethics over the years and thank Cindy and the society for doing

this. But I do have a question as well.

Cindy, in the judicial campaign speech provision in Canon 5, you're suggesting language in -- by 5A3(e), is that right? You know where I'm talking about? The sub "(e)" provision. "Shall not in statements to the electorate or the appointing authority."

Why did you qualify it in that way?

MS. GRAY: Well, we thought that the rules that applied to judicial candidates who are elected should also apply to those that are appointed. And if they can't say things to the voters or they can, they should -- the same rule should apply.

MR. ALFINI: But the rule could be read to apply to appointed as well as elected judges right now, right?

MS. GRAY: I guess so.

MR. ALFINI: Let me tell you -- let me tell you one of the problems I have -- I mean I agree with you. I think it should be read that way. One of the problems I have with doing that is that you don't say nominating commission and, as you know, I think, the commissions in Florida and elsewhere have started, post White, applying political litmus tests. So you want to add a nominating body to that?

MS. GRAY: Okay. Or something that makes that

clear, yeah.

MR. ALFINI: But, again, I'm concerned that, as we do that, we may leave something out as well.

MS. GRAY: I guess I was thinking "appointing authority" would include nominating, but I guess you're right that it does need to be clearer that that's -- it's the process involved, just not the authority involved.

MR. ALFINI: I wonder if we couldn't say it -- rather than specify, say it in another way. And I'm not sure how. But what you were trying to capture was the notion that appointed judges should be held to the same standard as --

MS. GRAY: Right. The language could be improved.

MR. HARRISON: Ellen.

MR. ROSNER: I too want to thank Cindy. I've worked with Cindy for ten years or more. And just as recent as last week, she helped me with a very thorny ethics issue that we had in Oregon, involving the same-sex marriage issues. So I really have appreciated that.

My concern has to do with page 10, Cindy, where you propose taking out the language of the rule. I don't have it exactly at the moment, but it's Section 10 on page 10 -- propose taking out on the judge

13:27 1 discussing -- making public comments while proceedings
13:28 2 are pending or impending, deleting the language
13:28 3 "That might reasonably be expected to
13:28 4 affect its outcome or appearance of
13:28 5 fairness or to make any nonpublic comment
13:28 6 that may substantially interfere with a
13:28 7 fair trial or hearing."
13:28 8 I'm very concerned about removing that plank.
13:28 9 And I understand the concern about possible vagueness
13:28 10 challenges, but at the same time it seems to me it
13:28 11 really makes it a much more restrictive rule, which, of
13:28 12 course, I think -- I don't know if you were present when
13:28 13 we had the discussion last time, but we actually have
13:28 14 talked about and have some proposals to liberalize the
13:28 15 rules somewhat so that judges can respond to allegations
13:28 16 concerning their conduct, perhaps an allegation made in
13:28 17 the media, so long as it does not affect the outcome or
13:28 18 impair the fairness of the proceedings.
13:28 19 So by eliminating that language, it sort of
13:28 20 throws out, seems to me, the baby with the bath water on
13:28 21 that. And I'd just like you to address that, if you
13:28 22 would.
13:28 23 MS. GRAY: Well, the -- I think it's a much clearer
13:29 24 rule to take that language out -- that, if I were a
13:29 25 judge, struggling with whether I could comment, I would

prefer to know I couldn't than to have to weigh those things.

There are just -- I think there are a lot of situations in this where it's black letter law, even if it's a little -- it seems broad -- is better than having this "So would this impair the fairness?" Just don't say it. Just don't say anything.

And it does -- the other -- the consideration here is very much about having what a judge does be on the record and what a judge says be on the record.

Because the most important thing a judge does is decide the cases for the parties. And if you open up the possibility that the judge can later go back and in the media amend what they've -- not amendment -- but supplement what they've said with explanations and things like that, I think it opens up a whole big problem for the parties in the case, for the judge.

This way it just encourages the judge to explain themselves on the record. And then when they're asked questions or they're criticized, they just can point to the record, they can put it on a Web site, they can have the public information officer distribute it -- that that's a lot better way of going about it than having judges having to ponder whether or not what they do will affect the fairness of the case. It's just a

much clearer rule, and I think this is an area where clarity is very important.

MR. HARRISON: Peter.

JUDGE BOWIE: I had a couple, one of which is not in your favor. But I wanted to know if you had a position and that is on the issue of when, if ever, a judge is obliged to recuse when a judge's former law clerk is appearing.

Is there some -- do you have an optimal period of time before a law clerk can appear? I think everybody would agree a law clerk can't appear on any case that was in chambers while the law clerk's employed there.

The question really comes up. And I keep getting asked by colleagues what the time frame is, what should the rule be. And they're all concerned that they're somehow creating employment limitation opportunities for law clerks to go with firms if they can't come and work on anything in front of you for two years, for instance.

So do you have any recommendations or does AJF have a sense of where that rule ought to be?

MS. GRAY: I hadn't -- there are advisory opinions on the topic and, off the top of my head, I couldn't tell you what they said. I think some of them do set

limits and usually they seemed to like two or three years. But I can't remember what they are, and I'd be happy to go back and look at what they are again. But there are some opinions.

JUDGE BOWIE: Okay. The second one is related to Ellen's, and that is, in your page 10 of your materials, you suggest deleting the phrase

> "A judge must not independently investigate facts on the case and must consider only the evidence presented."

And it wasn't clear to me why you would purge that or if you would put that someplace else to make that admonition clear.

MS. GRAY: I thought -- the definition of "ex parte" that I have in here defines ex parte to include independent investigations of the facts. So I think, by taking it out, I meant, at least, for it to be somewhere else rather than to change the rule. Maybe, if you don't notice that, it may be better to restate the rule twice.

JUDGE BOWIE: Plus I -- we've had a discussion about it in the past, and I know, amongst my colleagues in the bankruptcy arena, dealing with relief from stays, it's not been an uncommon practice for them to drive by the house or the factory or something to have an

13:32 1 informal view of the subject of the litigation, kind of,
13:32 2 thing and -- until they've been told that varying
13:32 3 programs would view that that's inappropriate because
13:32 4 that's a view, which could be gathering evidence,
13:32 5 depending on what circuit you're in -- and all that kind
13:32 6 of stuff.
13:32 7 So it seems to me that that is broader than an
13:32 8 ex parte communication in the definitional sense.
13:33 9 MS. GRAY: Well, if it's not clear, that definitely
13:33 10 wasn't the intent. So keeping that in the commentary
13:33 11 would be consistent with our proposals.
13:33 12 JUDGE BOWIE: And the third one I had relates to
13:33 13 your proposal with respect to adjudicative
13:33 14 responsibilities, where you talk about commenting on
13:33 15 pend or reimpending matter and you add
13:33 16 "A judge shall not discuss the
13:33 17 rationale for a decision outside the
13:33 18 record unless the judge is repeating."
13:33 19 And it -- the word "repeating" seems to me to
13:33 20 be fraught with all kind of potential for
13:33 21 interpretation. "I'm going to explain it in a different
13:33 22 way" and, of course, every time I explain it a different
13:33 23 way, it's fodder for somebody to argue on appeal that
13:33 24 what the judge meant was not what the opinion says.
13:33 25 It's now being spun.

So I don't know if you mean repeating or if you mean reading, rereading, or --

MS. GRAY: Well, I meant repeating word for word. Maybe I can clear up the grammar, if the judge misspoke or something, to get the um's and things. But I did mean "repeating," and if that wasn't clear, if there's a way of emphasizing it, that would be great.

MR. HARRISON: Margaret and then Charley and then Carol and then Bob.

JUDGE McKEOWN: I have -- my questions relate to Canon 4 and the charitable and outside activities.

On page 15 you have identified at the bottom there quite specifically about a judge not being a speaker guest of honor, et cetera, at a fund raising activity. And I can say, you know, from the federal level, we get scores of requests that are variations on this theme.

And I wondered -- here it's an absolute prohibition. And I understand the reason of not wanting to leverage the judge's position. But there are, you know, hundreds of organizations that would like in some way to honor judges for community services or otherwise.

And I'm wondering if you would give a little consideration to loosening this up somewhat, whereas, even if it was, quote, a "fundraiser" for an

13:35 organization that the judge's presence or identification
13:35 wasn't used in promotions and so they simply were an
13:35 attendee but then, as an attendee, for example, they may
13:35 get an award -- was there discussion on that?
13:35 MS. GRAY: We did consider it in that there are a
13:35 number of ways that states have addressed this either in
13:35 their code or in their advisory opinions. But it was
13:35 one of the topics that we didn't reach consensus on so
13:35 we're still considering it.
13:35 JUDGE McKEOWN: So, in other words, it just seems
13:35 to me that's an area the ADR commission needs to take a
13:35 look at. I was just curious. So there's no, kind of,
13:35 consensus on that one?
13:35 MS. GRAY: No. We did want to emphasize that they
13:35 can't speak at fundraisers. Because, you're right, the
13:35 advisory committees get a lot of requests, and it's just
13:35 so clear that they can't do it that you wonder why they
13:36 continue to ask. I think it is --
13:36 JUDGE McKEOWN: You get a lot of requests on this.
13:36 And sometimes it's something as innocuous as the
13:36 Bar Association's library foundation and you have to
13:36 tell in an advisory capacity or suggest to that judge
13:36 that he or she can't attend.
13:36 Maybe in along that line, you've added
13:36 something here that's interesting, on page 17, and that

13:36 is, in the first part of the canon, you basically shut down the judge from being involved in any fundraising and then at the end of it, you say, but you can do a de minimus amount. And then you give some examples like purchasing something that's being sold or whatever.

I wouldn't actually view that as being involved in fundraising. You know, when I buy a box of Girl Scout cookies or that sort of thing, I don't really view that as being involved in fundraising. But I'm curious whether, albeit you've given some examples, you had other de minimus fundraising in mind that would be permissible, in your view or the committee's view, in that area.

MS. GRAY: Well, I guess it's giving examples of the difference between soliciting for funds, which is prohibited, and participating in fundraising activities. And so that's how the examples -- I mean when you're buying the Girl Scout cookies, you're not soliciting funds, you're participating in fundraising by giving them money.

And there are lots of questions about whether judges can -- you know, at their church's pancake breakfast, whether they can flip the pancakes, whether they can be the person at the door getting the money, whether they can bring the pancakes around.

13:37 JUDGE McKEOWN: And they can provide the cello
13:37 concert for the --
13:37 MS. GRAY: Right. So that's a lot of lines
13:37 drawn -- opinions -- and many of them have done it this
13:37 way. As long as it's de minimus, your name -- you're
13:38 not in your robe while flipping the pancakes, your name
13:38 is not in the program as Judge So-and-so, that's
13:38 appropriate. That's what I meant by "de minimus." Very
13:38 behind the scenes without emphasizing the judicial role,
13:38 that kind of thing.
13:38 So that was the intent of the distinctions and
13:38 examples.
13:38 JUDGE McKEOWN: Because that is a significant
13:38 change here.
13:38 And then the third question I had is back one
13:38 page on page 16. This has to do with pro bono programs.
13:38 And, as phrased, it says you shouldn't solicit them to
13:38 participate in specific pro bono programs or accept
13:38 particular cases.
13:38 I see a big distinction between calling up an
13:38 attorney and asking that attorney to accept a specific
13:38 case. Because I certainly was on the receiving end of
13:38 that as a lawyer. And the answer is always,
13:38 "Yes. Your Honor, I had nothing else
13:38 better to do in my next five years than

accept that pro bono case."

But I worry that, as phrased here, that we might undermine this whole effort that the courts are getting involved in to get attorneys to participate in pro bono. And at the same time all the needs studies tell us we have to have more attorneys.

So what this would do is, we have a very prominent program in the Ninth Circuit on pro bono, and I'm out there all the time, you know, touting the joys of giving a free argument, so to speak, in the Ninth Circuit.

I would really hate to see that kind of promotion of the idea and the program in general. Without targeting a specific attorney or a specific case, I would not want to see that curtailed. But then maybe I'm missing something; so I would like to understand why the restriction.

MS. GRAY: Well, the intent of our proposal was to allow you to do that kind of thing, that kind of speaking or writing a letter saying, "By all means, participate in pro bono activities" without saying specifically "Participate in the program that the Legal Assistance Foundation has" or something like that.

So at least -- the proposal was intended to allow you to do that, and there are advisory opinions

13:40 from the states that say currently judges can't even do
13:40 that -- that that, sort of, even general pushing to do
13:40 pro bono work is the same as generally asking them to
13:40 give money. They can't do it.
13:40 So this was intended to loosen that up with
13:40 respect to pro bono issues. If it's not clear, then, by
13:40 all means, change it. But that was the intention of it,
13:40 to allow more without allowing this sort of one-on-one
13:40 pressure or the use of the prestige of office to be
13:40 used.
13:40 MR. HARRISON: Charlie and then Carol and then Bob.
13:40 MR. GEYH: A couple of people have already talked
13:40 about this, but I had a followup. This is on the
13:41 impending case provision on the -- page 10 and page 11.
13:41 And there are two different components of it that I'm
13:41 interested in your thoughts about.
13:41 But the first one, as originally -- as
13:41 currently drafted, the prohibition basically says you
13:41 can't talk about a pending or impending proceeding if
13:41 it's going -- if what you say is going to compromise the
13:41 integrity of the judicial process in some way, create
13:41 unfairness and so on.
13:41 The change -- and I think your explanation for
13:41 the change was -- it's kind of hard to, sort of,
13:41 interpret that. Why not just prevent them from talking

completely?

The second part of that is at the bottom of the page, and that's what -- we talked about this earlier

"A judge shall not discuss the rationale for a decision outside the record."

It's not limited to pending or impending decisions. Years later it would presumably prohibit that as well.

My question is: After White it seems to me both of these raise some real problems here. You're engaging in a content-based restriction on speech in both cases.

In the first instance, you're basically saying you can't talk about a pending case even if it doesn't have any impact on the integrity of the proceeding. And I have some real trouble with that after White.

The second is the same thing with this latter provision. It just seems to me that not linking it to a pending or impending proceeding and saying you can't talk about a case later on, regardless of what its impact is, and -- even if we change the language and made it linked to a pending proceeding, I'm a little concerned that it's got to be narrowly tailored and

simply commenting about a pending case could create some -- by not keeping the record, it would still have a real hard time getting past the First Amendment concern.

Did you think about the First Amendment issues in working this through?

MS. GRAY: Yes. I think -- I mean this doesn't stop a judge from talking. It stops them from talking off the record. They can go and on and on and on as much as they want with the parties present in an opinion, and that kind of thing. And that's what I think judges should do -- that that's what their job is.

And it doesn't stop them from explaining publicly the procedures of the court or how -- or from speaking in an educational context, as long as it's not their case, and that kind of thing.

So it's not really all that broad. And I think White is confined to judicial campaign speech. It talks about, if you're going to elect your judges and we think this is a bad idea, that -- that's the Supreme Court talking -- but I mean I agree -- then you have to let them talk so that voters have the information they need to cast their vote. That was the rationale of the majority decision. It was particularly the rationale of Justice O'Connor's concurrence.

I think outside the judicial campaign context

13:43 in this, when you're talking about commenting on a
13:43 pending case, a judge adjudicative duties that the
13:43 restrictions can be greater and it's not inconsistent
13:43 with White that they be greater.
13:44 Because, again, you're not preventing them
13:44 from giving information; you're just making sure they
13:44 convey it in a way they're supposed to convey it during
13:44 the case so that there's a record that can be appealed
13:44 or not.
13:44 MR. GEYH: Although, just for clarity's sake, the
13:44 last provision, when the case is concluded, the judge
13:44 can't go back on the record, right? I don't know.
13:44 Maybe they can. A year after the case is concluded, the
13:44 judge is asked questions and there's -- the speech is
13:44 it's a prophylactic ban on speech at that point.
13:44 MS. GRAY: Yeah. I guess I meant this to apply
13:44 only on pending case. I would be concerned if a year
13:44 after a case a judge made an explanation that was
13:44 completely contradictory to what appeared to happen.
13:44 But that was -- this wasn't intend to address that
13:44 situation.
13:44 MR. HARRISON: Carol.
13:44 JUDGE AMON: At Canon 3B5 on page 7, you add to
13:44 this list of not showing bias and prejudice -- you add
13:45 to the list that it included such things as sex and

rights and religion, marital status, parenthood, language, and ethnicity.

Why -- was there something going on in opinions that you were seeing or conduct that caused you to add those additional four categories?

MS. GRAY: I think I got them from other states' codes. And there are cases, particularly, in which marital status or parenthood, single mothers, have been singled out for abuse in a couple of cases. And while that's clearly a violation of a number of different provisions of the code, it just seemed a way of emphasizing that -- that kind of thing.

And it's a way -- and you could make this list twice as long or you could just say "Don't pick on people for any particular trait." So it's just a compromise of which particular things to include. But I think most of the ones I added were from other states' codes, and I thought, "Well, if the states think it's necessary to add it, we'll address it as well."

JUDGE AMON: What were you referring to when you talk about language?

MS. GRAY: A person's inability to speak English clearly.

MR. HARRISON: Bob.

MR. TEMBECKJIAN: Cindy, I noticed in all of your

13:46 recommendations you don't propose tampering with the
13:46 actual declarative canons themselves, but the
13:46 subsections or the meat portions that follow from them.
13:46 In light of the discussions on the subject
13:46 this morning, do you have any comment or view as to
13:46 whether or not, in fact, the organization, such as it
13:46 is, with declarative canons followed by specific
13:46 subsections ought to be amended so that we have titles
13:46 as opposed to declarations.
13:46 MS. GRAY: Well, I -- I like the format the way it
13:47 is. But it is familiarity, and I understand that. So I
13:47 can't really talk to the format without seeing what
13:47 the -- what the proposal is with respect to -- I like
13:47 all the declaratives -- and I think all of them need to
13:47 be part of the code somewhere.
13:47 And I think that, while they are general
13:47 statements, they do help the courts and the judges and
13:47 the commissions and the advisory committees when they
13:47 interpret the other provisions of the code. So I think
13:47 it's important that they be in there.
13:47 And I think the appearance of the propriety
13:47 standard is important as well as the avoid impropriety.
13:47 So as long as there are lots of -- those ideas are in
13:47 there and they're in there strongly and they use the
13:47 word "shall," I have no problem playing with the format,

seeing what it looks like. I'd like to see what it looks like first.

MR. TEMBECKJIAN: A specific example, one that we haven't talked about lately, since there was a lot of discussion of Canon 2, Canon 5, which now says a judge or judicial candidate shall refrain from inappropriate political activity, what if you replaced with a subheading that just said "political activity." Would we gain or lose something?

MS. GRAY: If there wasn't a subsequent rule that said a judge shall refrain from engaging in inappropriate political activity?

MR. TEMBECKJIAN: Let's assume that the Canon 5 began as Canon 5A, what it does right now, but that declarative sentence was not put somewhere.

MS. GRAY: I think it would be important to have the declarative sentences in there as well, in addition to the headings and the additional text.

MR. HARRISON: Jim.

MR. ALFINI: Cindy, I'd like to go back to the Canon 4 prohibition against judges speaking at fundraising events.

Particularly when I became a law school dean, I thought this was way too absolute and sweeping. And I -- I'd like to suggest something and see what you

think.

Let's say we're raising a scholarship fund in the name of Thurgood Marshall. And we've got a fundraiser, and law firms and individuals and others are buying tables for that event, and there's a prominent federal judge, who worked for Thurgood Marshall, who we would like to speak at that event.

What's the mischief? I mean is it going to destroy his or her independence and partiality integrity by speaking at that event?

MS. GRAY: Well, I hope not, but it would use the prestige of office to advance the private interests of law school. It means that -- and that doesn't mean they're bad interests. It just means that -- that that's not what the prestige of office is supposed to be used for -- that it's -- primarily used for -- to support the judge's adjudicative duties. And it gets -- if it's used in too many other ways, it's not --

MR. ALFINI: So it's lending the prestige of the judicial office to advance the private interests of others. Is that --

MS. GRAY: Right. I mean that's the main -- I think the main reason for the fundraising restriction. People worry they're being leaned on by the judge or they're trying to curry favor with the judge so

that's --

MR. ALFINI: Right. I think there's that aspect of it too.

And so you don't see any qualifying language that we might be able to add here? Because, again, on that second score, you know, why not allow it unless it would be inconsistent with the necessity of maintaining the integrity, impartiality, and independence of the judiciary.

MS. GRAY: Well, there are ways that people have compromised with that provision by, you know, not letting the judge's name be used to promote the event -- that kind of thing -- making sure the judge speaks and then leaves before --

MR. ALFINI: Doesn't eat any of the food.

MS. GRAY: Right. That kind of thing. So there are compromises people have -- that states have reached on this issue. It's just that we weren't able to reach a consensus. And AJS has an incentive to let a lot of judges to fundraise for them too. So we're trying to not be selfish about it either.

MR. ALFINI: I understand. I'm just wanting to struggle with it a little bit.

MS. GRAY: In the fundraising-for-law-related organizations is where the prestige of the office could

13:51 1 be misused in that people can feel pressure and
13:51 2 attorneys can give money and then say, you know, to the
13:51 3 judge -- remind the judge constantly that they gave
13:51 4 money in response to the judge's solicitation. So
13:51 5 there's a real issue there.
13:52 6 On the other hand, it does seem like a fairly
13:52 7 harmless thing for a judge to do.
13:52 8 MR. HARRISON: Yes.
13:52 9 MR. HILLIKER: Canon 2A -- you added a sentence
13:52 10 there to A, which -- that seems to be broader than the
13:52 11 first sentence, which talked about integrity and
13:52 12 impartiality. And then are these all independent? I
13:52 13 just -- it just didn't seem to me --
13:52 14 MS. GRAY: Well, I don't know how you'd end up
13:52 15 numbering this or anything because, obviously, you're
13:52 16 changing the numbering. So this was just put in there,
13:52 17 and it could have been made different.
13:52 18 But what I was trying to do there was there
13:52 19 are lots of -- I think you need some general provisions
13:52 20 that address specific issues, but there are lots -- a
13:52 21 lot of cases, where judges are being disciplined for
13:52 22 things like lying -- and not lying under oath, which is
13:52 23 easy because then you have perjury -- and so to have a
13:53 24 general provision that -- but that specifically
13:53 25 addresses that type of activity that can be charged.

MR. HILLIKER: Is there anything in the current code dealing with it?

I'm not an expert like others.

MS. GRAY: Right. The general rules would be referred to, Canons 1 and Canon 2, and this is just a more specific version of the general rule. But there is still some generality. But it was trying to capture some of those cases, and the lying one is one that comes up a lot, but also --

MR. HILLIKER: Temperament, I suppose, acting up in the courtroom?

MS. GRAY: Not just in the courtroom but in Outback Steakhouse, as a recent example, or something like that.

MR. HARRISON: Ellen.

JUDGE ROSENBLUM: I was just wondering, Cindy, you may be familiar with what we did with the Oregon code with respect to an exception for the matter that Jim was raising earlier. And we have a provision that says, notwithstanding the various restrictions, a judge may appear at, participate in, or permit the judge's name or title to be used in connection with fundraising events for private or public entities devoted to the improvement of the law, legal education, the legal system, or the administration of justice.

13:54 Do you really see any problem with that in terms of our strong-arming people to give money to various projects such as one that's -- our biggest fundraiser of the year is the classroom law project, which brings students into the courtrooms, which raises money for mock trial, for the constitution team -- all the things that judges care about and that we should be involved in.

MS. GRAY: As I say, we discussed that, and there's a lot of interest in it, but we weren't able to reach a consensus; so we'll continue to discuss the issue as well.

MR. HARRISON: Harriet and then Bob.

JUDGE TURNEY: I guess that dialogue raised a question. I guess what I'm hearing is it's not the purpose for which the fundraising is ongoing, it's the perceived strong-arming of lawyers to give to whatever cause, and that way they can come back and say -- if I'm understanding what you said earlier -- so it doesn't matter that it's perhaps a project we could all agree is a good thing and legal related. It's the fact that I'm the judge and I'm putting the arm on you to give money to that, where you may rather give it to the Salvation Army.

Am I correctly hearing that?

MS. GRAY: Yeah. That is part of it, that it -- that it's -- yes. It's the use of prestige and an appearance that the judge -- we're assuming the judge isn't actually doing that but that that's the appearance or the attorney thinks that they can curry favor with the judge by supporting their favorite project. That's the sort of thing that's an injustice.

MR. HARRISON: Bob.

MR. TEMBECKJIAN: Just to follow up on the Canon 2A point that I thought Don Hilliker was asking about, in proposing the additional language, particularly as to conduct that might reflect adversely on the judge's honesty, would that suggest that, if a judge, as a private citizen, is negotiating for the purchase of a used car, that he or she might not be able to say anything that was untruthful in terms of use of the car or the value or, for that matter, when the judge wants to sell a car to somebody else, you know. "Four good tires on this baby" or, you know, not -- "These were all soft miles on that odometer." It may not be true, but does it really implicate the judicial office?

MS. GRAY: Well, these are rules of reason, and it partly depends on the context, and used car sale negotiations is part of the context for that. And the commissions have to use some discretion in what

13:57 1 complaints they follow up on and which they don't.
13:57 2 So if they've got a complaint from someone to
13:57 3 whom they were -- the other person in the used car deal,
13:57 4 I don't know whether they would pursue it.
13:57 5 But I think it's definitely -- it's made for
13:57 6 the more obvious things, like the judge who claimed to
13:57 7 have a medal of honor, when he didn't have a medal of
13:57 8 honor. And there are lots of instances of that kind of
13:57 9 lying that isn't a violation of the law, necessarily,
13:57 10 but certainly -- the fact that a judge would tell a lie
13:57 11 like that makes you wonder what sort of a judge he would
13:57 12 be.
13:57 13 Now, the line -- the sort of stretching of the
13:57 14 truth that takes place in used car negotiations, I don't
13:57 15 think that people would necessarily think ill of the
13:57 16 judge for that. But if there were an out-and-out lie,
13:57 17 amounting to some sort of fraud, then they might.
13:57 18 MR. HARRISON: Any other -- Bob.
13:58 19 MR. CUMMINS: I think this last commentary
13:58 20 crystallizes why we need the hortatory language of --
13:58 21 the discussion that Bob and Cindy engaged in had to do
13:58 22 with whether there would be a disciplinary implication
13:58 23 to that.
13:58 24 But that's not we're trying to convey here.
13:58 25 We want people that are honest. And if they lie about

13:58 1 used cars, maybe they'll lie about something else. I'm
13:58 2 not sure that the distinction that, you know, we want to
13:58 3 draw is one that really is particularly relevant, when
13:58 4 we look at this document as something as including the
13:58 5 aspirational aspects of judicial conduct.
13:58 6 It just struck me as interesting that that's
13:58 7 where it headed.
13:58 8 MR. HARRISON: Yes.
13:58 9 JUDGE WYNN: Cindy, we, sort of, let you slide on
13:58 10 the comment that Minnesota v. White is limited to
13:58 11 candidates or elections. There have been a number of
13:59 12 instances in which that has not been considered the case
13:59 13 and doesn't appear to be at least a direction that seems
13:59 14 to be going.
13:59 15 There seems to be some indication that the
13:59 16 First Amendment considerations apply more broadly and
13:59 17 may be bones of contention in terms of other provisions
13:59 18 within the canon to the extent that a judge can exercise
13:59 19 of his First Amendment.
13:59 20 Is that something you've considered or come
13:59 21 across?
13:59 22 MS. GRAY: Well, I --
13:59 23 JUDGE WYNN: And I'm with you. I'm hopeful that it
13:59 24 has that limitation. But I don't think -- I don't think
13:59 25 you can just, you know, go and accept that that's going

to be the way it is.

MS. GRAY: Well, I think -- I don't think it's just hope that that's the limitation. I mean I think, if you read the opinion, it's definitely based on the campaign context. And, particularly, Justice O'Connor's concurrence is in the campaign context.

She didn't like voting the way she did, but she had to because of the context. And if you take her out and add her to the other four dissenters, then you have five/four the other way.

And I'm not aware of any decision that has come down since Republican Party of Minnesota v. White that has -- outside the campaign context, in which it's been given any kind of sway. It's still, kind of, early days. But so far most of the -- even the challenges are arising in the campaign -- or at least political context so all of Canon 5 may be implicated by the Republican Party of Minnesota v. White, but not necessarily the other canons.

So while -- so I think it's not just hope but, based on an analysis of the decision in White, I think it can be restricted to the campaign context. But it's difficult to predict what the courts will do.

MR. WYNN: I wanted to follow up to say that our supreme court in North Carolina has written a code that

has explicitly taking this Minnesota case and done such things as now allow sitting judges to participate in partisan activities and participate as speakers of particular groups, taken out all kinds of restrictions, in terms of funds -- attending fundraisers and sitting on boards, ostensibly on the basis of White.

And this is -- you know, I don't think the supreme court has been severely criticized, but it's there, and it's going to remain there.

MS. GRAY: The changes were outside of Canon 5?

MR. WYNN: Yes. No doubt about it.

MS. GRAY: Okay. They amended Canon 4?

MR. WYNN: The whole canon. The whole code has been changed. Of course, my point is is that you don't have to have a code at all. But they've simply indicated that they did this under the guise that Minnesota v. White now requires this to be done. So I mean it's not in a vacuum that this -- these type of things.

MR. HARRISON: Bob.

MR. CUMMINS: Cindy, what's your reaction to the participation of federal judges on the free board.

MS. GRAY: I don't think it's a good idea. I'm expressing my personal opinion rather than AJS's position. Because we haven't discussed it specifically.

14:02 MR. CUMMINS: In terms of the code.
14:02 MS. GRAY: I think that -- I mean it does sound like it's an advocacy group, from what I know about it, and I don't know that much about it other than what I've read in the newspapers, which I understand are not always accurate.
14:02 But the -- it is an advocacy board. They have a position in the case. And so I don't think it's a good idea for judges to be involved in those sorts of organizations.
14:02 There are so many things judges can get involved with, that they can clearly get involved with, like AJS and the ABA, that I think there are other ones -- that to be involved in these other organizations isn't necessary. But again, that's just off the top of my head.
14:03 MR. HARRISON: I thought there was some controversy whether judges could get involved in the ABA.
14:03 MS. GRAY: That's always been settled in the ABA's favor.
14:03 JUDGE McKEOWN: We invited some judges at the Ninth Circuit. We invited a number of judges from this area, and I did get back one response that said
14:03 "I'm sure the commission work is admirable, but there is nothing that I

like about the ABA, nor should it exist for judges to be participating in; therefore, I respectfully decline your invitation."

So that is the controversy.

I won't mention who did it, but I just, sort of, threw away the letter and said "Thank you."

MS. GRAY: Judges can always follow their own standards. They don't have to do all -- many things that they're allowed to do.

MR. HARRISON: Any other questions for Cindy?

If not, thank you very much. We really appreciate all the -- from the commission, thank you for all the work and the helpful suggestions in this time here. It's been very helpful to us.

I think our next contingent is going to talk to us about a settlement issue. We have three "Honorables." I'm not sure in what context the appellation arises. So maybe you can introduce yourselves. I have Ann Aiken, Wayne Brazil, and Ed Leavy. Please tell us to what court the "Honorable" refers.

JUDGE AIKEN: After listening to that discussion, I think we're all kind of nervous coming up here.

MR. HARRISON: Who wants to go first?

JUDGE AIKEN: I'll introduce us. To begin with, my name is Ann Aiken. I'm a district court judge from Oregon. I'm a member of the ADR committee from the Ninth Circuit, and I'm here in that capacity at the request of Judge Dorothy Nelson, who is the chair.

Seated to my far left is the Honorable Ed Leavy, who I know all of you know is one of the most renowned settlement judges in the nation and is particularly in Oregon.

And seated to my immediate left also, I'm sure known to all of you, is the Honorable Wayne Brazil, who is also a leading figure in ADR in the Northern District in California and also a member of the ADR committee for the Ninth Circuit.

Let me thank Judge McKeown for inviting us to appear here today and just raise a discussion that we were having in the ADR committee as we ran across some compendium opinions and some research done by our fabulous legal staff, Robin Donahue (phonetic).

And I'm going to hand around two things. First is what we're, sort of, proposing is two alternative modifications for you to consider. And we set out the canon, Canon 5E, as well as some modified language.

I'd also like to send around what has been

14:06 1 E-mailed to Mr. Kuhlman, a letter from the Honorable Tom
14:06 2 Cochran, who's a long-time magistrate judge in Oregon,
14:06 3 also discussing his feelings with regard to what we're
14:06 4 going to be talking about this afternoon.
14:06 5 A number of letters have been arriving,
14:06 6 regarding the issue of federal judges doing settlement
14:06 7 work state cases. And as you can see, they discuss the
14:06 8 issue of some of it in an informed way and an uninformed
14:06 9 way, and I would suggest that that comes on the heels of
14:06 10 a number of us, who have been doing this work over time,
14:07 11 declining to do state court settlement work.
14:07 12 Let me briefly begin by saying that the first
14:07 13 assignment I received as a federal district court judge
14:07 14 was from the Honorable R. E. Jones. I was ordered to
14:07 15 participate with Judge Lyle Beardon (phonetic), a state
14:07 16 circuit court judge in Oregon, to handle the 350 breast
14:07 17 implant cases that were both state and federal cases.
14:07 18 And thus my first assignment on the federal court was to
14:07 19 go back and work with my state court colleagues in a
14:07 20 cross-mediation process in those breast implant cases.
14:07 21 Oregon has a long tradition and history of
14:07 22 exchanging in a cooperative collegial work between our
14:07 23 courts, and it stems back far beyond my period of
14:07 24 service on the court, and I know Judge Leavy will
14:07 25 testify a little bit or talk about that as we progress.

This issue came about in an interesting fashion. At the ADR committee, we were beginning to discuss a program to work with training district court judges and, sort of, more sophisticated and cross-jurisdictional and team mediation work and help put a program together to start sharing resources and -- understanding that oftentimes it's important to pick the mediator for a particular case, a skill set that perhaps some of us have in one field that others don't have, and how in big complex multiparty settlement work, it's really important to share that responsibility with another colleague that you can work with and check and recheck your perceptions in a particular case.

As we were beginning a discussion on how to put such a program together, a request came in from a district court judge in Montana, which Robin Donahue captured and started doing some research both in conjunction with what we had hoped to do by way of a program and in response to the question from the judge from Montana on whether or not his magistrate judge could do settlement work for state courts.

At a meeting, I believe, sometime last fall, our regular fall meeting, Robin Donahue reported to us that the languages in the compendium opinions gave her some pause and concern with the direction we were headed

in terms of cross-jurisdictional work and those of us who were trading cases back and forth with the state court judges. Because it doesn't go one way, it goes both ways.

In the context of that discussion, it was concluded that perhaps we should ask Judge McKeown to come talk to us a little bit about that proposal. So she participated on February 26 in our meeting and encouraged us to come here today and to give you some alternative language and to talk about this issue in the context of the practicalities of what's happening out in the field.

In Oregon this is, again -- and Judge Leavy is going to talk about it -- but a number of the letters address some of the complex work that we're doing in Oregon and how it's been done pairing up state and federal judges and the results that have occurred.

And that's just the beginning and the tip of the iceberg. The breast implant cases come to mind. The Hyundai case out of Eugene -- which was a huge, gigantic issue with multiple foreign parties -- is another case, and I think you'll have some letters regarding that issue.

We participated, and there's a letter with regard to what's called the "Cape" case, and I think

Judge Rosenblum will probably fill you in on more than you'd ever wanted to know about that particular case because it was assigned to her. And Judge Lora (phonetic) and I worked over a year and a half on that settlement.

And finally then in 2000, the first set of Catholic church cases with the archdiocese in Oregon, which involved, again, issues related to state and federal courts.

So the cases that we touch on essentially were state/federal issues, but what I wanted to convey on behalf of committee is, number one, there are prefile cases that often come to our attention, and parties are requesting to participate in a case that will be filed but the parties requested to take a look at that case ahead of time.

There are issues of cases that -- for global settlement -- there's part of case that's sitting in state court but there's an issue that's a federal question, but in order for us to get people to the table, you have to have all parties there to do a global settlement. As Judge Proffit (phonetic) points out sometimes we're not sure whether or not this case will remain in our court and will, in fact, be sent back to state court for jurisdiction.

So there are a number of issues, and as we progress and look at this code, ADR was really not as prominent a tool in the judiciary in the 1990s when this code was drafted.

So it's our committee's hope that you'll take as a friendly suggestion the proposal that we are putting forward. The first proposal, I would say, has a broader support, has probably close to unanimous support. I'll leave to Judge Brazil the distinction that he wants to talk about with regard to the first proposal.

The second proposal better encompasses how members on the committee would like to have either a compendium or commentary written so that it's -- it's inclusive and then people don't guess what might be permissible and what might not be permissible.

The letters, I think, were all a number of cases that were very high profile in Oregon. And Judge Kaufman and I can tell you worked very long and hard on water issues that were very hot and heavy in Oregon, and he worked with many, many parties, who were not necessarily before the federal court. And had that case stayed in settlement discussions, I would predict that he would have been successful.

Chief Justice Wallace Carson hoped to be here

today but Oregon is facing a huge budget difficulty and we have very few resources at the moment. So he couldn't be here, and he's also awaiting a pending. He actually was a little afraid to be out of the state as actions are moving quickly in Oregon. So he's sending a letter in support because the help the federal court is getting offered in Oregon is very much appreciated.

I guess, if you look at our committee, it has strongly (inaudible) and wants you to address this and hopefully with permissible language.

If you look at the proposed rule, it provides for the consent of the chief judge in each -- in the state that holds the federal jurisdiction, which allows, again, a chance to make certain that our work comes first and that we're not putting federal work to the back burner with permissive language.

It also, I think, recognizes that there are specialized skills that are on both courts and that sometimes that's the best way to approach a particular case.

Finally, Dave Lombardi (phonetic), who sits as the Ninth Circuit head of the mediation program and his staff mediators, respectively, are looking toward being able to do more volunteer work in the community and do public service on behalf of the courts, which gives us a

14:14 1 great way of getting credibility and gaining respect in
14:14 2 the communities because we're more involved.
14:14 3 And, finally, I don't think any of us can --
14:14 4 well, there's the second-to-the-last, I'd like to say in
14:14 5 smaller districts than our district, for example,
14:14 6 Judge Kaufman, for a long time, was doing -- was forced
14:14 7 to do settlement perhaps in his own cases with
14:14 8 permission. And he will readily acknowledge that.
14:14 9 When you have a broader pool to draw on, it
14:14 10 makes certain that you're not going to necessarily --
14:14 11 not be required to do your own settlement work. And, as
14:14 12 such, I think that provides two things.
14:14 13 One is that you have a judge prepared to try
14:14 14 that case, who's knowledgeable and should retain that
14:14 15 case. And that case also has the privilege of having a
14:14 16 settlement judge being able to pick up and take that
14:14 17 case and run with it without the appearance of any
14:14 18 impropriety or any impartiality concerns.
14:15 19 So it's important in smaller districts or in
14:15 20 smaller areas that there be more flexibility and ability
14:15 21 to draw on the resources.
14:15 22 And finally, I can't begin to tell you the joy
14:15 23 in watching the judiciary in my years of state court
14:15 24 services -- which is just about ten now, and my
14:15 25 seven years on the federal bench -- the settlement work

is so much more difficult and more stressful and complex and demanding, in many respects sometimes, than trying cases, but the joy of coming to those complex resolutions of cases and leaving people satisfied, having been heard and having had the opportunity to participate fully in a conference, where their case -- they designed their exit strategy and they're able to walk out having high regard for the court is really one of the best callings we could ask for our members of the judiciary to participate in.

So it's with our strong support from our committee that we will hope you take serious look at it in your revisions.

JUDGE BRAZIL: I'm a magistrate judge in the federal district court here in Northern California. When we started thinking about this, we were a little puzzled by two things: One is this lack of historical knowledge about what the policy drivers were that informed the current canon, and we're talking specifically about 5B, just not knowing exactly what the policy drivers are or were.

There are some obvious candidates, like not wanting to permit judges, federal or state, to have a JAMS practice on the side. So if there's compensation involved, that's -- it's clear that that raises some

very serious problems and maybe that's what was driving the phrase "private capacity" in 5E.

Also another obvious possible consideration is not wanting judges to get heavily involved in activities that interfered with their ability to do their core job.

Those are speculations by me, having not seen any legislative history and not knowing. And then I've made a whole list of other possible concerns or policy drivers that might inform this canon. But I'd like to know if any of you folks know -- we'd like to know by way of conversation -- what other concerns need to be addressed in the process of considering whether the canons should be -- this particular canon should be adjusted.

Maybe to make it a little clearer, what -- there are two things that are of concern to our committee -- our committee being the Ninth Circuit ADR committee. One is wanting to address the concerns that many judges and federal courts have and some state court judges have as well of being able to work simultaneously with judges from other jurisdictions to promote settlement.

Canon 5E does not say clearly that you can't do that. But that's one of our concerns, and I'll explain why a little bit more here in a second.

14:18 1 The other is a concern that's more personal, I
14:18 2 suppose, to me. It's not necessarily shared by --
14:18 3 certainly not shared explicitly by all the members of
14:18 4 the committee, by way of articulation anyway -- and that
14:18 5 is that I am also a private citizen, also a father, also
14:18 6 a person who wants to be connected with my community and
14:18 7 do good in my community simply as a matter of personal
14:18 8 reward.
14:19 9 And the way the federal authority have
14:19 10 construed Canon 5E would prohibit me from serving for no
14:19 11 money as a mediator in the public school in my town in a
14:19 12 dispute between two students. And it's unclear to me
14:19 13 why that should be.
14:19 14 And that -- the unclarity, I say not as an
14:19 15 advocate but as a questioner, as a wondering, "Gee, I
14:19 16 wonder what is it that my doing that would threaten."
14:19 17 Anyway, we have 5E. And we have questions
14:19 18 about what its drivers were and what its scope is.
14:19 19 And then not really for this committee
14:19 20 directly, but indirectly, we have two opinions from the
14:19 21 committee of the Judicial Conference of the
14:19 22 United States that is charged with articulating views
14:20 23 about ethical considerations.
14:20 24 And those -- those opinions are -- in
14:20 25 Section 4.4B and Section 5.5A of compendium to the Code

of Judicial Conduct for federal judges, prohibit federal judges from acting as mediators in state court cases, from acting as arbitrators in state court cases, or from hosting settlement conferences in state court cases.

And those prohibitions, I think, are the primary concerns. I hope I'm speaking accurately of Judge Aiken and the members of the committee not understanding -- fully, at least -- where those prohibitions are sourced.

And one thing I mean by that is it's not clear to me how one reasons from Canon 5E, which is, I think, supposed to be the source of this federal thinking -- how one reasons from Canon 5E to these two opinions from the federal judiciary.

One of the reasons we're here is because we've been advised -- and none of us were there at the creation -- but we've been advised that the federal code of judicial conduct is at least very substantially informed by the ABA's code and except in a few places tracks it.

So if there were an articulation from the ABA either that suggested that the judicial conference's interpretation or the rules the judicial conference has pulled from 5E don't necessarily pull there and that the ABA doesn't really necessarily share those views, that

would help with the judges who want to be freed up to help on the state side.

And I think it would also illuminate things and provide better guidance for all us if there were some additional commentary from the ABA under 5E about what "private capacity" means.

Secondly, some additional illumination about the drivers here generally. For example, 5E prohibits -- and I realize it says "should not," but I think those of us who are cautious view that as a prohibition -- should not act as arbitrator or mediator or otherwise perform judicial functions in a private capacity. I've asked my questions about private capacity.

I ask you to consider whether or not that phrase "arbitrator or mediator or otherwise perform judicial functions" is well considered. Because there obviously is a connection between functioning as an arbitrator and functioning in a judicial capacity.

Obviously, also a potential huge difference if the arbitrator does not have power to bind. But there's a potentially much bigger difference between performing at least a traditional judicial function and being a mediator.

If you assume that a mediator always twists

14:23 arms by predicting what the legal outcome would be, you're closer to one's home. But there's a mammoth practice in mediation, which is -- at least, theoretically -- purely facilitative and bears precious little resemblance to a judicial function.

And it might help if there were some more explanation given to the notion that -- at least, a facilitative mediator -- why it is that the view is taken that a facilitative mediator is performing a judicial function.

And just at a broader level, when one thinks about these things, obviously, one starts with trying to figure out why we have a rule, what are the purposes that it's designed to pursue, what are the goals and values.

Then one would look at the other side and say, well, what are the goals and values that loosening the rule would promote and then compare them, both in magnitude and likelihood, and then look for ways to craft a solution that would reduce the likelihood of the harms that you're trying to avoid or the magnitude of those harms.

And I've got a little outline paper, which I won't bore you with. But my hope would be that there would be some consideration holistically like that and

that, after that consideration, either this body would be able to articulate rationales that we could all at least understand if we don't completely agree with, but those rationales would help us -- help inform our judgments on the margins.

If we know why something is the rule, then it helps inform us when we have to make decisions that are not clearly dictated by the letter of the rule. And the process of articulating a rationale might result in line-drawing in different places.

JUDGE McKEOWN: Probably you've all figured this out as you're looking, but 5E is what Eileen handed out. But it's 4F in our model code. It's the same, and they're very identical.

MR. ROSNER: What is challenge --

JUDGE McKEOWN: I should add but that's more of the way the federal code is worded, but the substance is identical.

JUDGE LEAVY: As indicated, I'm Ed Leavy, a senior judge of the Ninth Circuit and have been senior for seven years as, ten years in retroactive service, and before that I completed 30 years as a trial judge in one court or another including the federal and state court, and have been doing mediation more or less at the suggestion of anybody who wanted to do some negotiating

over my areas as a magistrate and district judge and circuit judge.

And I, kind of, fault Judge Aiken for bringing all of this to my attention. Because up until a few weeks ago, I was living in a perfect world of total ignorance. I had no reason to suspect that anybody would consider what I had been doing to be in violation of some code of judicial conduct. When you go out here and do social work, among the rich even, that shouldn't be condemned.

Now, having said that, Judge Brazil first pointed to some interpretations and a compendium on selected opinions. These -- this is the language that we're faced with. Federal judges, including judges on senior status, may not serve as arbitrators in cases not on the docket of that judge's court or a court upon which that judge is designated to sit unless expressly authorized by law. Similarly, judges should not sit in as settlement judges in state court.

The senior judge designated in a particular federal district court may offer his services to settle cases and may serve as a mediator in that court.

Now, this all suggests to me that a federal judge, who has no assignment to a particular court, would be in violation of this opinion to the effect that

we should not serve.

Now, I have, as I say, in my private status of ignorance, served as a mediator in bankruptcy court. And one that comes to mind is the large bankruptcy of a farmer's cooperative, where claims were being made against the producers, where we had so many potential defendants that we had to actually meet at the Oregon State Fairgrounds to get the -- to get the group together -- all these farmers being threatened action by the trustee to recoup the small fraction of what they had been paid for their crop.

And then I did mediation in the Tri-Valley Coop here in California, which is 20 times as large as that one. And I've done mediation in the district court in Albuquerque without benefit of assignment or permission from anybody in authority except the trial judge.

And it goes on and on.

Recently, we had a major fraud case in Oregon, where, as a result of mediation over which I was -- participated, $140 million changed hands.

Not all of the plaintiffs were similarly situated. Some wanted to bring their cases under Oregon securities law, which they think is far more favorable than the damage that might be recovered under the

Employees' Income Security Retirement Act and so on.

Now, I never even bothered to think of which court these cases might be pending in. And just to compound it all, as a result of that, some part of one law firm was a party from New Jersey, and it had some litigation with one of the other parties to it, and they asked me if I would serve as the mediator for the case pending in New Jersey, and I said I would.

Now, that's what you can do if you're not encumbered by somebody's fancy adjudication of what is contrary to the canons of behavior.

Now, the last thing that one lawyer wants to hear from another lawyer is an accusation of doing something that's unethical. And whenever that occurs in the court on which I'm sitting, I always ask that lawyer "Do I have to agree with you in order to rule in your favor?"

And none of us like to be vulnerable to the kind of accusations that are latent in all of this; that whatever we do, the kind of thing that -- in the judicial seminars for newly appointed judges, they tell you, "If you're uncertain about whether to do something, you can do it unless you're afraid that it wouldn't look good on the front page of The New York Times.

Now, what in the world is anybody trying to --

what evil are they trying to avoid by suggesting that we can't be mediators?

And I'll just add further that this concept that a judge from a court other than the court in which the case is pending is contrary to my entire approach -- and, particularly, in discrimination cases -- because anybody who feels that they have been victimized by discrimination is naturally going to be on guard for fear that, in the midst of this mediation, they're going to be victimized again.

And how do you assure them that -- that they're not going to be? You have to assure them that the mediator has no power and that they have the power. And once they become comfortable with the fact that they have the power, the mediator does not have the power, then they don't have to be defensive to what the mediator might say.

And this whole idea that a judge should be a judge of the court in which the case is pending or leave it alone, as I say, is contrary to my whole framework.

And I thank the committee now for listening to my little bit of complaint.

MR. HARRISON: Alan.

MR. ALFINI: I'm very sympathetic to this approach, and, in fact, I'm going to take advantage of your

presence here because I'm proposing an analogous rule here, and it's very short. I'd just like to read it to you and get a sense of what you would think of it.

This would be called settlement in Canon 2.

"A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not, one, act in a manner that coerces a party into settlement; or, two, sanction a party or a party's lawyer for failing to participate in settlement discussions in good faith without first informing the parties of the judge's reasonable requirements for party participation in settlement discussions."

The commentary would essentially say that a judge should not undertake to act as a mediator in a matter assigned to the judge for trial. A judge may, however, undertake to mediate a case assigned to another judge if the judge undertaking the mediation has received mediation training.

So, essentially, I agree with you. I don't think judges, because of the apparent appearance of coercion, I think, should be mediating cases certainly that are assigned to them for trial, although there are some federal judges that do that.

14:34 1 And maybe they shouldn't be mediating cases --
14:34 2 I take it, would be your position -- that are assigned
14:34 3 to their -- anybody in their court for trial.
14:34 4 JUDGE LEAVY: A lawyer representing a party, who's
14:34 5 going to be intimidated by a federal judge, has no
14:34 6 business practicing law in a federal court.
14:34 7 And if I believe in the adversary system. And
14:34 8 I go into that mediation with a view that
14:34 9 "You people are going to do what is in
14:34 10 your self-interests. You've got lawyers,
14:34 11 you know what you're doing, and I'm not
14:34 12 going tell you what you have to do or what
14:34 13 is even fair. I'm going to look for
14:34 14 something that works."
14:34 15 And I try to put people in the position that
14:35 16 they're comfortable knowing that I can say anything I
14:35 17 want without authority or responsibility.
14:35 18 And so if you're in a situation, where you
14:35 19 have the adversary system playing out, I don't see why
14:35 20 the restrictions should be placed on the media. The
14:35 21 duty ought to be on the lawyer to look out for the
14:35 22 interests of that client if the adversary system is --
14:35 23 MR. ALFINI: So you think that a judge should be
14:35 24 able to mediate a case that's assigned to him or her for
14:35 25 trial?

MALE SPEAKER: No, no. I didn't say that.
MR. ALFINI: You wouldn't go that far?
MALE SPEAKER: I wouldn't go that far, except to say that, if the parties consent to it, maybe.
JUDGE BRAZIL: The way our court has drawn the line -- and, obviously, people can draw it in different places -- is to prohibit a judge from being a settlement conference host -- and distinguish that from a mediation -- in a case assigned to that judge, period, if it's a court trial, only with written consent from all parties if it's a jury trial.
The only other little response I'd have is your inclusion of the phrase "good faith." There's now an emerging literature about difficulties --
MR. ALFINI: Then, by the way, we should note that Judge Brazil is a nationally known author in the ADR field and has written on this. That's why I'm taking advantage of his being here.
MR. HARRISON: You're responsible for the emerging literature, I take it.
JUDGE AIKEN: He is the emerging literature.
JUDGE BRAZIL: Some emerging literature.
MR. ALFINI: I just wanted to alert Jim to that, that partly as a political matter -- in addition as a substantive matter, from my view -- but you'll have

better sailing, I think, if you take a harder look at that phrase.

JUDGE AIKEN: I'd also like to just point out, as mediation training -- and that's what we're starting to do more of in the ADR committee as more people understand and appreciate the skill sets and the lack of coercion -- coercion is an issue, and there are bad apples as there are bad apples in the legal community, who push the envelope.

But, once again, I think, with good training and with an understanding that, you know, literally, it's -- they're in charge and that's the only way the settlements work -- because they have to buy into the entire process or, at the end of the day, the cases aren't going to settlement.

MR. ALFINI: Can I ask them to clarify.

So this prohibition, this current prohibition, comes from the Judicial Conference of the United States's interpretation of Canon 5E?

JUDGE BRAZIL: That's what we understand. And I think, to repeat something I said before, one of the problems is that Canon 5E is not clear, but -- in other words, both in scope and the policy drivers that inform it are not clear.

So that makes it difficult and invites or at

14:37 1 least creates room for interpretations like the judicial
14:37 2 conference's committee has pulled out of it that really
14:38 3 do interfere -- certainly, the interpretation -- and I,
14:38 4 for one, don't understand how you go from Canon 5E to at
14:38 5 least one of the judicial conference's opinions. Now,
14:38 6 that doesn't mean there isn't a good way. It's just not
14:38 7 clear what it is. It's not obvious.
14:38 8 But I think what Judge Aiken is especially
14:38 9 concerned about are great, big complicated cases that
14:38 10 are proceeding at the same time in two jurisdictions, at
14:38 11 least -- one state and one federal.
14:38 12 And she believes, with considerable experience
14:38 13 to support the belief, that, if judicial officers from
14:38 14 both jurisdictions -- not the assigned judges but
14:38 15 judicial officers from both jurisdictions -- can
14:38 16 simultaneously and in a coordinated way participate in
14:38 17 the process by which the disposition is reached by
14:38 18 agreement, you get faster agreements. You'll get
14:38 19 agreements that are more comprehensive, that reach all
14:39 20 the problems. You'll have tools to enforce that you
14:39 21 wouldn't have if you stayed only in one jurisdiction.
14:39 22 And you'll have a more enduring agreement for those
14:39 23 reasons.
14:39 24 So there are all kinds of good reasons to
14:39 25 permit judges to work together to solve problems that

aren't confined to one little jurisdiction or territory. And we don't quite understand what the harm is as long as they're not getting paid, as long as they're still able fully to do their primary job.

MR. HARRISON: Ellen and then Carol and then George and then Greg.

JUDGE ROSENBLUM: First of all, I just want to take a point of personal privilege to thank the judges. I haven't met Judge Brazil, but both Judges Aiken and Leavy are my colleagues, if you will, in Oregon, and they -- we are just so lucky to have them as judges in Oregon with their prior state court experience in addition to their federal experience.

And they have truly blazed a path that we can't go back from. I mean we can't go back in Oregon. We have such a relationship built up now between the -- our state and federal judiciary to help settle these major cases.

What we're talking about here really comes down to at least, from my own perspective, and Ann mentioned the Cape case, which -- I don't have time to go into the details -- but there were a bunch of condominiums about to fall into the ocean on the Oregon coast and, basically, Ann, along with a state court judge, teamed up and did a joint -- together did a

mediation that avoided my having to go over to the coast to try a six-month case in an Armory Building because we couldn't have fit into the courthouse over in Tillamook. So that's just one actually fairly small example compared to many of the other cases they've been working on.

Judge Leavy, who's very humble, will tell you that the case in Albuquerque was the Wen Ho Lee case. That's the case that he mediated.

I hope you don't mind my mentioning that by name.

So we're talking about something that really is already institutionalized, at least in our state, and that -- I think we can serve as a model for other states that haven't yet discovered the value of this. And it really does come down to the restricted state court budgets that simply cannot accommodate the major litigation that we have going on in our courts. Without their help, we'd be truly stuck.

And so, you know, when Ann first called me, I honestly did not really stop to consider what this group could do. In fact, I was a bit confused at first. And I thought, "How can we help?" But the truth is that I think there's a whole lot we can do because we are serving as a model for the federal code, and that, if we

can make some changes that would be to their benefit, we will be benefitted in the state courts immeasurably.

JUDGE AIKEN: Ellen points out something Judge Leavy just quietly said to me. What happened was, when this discussion took place at our ADR committee, and those of us -- you can imagine how hard it was for me to tell Judge Leavy that there might be an issue.

"I didn't say it was unethical," is my response to him, but I thought he might want to be aware of it. It was a conversation, a casual conversation over dinner in New York, and we talked about it and thought we needed to do something.

But I declined -- I started declining any of the work, and the letters and the lawyers are driving this process in Oregon now. And they're -- we've, sort of, held back people writing because they're just now used to this in complex litigation and really wanting to have a way to move the process forward.

And the comments made by Judge McKeown in our committee is it's really lawyer driven in so many ways, the issues now and the complexities of this case.

So I would like to tell you also, with regard to Ellen's case, had that case not been settled, it would still be going on. It would be in federal court now on coverage issues, and there would be no money

left, absolutely no money for any of the people who --

JUDGE LEAVY: You mean the lawyers would have gotten it all.

JUDGE AIKEN: Absolutely. And as a result of that creative process that was agreed to by all, it initially began because the lawyers didn't have another way to figure out how to solve it. So it's really big. This whole issue is lawyer driven.

MR. HARRISON: Judge Aiken, would you yield to Judge Leavy for just a moment. He wanted to jump in.

JUDGE AIKEN: I will.

MR. HARRISON: He has senior status.

JUDGE LEAVY: I had a senior district judge in Oregon tell me one time that the constitutional requirement of good behavior does not apply to senior judges.

And I have not -- I have not -- and maybe I should -- I have not rejected participation in the state court cases. I have not. I have some schedule. And I'm going to ask for a little help maybe from you collectively to tell me that I should stop it, in the face of this, or not.

The other thing that Judge Brazil talked about things in the neighborhood that he might want to participate in, in the name of citizenship. And I have,

over the last at least 20 years, made it known among lawyers that anytime a lawyer was sued for malpractice or some other form of misconduct and the parties wanted me to be a mediator, I would do it without regard to whether anything was filed or where it was filed.

And I've done that in literally dozens of cases, as, kind of, a sense of, if you will, responsibility of being a professional. And if they want me to be a mediator in a case like that, I will be glad to do it.

And since we're making a bunch of confessions, I also have to tell you that I tried to settle that case before it ever got to you, and I failed.

MR. HARRISON: Thank you.

Judge Amon.

JUDGE AMON: One thing I know that you said that you raised some of these issues with Margaret, who's on the code of conduct committee now. But have you ever sought to do a presentation or brought this to the committee's attention, the concerns you have from your ADR committee?

Because it's that opinion that you are concerned about and -- there's a whole list of cites to it and, of course, I don't have those now to go into all the thought processes that went into reaching those

opinions. But what we really seem to be concerned about, it seems to me, is the committee, and it seems like you ought to take up some of these concerns.

And I see a distinction -- if you're talking about some of the massive tort litigation -- we have a number of those cases in New York -- and I don't know that this necessarily precludes, when there are parallel cases in federal court and state court, with a federal and state court judge working together in the settlement context -- I don't even know that that -- these opinions necessarily preclude that.

I think some of the concerns -- and, again, I haven't reread all of these, and I'm not speaking with any informed basis from having looked at some of the analysis -- I think there may be some concerns, when you're talking about jumping into a state court case that you really have nothing to do with -- in other words, it's not a case on your docket -- that there's some concerns about the independence of the federal judiciary -- that we shouldn't be in a situation, where we're acting in the context of state court judges, in that sense, particularly, if the state has any authority over you as a mediator, what cases you'll get -- in other words, if there's some state court authority that then becomes -- telling you where you go and what you

do, and -- you know, in those concerns.

Because we also have some jurisdiction over state court judges, to some extent, in the habeas corpus area, because we get appeals from state courts.

So I know there's some concerns. I don't know if that's what drives these decisions. But there is some independence concerns that may be behind some of this. But my suggestion would be, particularly, since you all feel so strongly about this, that you ought to, you know, write to the committee or talk to the committee about your concerns. I mean that's just one thing.

But I do think that there's a difference when you've got parallel cases. I know often the judges work together to try and create global settlements.

And the other thing that, you know, I feel particularly strong about and I think that I do -- and I particularly want this clear -- you are not saying that anyone who works in the ADR field -- that a judge cannot act as -- cannot conduct a settlement negotiation in his or her own case as long as there's, for instance, a jury trial? Because I would be very concerned about a rule like that.

JUDGE BRAZIL: No, we're not. As long as there's real voluntary consent.

MR. HARRISON: George and Loretta, Bob Cummins, and then Peter.

MR. KUHLMAN: Thank you, Mark.

I have to confess to our guests and actually to the whole commission that, when I first heard discussion of this subject, I was underwhelmed with the significance of it. I really didn't get it at all, and I thought that it might not even be an ethics issue.

After hearing this very interesting discussion, basically, what I now am beginning to think is that, when those of us who worked on the development of the current ADA model code -- I think the only other person in this room, who might have been around the table with all of us is Seth Rosner -- but I was counsel to the ethics committee when it did develop the code back in 1987 and '90 -- is that we may have just given short shrift to this issue.

And so I'd like to say a few things. Some are historical and then some are my analysis of maybe where the problem really has come to rest and what we might do.

Historically -- well, first of all, I would point out I saw that Don Hilliker had checked his book on the development of code of judicial conduct to see if there was any discussions of the history of this and

there is nothing, just as there's no comment --

MR. HILLIKER: It just said it wasn't wise.

MR. KUHLMAN: But there's no explanation. There's no real evaluation of what concerns were and, of course, there's no comment that accompanies this provision in our -- what is now 4F. So, clearly, we didn't -- we didn't give anybody the ability to understand what we were thinking about.

And I'm not sure that my memory is terribly clear, but I do know that in about '87, there was a general concern that a lot of people had about possible impropriety and just the bad appearance of what was at that time first identified as the rent-a-judge phenomenon.

A And it was a concern that was expressed by a lot of people about judges who were wanting to stay on the bench but were also wanting to go out on their own, rent themselves out and their judicial abilities. Not that they couldn't have done very good jobs in doing all of that, but just that there were potentials for several different types of conflicts, not the least of which was potential interference with the work of the court to which the judge was already assigned, potential for subsequent interference with the efficient administration of the judge's own court, if she or he is

later disqualified, because of having been involved in a situation with people who end up as litigants before the court, maybe in a related matter, subsequently or whatever.

There were a lot of things that clearly were never wrote into the explanation of why we thought there might be some concerns. But I think that those were some of the policy drivers, as Judge Brazil, sort of, asked if we can identify any of those. I think they were probably policy drivers.

I will also tell you that another reason that I initially thought, "Well, this is really no big deal," is that I remember that we wrote the last part of what is our 4F to really provide for legitimate situations in which the conflict problems weren't going to be rife and the courts had themselves had the opportunity to consider what the process would be and to develop their own rules.

In a sense, I think what the ABA was doing was punting by saying that "A judge shall not do this a private capacity unless expressly authorized by law." And "authorized by law," of course, if you look at the definition in the rules, says that court rules are the law as well -- cases and court rules.

So I do think there was an element of punting

in saying, you know, if the courts look at this and the court decides that it's okay to do it, it is not for us in a code of ethics to try to overrule that. And so we'll just leave it as it is.

And I don't think we saw the mischief that potentially lay in the hands or at the pens of those who might write opinions, interpreting this just, sort of, in a sense, almost blindly accepting the black letter and saying

"Well, it says you can't do it and so we don't even need to say why. It's just a violation of something that the code says you can't do."

So I now have, sort of, come 180 degrees to recognize that this particular provision probably, if it belongs there at all, if there are policy drivers that are legitimate that would suggest a need to keep some a type of cautionary note in the code about the potential for conflicts in this situation, then I think we can probably work to find a positive way of stating this as something that is permitted and then add to it the qualifications that indicate the circumstances in which it might not be.

Now, that said, I do think that the policy drivers are all implicitly or explicitly laid out in

other provisions of the Code. We're got the conflicts provisions. We've got the disqualification provisions. We've got a lot of the things that, sort of, tie into this, ultimately, if the question does have to arise in ensuing from a perfectly legitimate undertaking by a judge to do this sort of thing.

I don't know if that was very well organized. But it's trying to take the last 17 years of this benign neglect of the subject and add to it this, sort of, cursory review that we did of it, say, 1989 or something and say "Look what we left ourselves and look what we left you with."

MR. ROSNER: Can I comment on that.

MR. HARRISON: Let's get the other ancient reporter to --

MR. ROSNER: George, I think your recollection is very accurate indeed. I don't think that the committee 15, 17 years ago had any perception of the way this could come to be viewed. I don't think the committee spent a great deal of time on it, frankly. And one of the things that supports that is -- that it talks about "arbitrator or mediator." And arbitrator has nothing to do with the issues that your office has now.

And the fact that there's no commentary, I think, bears out George's recollection, which,

14:55 1 essentially, is the same as mine.
14:55 2 It's interesting that arbitrator is first.
14:55 3 That's what, I think, the committee was focused on
14:55 4 mainly. We're also talking about a relatively early
14:55 5 time in the whole development of ADR -- 1987, I guess it
14:55 6 was. I think your recollection is very accurate indeed.
14:55 7 MR. HARRISON: My lineup is Loretta, Bob Cummins,
14:56 8 Peter Bowie, and Ron.
14:56 9 MS. ARGRETT: I'm going to pass.
14:56 10 MR. HARRISON: Okay. Bob.
14:56 11 MR. CUMMINS: I'd like to come back to this
14:56 12 proposal that Jim Alfini put on the table, and there
14:56 13 seemed to be some acquiescence.
14:56 14 I've been trying a similar thing about
14:56 15 four years, and what I don't want to see in the code, in
14:56 16 my judgment, is a limitation on a judge's ability to
14:56 17 settle a case. Whether it's on -- quite frankly, as I
14:56 18 plea-bargained a lot of criminal cases in front of a
14:56 19 trial judge, and Hubert Well, phonetic), for example, in
14:56 20 the northern district of Illinois, settled a lot of
14:56 21 cases that might have been bench or jury trials. I
14:56 22 don't even remember now. And there wasn't coercion in
14:56 23 the sense that most people think of it.
14:56 24 So, Jim, I'm not sure your proposal doesn't
14:56 25 suggest that there would be an inhibition on a judge

from settling a case that is assigned to that judge's docket and, if the parties agree, even if it's a jury trial. And I don't know why -- I don't know why we should impose any kind of limitation on the discretion of judges. That's all.

MR. ALFINI: I just -- can I quickly respond to that? I would certainly change that first sentence and that first commentary to probably track the Northern District of California's approach. I think that's fine.

I'm not -- the problem here is that, over the last couple of decades, we created a settlement culture, and we don't have an ethics infrastructure to support that culture. That's, I think, what we're -- we've been talking about here. And George just reinforced that big time.

So I think we need to struggle with some language here because we're, to some extent, writing on a clean slate here.

MR. CUMMINS: But are we going to have a rule that says a trial judge can't handle the negotiation of the settlement of a case simply because it's a bench trial? I hope you don't have a rule like that. Because there ought to be cases that, even in the context of a bench trial, where the jury has been waived or nobody has made

14:58 1 a jury demand, that the trial judge ought to be able to
14:58 2 participate in settlement.
14:58 3 Let's say he's already ruled on three
14:58 4 12(b)(6) motions and a motion for summary judgment. He
14:58 5 knows more about the case than anybody in the world.
14:58 6 Why shouldn't that judge be able to settle that case?
14:58 7 MR. HARRISON: Can I ask you to, sort of, hold that
14:58 8 till we come back to this, when we don't have --
14:58 9 MR. CUMMINS: I thought we had the experts here,
14:58 10 who might react to that, how they would deal with that
14:58 11 issue.
14:58 12 MR. HARRISON: We do, but that's not what they came
14:58 13 here to talk about.
14:58 14 We have Peter Bowie and Don Hilliker.
14:58 15 JUDGE BOWIE: First, as part of history, it's
14:58 16 useful to go back to the code in the '72 code, which is
14:59 17 where 5E came from feds, and look at that. It doesn't
14:59 18 get to your question in terms of this, and there are a
14:59 19 couple things.
14:59 20 Like Carol, I do not have access to the
14:59 21 individual dockets that led up to the compendium thing
14:59 22 anymore; so I can't tell what you the rationale behind
14:59 23 all of that was.
14:59 24 But I would add to the discussion and
14:59 25 emphasize the point that Carol made that one of the

14:59 1 issues is a Canon 1 issue in that there is a notion --
14:59 2 as well as the separation of powers discussed in the
14:59 3 ABA's comments on the history of Canon 1 -- a notion of
14:59 4 federalism, meaning a separation of state and federal in
14:59 5 that context, which the codes of conduct committee has
14:59 6 observed.
14:59 7 Now, it's of some interest to me that in --
14:59 8 after the committee on codes of conduct reviewed the
14:59 9 1990 model code, they chose not to adopt the commentary
14:59 10 to Canon 4F, which is 5E for us. That commentary says
14:59 11 4F does not prohibit a judge from participating in
15:00 12 arbitration, mediation, or settlement conferences
15:00 13 performed as part of judicial duties.
15:00 14 So if you were to adopt some commentary like
15:00 15 that, or if you were, in some way, to define performance
15:00 16 of mediation in this kind of context across a
15:00 17 jurisdictional line between federal and state, as being
15:00 18 part of the judicial duties, even within the context of
15:00 19 the ABA, you've got that issue solved. Also the black
15:00 20 letter language of 4F or 5E deals with doing this in a
15:00 21 "private capacity," whatever that means. And who has
15:00 22 defined that?
15:00 23 So those are some thoughts that you might want
15:00 24 to consider, wherever you choose to take this. But I
15:00 25 suggest to you that at least as a piece of the answer to

15:00 your problem, it may not be sufficient to just bring it
15:00 here for the ABA to look at to the extent that the
15:00 judicial conference of the U.S. is going to be looking
15:00 at the federalism question as well.
15:00 JUDGE BRAZIL: May I respond to that?
15:01 MR. HARRISON: Sure.
15:01 JUDGE BRAZIL: Because two judges now have asked,
15:01 you know, "Why are we here?" basically. And I -- and
15:01 the short answer is we're not 100 percent positive. But
15:01 a little bit more -- a little bit richer answer is that
15:01 we've been advised that, if we ask prematurely the
15:01 judicial conference, we're not going to like the answer
15:01 we'll get.
15:01 And the reason that will happen is because of
15:01 this history, which is a little -- specifically, what --
15:01 one of the ways to construe how -- the advice that was
15:01 given to us is why not take advantage a process that's
15:01 been recently launched that will be respected, in that
15:01 it will have input from all kinds of quarters -- lots --
15:01 state, federal, lots of lawyers, lots of judges, a
15:01 thorough process -- and if that process produces a
15:01 different writing, we will be in a much -- first of all,
15:01 our debate will be enriched, and we'll be in a much
15:02 better position, when we go to the judicial conference,
15:02 rather than getting an answer that, frankly, we're a

15:02 1 little afraid of. So we're here partly because we were
15:02 2 advised to start here for some of the reasons I just
15:02 3 explained.
15:02 4 And my fear is that there -- among other
15:02 5 things, plenty of fears -- is that this notion of
15:02 6 separation of power gets misused when we're not talking
15:02 7 about power.
15:02 8 JUDGE BOWIE: Well, this is federalism.
15:02 9 JUDGE BRAZIL: Okay. But federalism means, among
15:02 10 other things, "Let's work together," and not in a
15:02 11 situation where the feds can force the states or where
15:02 12 the feds are constipated by the states but in a
15:02 13 situation where no one has power except to reason.
15:02 14 We just want to help -- not power -- help,
15:02 15 reason.
15:02 16 MR. HARRISON: Don. And then I think we need to
15:02 17 bring this discussion to --
15:03 18 MR. HILLIKER: Could you just maybe articulate a
15:03 19 bit this second alternative, which is a broader
15:03 20 alternative, why you would recommend that. I'm assuming
15:03 21 that would be your first choice.
15:03 22 JUDGE BRAZIL: The second alternative is a product
15:03 23 of the concern that I articulated a few minutes ago, in
15:03 24 our committee, which was -- my concern was partly about
15:03 25 the ambiguity of the phrase "private capacity."

15:03 1 I assumed that that's -- now 4F -- I thought
15:03 2 that the driver there was
15:03 3 "Don't go make money. You're getting
15:03 4 paid by the government. Earn your money
15:03 5 in the government and don't go earn it
15:03 6 anywhere else."
15:03 7 Fine. I love that idea. I think that's
15:03 8 perfect. If that's what that means, no problem. I'd
15:03 9 like somebody to tell us if it means more than that.
15:03 10 Because I would like to do community service and to use
15:03 11 some of the -- whatever they are -- talents that I have
15:03 12 to do community service well.
15:04 13 So that's the driver on here. But I also need
15:04 14 to tell you that these things that are before you are
15:04 15 the products of about a half an hour's thought.
15:04 16 So they are just, "Okay, let's get something
15:04 17 out there to start the conversation." They are in no
15:04 18 sense the product of the kind of deliberation that this
15:04 19 committee is used to and will bring to it. So they're
15:04 20 just, sort of, ideas. Please don't view them as
15:04 21 anything else.
15:04 22 MR. HARRISON: Judge Wynn.
15:04 23 JUDGE WYNN: Judges, I thought you would benefit
15:04 24 from someone who was singing a little different tune
15:04 25 from you are on this. And my comments are for the

benefit of saying that these are concerns that come immediately to my mind, not necessarily the way in which I feel. I think what you're doing is laudable.

But I think what you're attempting to do is increase the jurisdictional role of a judge to do something outside of the role in which you've been assigned and elected or selected to do.

And when you select to do certain things such as to go out and arbitrate or mediate disputes that are not before you, the first question is going to be is whose disputes are you arbitrating, how are they selected, and what are the subjects that you've been limited to?

Are you going to arbitrate disputes limited to domestic matters? Are you going to do gang-related violence-type disputes? Are you going to do other type events or what? Things of that nature. And who are you going to do these for?

If you're going to do them for one section of the community, are you going to do them for the other section of the community? Am I entitled to have you to do this in my neighborhood because I saw you doing it over there in another neighborhood?

I think the problem you get with this is that, traditionally, the role of a judge -- my court is a

15:05 1 court that has gotten into the business of mediation --
15:05 2 in fact, I'm a certified mediator. I'm not dealing with
15:05 3 it because I choose not to do it because I could write
15:05 4 opinions and give you an answer. I don't want to
15:05 5 mediate your disputes.
15:05 6 And I think that's what judges do. They don't
15:05 7 have to mediate. They can tell you what the answer is.
15:05 8 So when you get into the business of mediating, what
15:05 9 essentially is probably the major concern is the erosion
15:05 10 of the role of the judge.
15:05 11 When are you this mediator? When are you this
15:06 12 arbitrator? When are you the guy who's in the community
15:06 13 talking in these areas? And when are you the judge
15:06 14 whose rule that "You go to jail" for a certain period of
15:06 15 time is not mediation. That's you acting in your role
15:06 16 as the judge. So I think that's the major concern is
15:06 17 when do you play this role as a judge.
15:06 18 The only reason you're being asked to mediate
15:06 19 or arbitrate is because you're a judge. Before you
15:06 20 became a judge, no one is going around to ask you to do
15:06 21 these things; so what you're essentially doing is taking
15:06 22 the authority that you earned as a judge by being
15:06 23 selected or elected or represented and transferring it
15:06 24 to this arena in which you are now mediating, and you're
15:06 25 doing it on your own selection, and you're selecting the

things you want to do it for. And that's kind of it. And that's, kind of, what's going on.

In my neighborhood, we do it -- I'll tell you why it came up. It came up because -- is what I call the judges' reemployment act once you retire. You are making yourself very employable because what you've done is become certified as a mediator and you start doing it, and when you retire, which is free years now, "Boom," you are automatically a prime target for employment as a mediator.

And, you know, so that's, kind of -- but it's only for matters that come before our court. It's not for matters elsewhere, and we can't go out in the community doing these things in the role of a judge.

But all those comments are to say, I think those are concerns that I hadn't heard articulated in here. But I can see them coming up, and they seem pretty legitimate to me.

JUDGE AIKEN: I'd like a chance to just respond in the following fashion. I sat as state court judge, as I indicated, for almost ten years and as a federal judge for seven years. In the federal system, I try 1 percent or less of the cases before me. And with sentencing guidelines, criminal cases that are tried are few and far between.

15:07 1 So what do I do with my time? Let's be
15:07 2 honest? Collegiality begins in your own backyard, and
15:08 3 that begins building relationships with state court
15:08 4 judges.
15:08 5 I came to the federal bench with skills that
15:08 6 are very different, perhaps, from some of my colleagues
15:08 7 and yet the same. And what we do -- and I wanted to go
15:08 8 back to the parallel tracking cases -- those are
15:08 9 actually the easy ones to decide under this rule when
15:08 10 it's a state court case pending as well as federal
15:08 11 litigation that crosses over.
15:08 12 The more difficult case is when I have a very
15:08 13 complex construction insurance defense case and I don't
15:08 14 have someone who necessarily can help me with that but I
15:08 15 know it needs to be mediated because the parties are
15:08 16 going to be so dissatisfied as we go through the
15:08 17 litigation process.
15:08 18 And I can call on a state court judge and say,
15:08 19 "Can you take this case because it's
15:08 20 your area of expertise and you know how to
15:08 21 do this. And I'll solve it if I have to
15:08 22 in litigation, but I think you can do
15:08 23 that -- and I'll trade you a med mal, and
15:08 24 I'll take a baby death case. And I'll do
15:08 25 a settlement in that case because I

15:08 actually have really good skills in that
15:08 arena."
15:08 And we trade cases because we have different
15:08 skill sets that were developed not only as a lawyer but
15:08 as a state court judge and a federal court judge. And
15:09 that's the collegiality that goes back and forth.
15:09 And like Judge Leavy, I am happy to take
15:09 whatever case I'm asked to do. And it crosses all over
15:09 the place. And you bet it's important that you take
15:09 cases from all the communities and that you serve people
15:09 who ask you. But it's a good skill set.
15:09 And I want the courts to be relevant. I want
15:09 judges to remain relevant in the resolution of cases.
15:09 And what we're seeing in state court is the development
15:09 of many doors out of litigation.
15:09 And for us to use our best skill sets, ours
15:09 necessarily is to be mediators and to have the ability
15:09 to not just order people to do things but to tell them
15:09 in the kindest most appropriate way, thoughtful way how
15:09 to design their own exit strategy to end their
15:09 litigation.
15:09 And at the end of that day, I feel much better
15:09 about the result that I give than going home and having
15:09 ordered them to do something.
15:09 MR. WYNN: Do you think you're covered by judicial

15:09 1 immunity in those instances?
15:09 2 JUDGE AIKEN: That's the conflict. That's the
15:09 3 question that we're asking. That's why I'm --
15:09 4 MR. WYNN: I can't imagine how you are.
15:10 5 MR. HARRISON: It's clear to me that I see hands
15:10 6 trembling a little bit. And I'd love to continue this
15:10 7 discussion because you've obviously provoked an awful
15:10 8 lot of thought and consideration that we hadn't given to
15:10 9 this and didn't appreciate the dimensions of this
15:10 10 problem.
15:10 11 So I will ask members of the commission of the
15:10 12 advisory group to make a note of what you would have
15:10 13 said if I had given you the time to say it right now
15:10 14 because we have a whole other group of judge from
15:10 15 California to visit with us, and we've got to end in
15:10 16 time.
15:10 17 By the way, all you, it's my understanding --
15:10 18 if I misstate this and screw this up, please tell me --
15:10 19 but I think everybody who's testified today or appeared
15:10 20 today is invited to a reception at the Ninth Circuit at
15:10 21 5:00 o'clock. So --
15:10 22 JUDGE AIKEN: I think we're all going to -- intend
15:10 23 on participating.
15:10 24 MR. HARRISON: That's great.
15:10 25 JUDGE AIKEN: Thank you very much for your time.

And any comments you have, send back because we're working on this in our committee and, truly, this was an opportunity to come here today at Judge McKeown's invitation. We thank you, and we're happy to do whatever work.

MR. HARRISON: We're going to take a five-minute break.

(Recess was taken from 3:11 p.m. to 3:24 p.m.)

MR. HARRISON: I would appreciate it if you would introduce yourselves for the record. I have not been very kind to the court reporter because I haven't insisted that everybody identify themselves before they speak. So, belatedly, I'm going to do that.

If you would tell us who you are, and then we're looking forward to hearing from you.

JUDGE GUTIERREZ: My name is Phil Gutierrez. I'm a state court judge sitting in Los Angeles. And I am this year's chair of the ethics committee.

JUDGE HOLLENHORST: My name is Tom Hollenhorst. I am an associate justice on the California Court of Appeal. I sit in Riverside. I am a vice chair of the ethics committee.

JUDGE CONGER: I'm Julie Conger. I'm a state court judge. I sit in Alameda County. And I have been chair of the ethics committee twice since 1990. And I'm

currently sitting as a member of the ethics committee.

JUDGE MacLAREN: I'm Ronni MacLaren. I'm a Los Angeles County Superior Court judge cross-assigned to Alameda County, temporarily, while the Scott Peterson case is being tried. I'm filling in for Judge Delucchi.

And I'm just a lowly member of the ethics committee. I have no title, but I've been on the committee since 2000.

JUDGE GUTIERREZ: The first thing I'd like to do is thank you for inviting us to be here and let you know what the ethics committee does in California. There are 15 members to the ethics committee -- judges and commissioners.

Our role is to basically answer ethics questions presented to us by the California judges, commissioners, and judicial candidates. Over the last year we -- last year we answered 382 questions from judges and commissioners. The year before that we answered over 400 questions from judges in California.

How the process works in California is that a judge who has an ethics question calls the hot line. That judge is provided two names of ethic committee members. They choose one.

That person fields the question, works up a written response called an "informal response." That

15:27 1 informal response is run by the vice chair, who approves
15:27 2 of whatever the advice will be.
15:27 3 We then meet six times a year, and the
15:27 4 committee members review the advice given. It takes
15:27 5 ten committee members to ultimately approve that advice.
15:27 6 The written advice is called "informal response," an
15:27 7 "IR." The IRs are confidential between the committee
15:27 8 and the judge. The judge can waive that confidentiality
15:27 9 and share the advice that was given, to whomever the
15:27 10 judge wants to.
15:27 11 At the end of the year, we take those
15:27 12 380 inquiries, and we publish an ethics update, which
15:27 13 basically summarizes what our advice has been to the
15:27 14 questions asked the prior year.
15:27 15 The other important function that we -- that
15:27 16 we carry out is that we -- it is our understanding that,
15:28 17 if a judge calls the ethics hot line, gets a response to
15:28 18 an ethical question, and subsequently is facing
15:28 19 discipline based on that question, that it's our
15:28 20 understanding that the California Commission on Judicial
15:28 21 Performance will give great deference if that judge
15:28 22 solicited that advice and then followed that advice.
15:28 23 So that's basically the function of what the
15:28 24 ethics committee does. And it's my understanding -- and
15:28 25 we would be happy to answer any questions that you have

with regard to common questions that occur in California and how we apply the code in California as well.

JUDGE MacLAREN: May I add one thing?

Periodically, we issue formal opinions. When we see that we are getting a lot of questions on a particular subject, we'll write a formal opinion that's merely guidance to judges but something we think is important for judges to know.

MR. HARRISON: Peter.

JUDGE BOWIE: Just an additional observation. And that is there is a book, Judge Rothman's book, which you guys are involved in, if I understand correctly, which is a tremendous resource that contains everything, including those formal opinions, that -- and it's a great place to go and look for help.

JUDGE CONGER: I might add also that, in addition to the book, there have been a number of publications that the ethics committee has produced.

One of them, in particular, involves judicial elections and ethical involvement in judicial elections. Another one was a transitions pamphlet for the new judge. Another one was a treatise on disqualification and disclosure issues. And to the extent that we do these publications, we make them available to all 2000 or more trial judicial officers in California.

JUDGE BOWIE: There is one other thing that they're doing that's incredible, and that is that California judges, if they attend a special one-day training program on ethics, will get the premium for their liability policy paid.

JUDGE CONGER: That's correct. The ethics training program that -- we're actually on the second phase of that. The first program was done basically from judicial educational research from each state.

The second program, again, is by the state, but the Judges Association Ethics Committee is going to be participating in a supplement program this spring. I believe Judge MacLaren, Judge Hollenhorst, and I are going to put this on, and that's also going to qualify for the qualifying insurance.

JUDGE MacLAREN: And we have a computer database of all of our advice so that, when we get an inquiry, we go in and research and make sure that our advice is consistent throughout. So we -- and we prepare written responses that are just confidential with the inquiring judge, but it lists the authority for our advice, whether it's Judge Rothman's book or a prior response we've given or something in the update or, obviously, some- -- we always list the canon that applies.

MR. HARRISON: Questions?

15:31 JUDGE WYNN: I just want to point out that Tom Hollenhorst is my classmate at UVA. He graduated first in the class.

But I also wanted to say the -- in North Carolina, you know, the chair is by statute a person from the court of appeals. I'm the appointee to be the chair, which remains to be seen now that I'm a candidate to the Supreme Court.

But the question I have is, until recently, a judge could call the chair and the chair could give off-the-cuff advice to the judge, which would effectively insulate that judge in the event it was later determined that what he was doing violated something.

Do you have such a vehicle that would allow a judge, who, let's say, is doing something, all of a sudden -- is there someone he can call to get that type of insulating advice and, if he follows it, then he's okay until you get a formal opinion?

JUDGE HOLLENHORST: I get the second call. The first call goes to a member of the committee and sometimes, because there's only one or two appellate judges and we're not in court as much as the trial judges are, it's probably easier to get an appellate court judge. If they can't find a trial court judge,

they just keep calling. Sometimes they'll actually call me too.

But we've had cases, issues where judges have literally had the litigants in front of them and somebody has gone into chambers and called the hot line and we've been able to turn it around in about 15 minutes.

Usually, we can do that if the question is not one that is going to require a lot of expert research. We try never to give off-the-cuff advice, though. We try to research it. We all have a research program that's -- that we actually use in the Court of Appeal that we've now modeled it to where it will work for ethical inquiries as well.

So we've got a database of ten years of ethical advice that we've given to judges on those CD ROMs. They're quite searchable now. That material is quite searchable. So we can turn around a question literally in minutes because of the use of that CD-ROM using this database called ISIS.

We also, of course, have Rothman's book. Every new judge in California is given a copy of Rothman's book when they're appointed. Every new judge in California goes to two ethics courses within the first year, once within the first few weeks of

appointment. The second one is within the first year of appointment. And that's a two-week program with all kinds of ethical issues that are developed through that.

California judges have access to lots of different educational opportunities involving ethics education.

MR. HARRISON: Is the database to which you referred searchable by subject matter, canon provisions, or what or both?

JUDGE HOLLENHORST: All of them.

JUDGE CONGER: Anything. We can put in your name and find it. Any inquiry since 1990, I think we have.

JUDGE HOLLENHORST: It's almost now developed into a series of reports. And it's interesting, because as new factual scenarios come to the ethics committee, we almost annotate them based upon old citations. So you can actually now follow a thread of the development of an ethical theme over the years to see that -- how committees in the past have handled it, how factual variations lend to different conclusions. It's actually turned out to be quite handy.

FEMALE SPEAKER: But I think it's important, on the term "off the cuff," when an inquiring judge has a problem, the member of the committee who responds has to run it by the vice chair so it's not just one person's

opinion.

And then that is considered a tentative response of the committee until the whole committee has an opportunity to review it, which is once every two months. Unless it's an emergency, and then we will do an E-mail survey so that any advice coming from the committee is considered by the whole committee, and it's not just one member giving off-the-cuff advice.

JUDGE CONGER: We also have the ability to do teleconferencing, the whole committee or just a small group of the committee, so that we can assure that the advice given, if it must be acted upon before the next committeewide meeting is at least consonant with what everybody degrees on.

JUDGE HOLLENHORST: There was a case that came through recently, where a judge had a really interesting ethical problem, which didn't need to be decided today or tomorrow. It happened that he was leaving for vacation, and we thought, you know, what a nice thing if we could wrap this up for this judge. So the day the judge got back that we had a considered ethical response, and it was -- it was a very fine point that we had not discussed before.

And what I did is I sent a copy of the proposed answer to everybody on the committee and

15:36 1 basically we had a vote by Internet. And there was some
15:36 2 wordsmithing that went on. So when the judge came
15:36 3 back -- the first thing that happened when the judge got
15:36 4 back to court was the judge had an answer to, sort of, a
15:36 5 difficult question but knew at the time the judge walked
15:36 6 in and looked at what we had done, that there was a
15:36 7 majority that said "Do this," and he was prepared to
15:36 8 proceed that way.
15:36 9 MR. HARRISON: And, Ann Cleaver, I think you had a
15:36 10 question.
15:36 11 MS. CLEAVER: Yeah. Two questions. One of them
15:36 12 has, kind of, been answered. I was initially going to
15:37 13 ask how long it takes generally to get one of those IRs
15:37 14 back out, but -- that really hasn't specifically been
15:37 15 answered, but I'm hearing there are lots of ways to get
15:37 16 some assistance to an individual rather expeditiously if
15:37 17 needed.
15:37 18 JUDGE GUTIERREZ: It depends on the question. Like
15:37 19 Tom said, it could be 15 minutes. If the answer -- if
15:37 20 the judge needs it for two weeks, it will be two weeks.
15:37 21 They're tentative decisions, and a decision doesn't
15:37 22 become final until 10 of the 15 members agree at the
15:37 23 meeting that occurs every two months. I would say last
15:37 24 year, out of the 380 questions, there were probably two
15:37 25 or three that didn't garner ten votes needed to sustain

the advice that was given, and there was maybe one or two, where the ten committee members felt that the advice given was potentially in error or they disagreed with the answer that was given.

So it's -- typically the advice that's given up front, out of the 382 responses, probably 378 ultimately became the final decision of the committee.

JUDGE CONGER: I think one of the questions that you asked was to what extent does that opinion give you some absolute immunity. And I don't think we can say it gives you absolute immunity to discipline. But we're informed that it is a pretty darn good defense.

MR. HARRISON: Commenting on that, I was interested because in the -- and Mr. Stott, who is the administrator of the judicial conduct commission in Arizona is here -- in a case that I handled for the judicial conduct commission several years ago, the judge's failure to contact -- he acknowledged that he knew of the existence of the judicial ethics advisory commission, and his acknowledged failure to contact that group before he took the action for which he was subsequently charged, in my judgment -- and, Keith, you can bear me out -- I think it was a major problem for him. I think it was a strike against him.

So it's interesting how that -- even though

it's not conclusive, the failure to do it when it's available is significant.

Bob and then Peter.

MR. TEMBECKJIAN: In New York, which is where I'm from, there is a statutorily created advisory committee on judicial ethics that's part of court system. And in the -- in legislation, it's noted that opinions of the advisory committee, if followed on the facts given, without variations, raise a presumption of propriety with the Commission on Judicial Conduct. But it's not an association, it's not a voluntary organization.

I wonder if you aware of or detect in California any movement toward a more formalized structure for what it is that you do. Because, I think, those states that have committees like this -- and New York is certainly an example -- it's extremely useful to the judiciary to be able to turn to an advisory committee to get such an opinion.

And in New York as was the case in Arizona, if the judge doesn't follow it or doesn't seek it, it tends to be an aggravating circumstance, particularly, since these opinions are readily available. And counsel can tell you right off the bat, after ten years, it's not often that you come up with a brand-new conduct situation, whether what you're proposing to do is right

15:40 or wrong.

JUDGE HOLLENHORST: I think, informally, we are very formal and special for this reason. We're probably the only committee in the California Judge's Association that rewards longevity. The longer you stay alive, the longer you serve on the committee.

It's a rather remarkable event to see your oldest, oldest friends, many of whom who don't get that old -- I do, but they don't -- who serve on this committee, some of them -- I think I've been on for about 17 years or so. Julie and I have worked together on I don't know how many occasions. We've been judges for over 20 years.

And I don't know how many classes we taught together. I can't count that high. And Phil and Ronni are newer judges, but they've been on it already for a long time, most of the members of the committee -- when we do try to seed in newer people to replace aging brain cells -- but the mixture of the committee is deliberately skewed toward long-term members.

Because it is only after answering a lot of questions and getting that experience do you really recognize where the cracks are and where the problems are and practical pitfalls are.

In that regard, I think we're a little bit

different than, sort of, ad hoc committees that are here today and gone tomorrow. That is not the way the ethics works.

JUDGE MacLAREN: And the other benefit is trust on the part of inquiring judges. When you're dealing with members of the committee, who have been on the committee a long time -- Julie has been on a long time.

And most of your inquires don't even go through the hot line.

The judge is calling her directly because they have trust and -- you know, that the advice -- they trust her judgment and that the advice is going to be given in a confidential manner and they can trust her.

MR. TEMBECKJIAN: Are you aware of any circumstances in which a judge to whom you gave an advisory opinion actually got in subsequent disciplinary trouble for following it?

JUDGE HOLLENHORST: No.

JUDGE CONGER: No. But as has been described, the opinion that we give is confidential and we so inform the judge.

If the judge chooses to waive the confidentiality in a subsequent proceeding -- be it disciplinary, electoral challenge, public clamor, or something like that -- that's the judge's decision. And

15:43 1 that has occurred -- the waiver of confidentiality
15:43 2 has -- and, in fact, it occurred in a electoral
15:43 3 campaign.
15:43 4 And our opinion was touted by the judge,
15:43 5 saying, "I acted upon the advice and, in fact, it was
15:43 6 the right advice." And he survived his electoral
15:43 7 challenge.
15:43 8 JUDGE MacLAREN: But I think that an important
15:43 9 issue is that the California Judge's Association doesn't
15:43 10 have a guaranteed longevity, and there are some
15:43 11 question, you know, of the courts have recently -- well,
15:44 12 the courts can no longer pay for judges to belong to the
15:44 13 association.
15:44 14 So if the association loses a lot of its
15:44 15 members, so goes the association, so goes this
15:44 16 committee. And there won't be anything for -- anyone
15:44 17 for the judges to call. So a more formal structure
15:44 18 would be good.
15:44 19 JUDGE BOWIE: The question I had is about as
15:44 20 open-ended as you can get and that is, based upon the
15:44 21 experience that each of you have had in this process and
15:44 22 recognizing that there are differences between the
15:44 23 California code of judicial conduct and some of the
15:44 24 other states and, for that matter, the feds, what, if
15:44 25 any, areas of ambiguity or difficulty have you

15:44 encountered in working with the code, where you think
15:44 some clarification, some improvement, some
15:44 reorganization -- any of those kinds of things -- could
15:44 be made?
15:45 Because that's specifically a focus of what
15:45 we're about. And I'm wondering if we could tap into
15:45 your experience to draw on that.
15:45 JUDGE CONGER: I'll talk on one area, and that's
15:45 area of disqualification and disclosure. In California
15:45 our disqualification statute for trial judges, not
15:45 appellate judges, is governed statutorily by the Code of
15:45 Civil Procedure.
15:45 The interpretation thereof is, in fact, a
15:45 source of a great deal of questions that come to the --
15:45 to the ethics committee. And so -- and I recognize that
15:45 we are statutorily governed, whereas the model code has
15:45 it within the code itself. But that is an area that we
15:45 get a lot of questions.
15:45 We in California also have a duty to disclose
15:45 any information that the judge may consider relevant to
15:45 the issue of disqualification. Whether or not the judge
15:45 feels that particular information is disqualifying is
15:46 irrelevant. It's the issue of relevance to the --
15:46 whether the parties may consider it relevant, and that
15:46 is another issue that we get a huge number of questions

about and I think might do with clarification, although I recognize the model code does not have that provision therein.

And that's something --

JUDGE BOWIE: Also it is in the commentary to 3E, but it got picked up by statute in California.

JUDGE CONGER: That's correct.

JUDGE BOWIE: What's the consequence? I've wondered that. What's the consequence of a failure to disclose when you determine you're not disqualified?

JUDGE CONGER: I believe there are a number of appellate decisions which basically overturn any rulings or any subsequent judgments based upon a judge. I don't know --

JUDGE HOLLENHORST: There's a split of authority nationwide on that. Some courts find that the case is to be reversed, and others don't follow that.

JUDGE BOWIE: Purely for nondisclosure and regardless of whether --

JUDGE HOLLENHORST: An otherwise disqualified judge that failed to -- that failed to disclose something that was disqualifying could lead to a reversal.

JUDGE CONGER: If it's disqualified.

JUDGE BOWIE: That's my question. The question is whether there's any consequence at all for only failing

15:47 to make the disclosure if you're not otherwise
15:47 disqualified.
15:47 JUDGE CONGER: That San Mateo case -- do you
15:47 remember that one where it was overturned?
15:47 JUDGE HOLLENHORST: Right.
15:47 You know, what we teach judges in California
15:47 to do in that area might answer that question. It's a
15:47 two-step process. You examine the issue first for
15:47 disqualification. If you're not disqualified, then you
15:47 move on to disclosure.
15:47 So, hopefully, the first part of
15:47 two-step process was done correctly so the disclosure
15:47 is -- is, at the end of the day, not disqualifying;
15:48 therefore, the -- in reasoning on how the case survives,
15:48 it does because it wasn't a recusable issue.
15:48 JUDGE GUTIERREZ: Then in California we have
15:48 statutes that would provide for motions or petitions to
15:48 disqualify the judge, based on what was disclosed. So
15:48 that's a mechanism that becomes available to the parties
15:48 so that Judge X has now disclosed what his
15:48 nondisqualifying relationships may be with the parties.
15:48 And then they would bring a motion under the California
15:48 Code of Civil Procedure to disqualify that judge, and
15:48 then that would be heard by a different bench officer.
15:48 JUDGE CONGER: I think that Tom just reminded me

that one of the questions that we most frequently get is how long do I have to disclose this particular factor?

Now I'm married to a district attorney or, no -- I used to be a district attorney, and now my two years have passed or whatever it is. How long do I have to do this disclosure?

Another area that we get frequently is there is a factor that should mandate disclosure, but it entails revelations of something so private or so confidential that the judge feels an intrusion upon the judge's personal life.

An example of that might be I have a case assigned to me, which involves a schizophrenic disorder which has affected me or a member of my family personally, but I do not wish to disclose this to the parties. But it obviously is something that is relevant to the issue of disqualification. The parties might consider it relevant and question what to do in that situation.

And that's another issue that we have to face is the tension between the mandatory -- the requirement to disclose and privacy/confidentiality issues.

MR. HARRISON: Bob.

MR. TEMBECKJIAN: I wonder if you can say whether, with any regularity, you advise judges that the

prospective conduct should be avoided because it would raise an appearance of impropriety, and do you ever or can you quantify the number of times that that's the only provision that you cite that it would be inappropriate?

JUDGE HOLLENHORST: It is a problem. I personally think, at least on my watch as the vice chair -- because it all comes through me right now -- that it probably actually is the largest number of cases that come through.

If you were to categorize them disclosure/disqualification and appearance of impropriety issues come up all the time because it's sort of the giant catchall.

And, you know, when we're baby judges, they have sort of an interesting test that they teach you -- and if you're an older judge, like me, then you learned about the smell test, "It really smells" -- or if you're a newer judge, it's the headline test, "If this were to appear in a headline, would you be proud the next day?"

And those are, sort of, the appearance of impropriety tests that are brought home in, sort of, an easy way for young judges to understand.

But as time goes on, those questions are more subtle. And the questions that we get oftentimes are

more subtle than that. And it's really great to have a third party look at the conduct, sort of, two or three steps back. And that's where I think we've been particularly useful.

Some of them are really easy calls, and we would hate to see that provision go because we wouldn't get these really interesting calls of things that judges are thinking about doing that we dissuade them from doing.

JUDGE CONGER: Also perhaps I'm of the same age or perhaps older than Tom, but some of the questions that we get don't -- people don't recognize the term -- you cannot be -- participate in an activity that demeans the judicial office, which, of course, falls under the appearance of impropriety.

And a lot of people ask us things, and it never dawned on them that this might be demeaning to the judicial office. And so I concur with Tom again. I would say at least half the questions are propriety -- appearance issues.

MR. TEMBECKJIAN: Would you say, then, that the current Canon 2, the appearance of impropriety canon, both in your roles as judges and as those who issue advisory opinions, is workable, understandable as it is, or do you think that it needs to be modified or amended

to be more workable or more understandable.

JUDGE MacLAREN: I like it. I bet if we did -- with our computer database, if we put in 2A, that would probably pop up more than any other canon that we cite or advise. I think it's very workable, particularly when you have 15 people sitting there discussing it. We rarely disagree on the answer.

JUDGE GUTIERREZ: Because when 2A becomes -- is a very good guideline to how you conduct your off-bench activities and your on-bench activities. It's the last barrier, the thing to look at.

And when you're examining what you're doing off bench or on bench, 2A becomes the catchall, I think, that protects the bench officer from finding themselves in the newspapers or before a disciplinary body.

MR. HARRISON: I think Margaret had --

JUDGE McKEOWN: If there's other 2A impropriety, I'd rather hear that than interrupt.

MR. HARRISON: Carol.

JUDGE AMON: I just had one question.

You're in the capacity of giving people advice on what that means. Would it bother you more if there's another body that's disciplining people based on that scenario?

JUDGE HOLLENHORST: I don't think that we see as

much discipline in that particular area because, I think, judges, particularly from their earliest time, begin to think in terms of appearance of impropriety.

And using those very easy tests -- when you leave judge's school, you leave with those tests. And I think it's so fundamental right now, in our system in California, that not too many judges really have that kind of problem with it. We grew up with it.

JUDGE MacLAREN: May I go back to an answer -- your question about troublesome language, confusing language.

One term that's always bothered me and that I don't think we -- we can really -- we as a committee -- we have difficulty defining is "ordinary social hospitality." I don't think any of us really knows what that means.

JUDGE BOWIE: You just know it when you see it.

JUDGE MacLAREN: I'm not even sure about that.

JUDGE CONGER: It's very regional.

JUDGE McKEOWN: My question is somewhat along those lines. And that is, you know, one of the things you have to spend your time doing often is telling judges, in your view, they can't do certain things.

Are there things, in your heart of hearts, that you have to say you can't do it, but if you were the Czar, you'd say, "Well, I don't know why they can't

do it. It just doesn't make sense that I have to give them that advice," in which area we should maybe look at loosening up or modifying the current code?

Can you think of any examples like that?

JUDGE CONGER: I was thinking of one, and that is in regard to participation in civic and charitable activities. We have a very strong prohibition against fundraising, personal solicitation of funds.

And the policy, of course, behind that is well articulated in our commentary; namely, that the prestige of judicial office should not be used to put pressure on people to give funds.

Yet in our mandate -- in California, we are mandated by the standards of judicial administration to do outreach and to participate in the community and volunteer and to talk and to participate in various civic and charitable activities. And a number of us do this.

Part and parcel of that also is encouraging others to so volunteer and become active. And I wonder at whether or not using the prestige of judicial office to gather others to assist you in volunteering or participation in these activities, the policy is still behind it.

Yet why isn't that policy also applied to the

15:57 1 fundraising activities? And why is there that
15:57 2 distinction? And perhaps a more clear delineation could
15:57 3 be made for judges participating in outside activities.
15:57 4 I personally appreciate the ban on personal
15:57 5 fundraising because the last thing I want to do is put
15:57 6 the hit on people. But at the same time I want to
15:57 7 comply with the canons and do my particular work with
15:57 8 various charities or civic activities. And it's a very
15:57 9 fine line that I feel I'm crossing because, by gathering
15:57 10 others in, am I using the prestige of my office in
15:57 11 pulling other people in to help me out.
15:57 12 MR. HARRISON: Bob Cummins and then Seth.
15:57 13 MR. CUMMINS: Looking at the California code on the
15:57 14 matter of disqualification, in the context of a hotly
15:58 15 contested motion to disqualify a judge, you get an
15:58 16 inquiry, you render an opinion, and the judge makes a
15:58 17 decision based on the opinion that you get, but he will
15:58 18 not then or she will not then disclose the basis that
15:58 19 formed your guidance to that judge?
15:58 20 JUDGE CONGER: The opinion that we give is in the
15:58 21 form of confidential opinion.
15:58 22 MR. CUMMINS: Yes.
15:58 23 JUDGE CONGER: I'm not sure I understand the
15:58 24 context in which you're asking that question.
15:58 25 MR. CUMMINS: Will the party who wins or loses the

15:58 1 motion understand that that judge is basing his or her
15:58 2 opinion on the advice of your body?
15:58 3 JUDGE CONGER: Are you implying that this is a
15:58 4 motion to disqualify a judge for cause?
15:58 5 MR. CUMMINS: Yes.
15:58 6 JUDGE CONGER: Okay. You see, that is a legal
15:58 7 issue. This judge is being asked to rule on a legal
15:58 8 issue, and we do not give legal advice.
15:58 9 MR. CUMMINS: So the judge could call up,
15:58 10 hypothetically, and say, "If you were faced with this
15:58 11 situation, what would you do?" You wouldn't know --
15:59 12 JUDGE CONGER: We would not give legal advice on
15:59 13 how one judge should rule in disqualifying another
15:59 14 judge. That is a legal issue pending before the -- so
15:59 15 we would not be giving that advice. The advice that we
15:59 16 give is if a judge calls up and says, "I own a certain
15:59 17 amount of stock in" -- such-and-such an organization --
15:59 18 "and should I disqualify myself?"
15:59 19 And we, on the Brightline test, of the 1500 or
15:59 20 10 percent, we make that ruling. But we don't give
15:59 21 advice for another judge to -- we don't give secondhand
15:59 22 advice.
15:59 23 I did bring with me a copy of the
15:59 24 disqualification and disclosure handbook, which I'm
15:59 25 happy to submit to you, just in case.

15:59 Because what this is is, basically, a compilation of all the advice that we have given on the issue of disqualification and disclosure as well as the discipline from the Commission on Judicial Performance since 1990 -- I guess it was.

16:00 JUDGE BOWIE: So all your motions for disqualification for cause, if it a "for cause," it's heard by somebody else.

16:00 JUDGE CONGER: Right.

16:00 MR. ROSNER: You answered Bob's questions about the appearance of impropriety stating that the largest number of inquiries are on the 2A issue.

16:00 JUDGE MacLAREN: No. What I said is that, in responding to inquiries, we probably cite 2A more than any other canon as a reason a judge shouldn't do something.

16:00 MR. ROSNER: Okay. I'm sorry. I misunderstood.

16:00 My question is this: In 2A the words "appearance of impropriety" don't appear. When you are citing 2A, are you, in effect, melding or using the text of 2A to inform the canon itself, which does use the phrase "appearance of impropriety." We spent more time on that issue.

16:01 JUDGE HOLLENHORST: It's in our commentary.

16:01 MR. ROSNER: Okay.

16:01 MR. HARRISON: Other questions for our guests?
Before we break up, are there any particular issues that are of concern to you that you think we ought to pay special attention to?
JUDGE HOLLENHORST: Well, we have a couple of things that maybe are observations rather than anything else. I know that the issue of drug courts -- I guess they're -- they have different names throughout the country, but "therapeutic courts" has been something we hear out in the west here, with regard to special rules and the code.
And I'm not certain that we would be particularly supportive of changing the code to meet the special concerns that arise out of therapeutic courts. We believe probably a different approach to that that would work would be to create standards for judicial conduct, as opposed to something in the code itself, and make that -- as we have done in California, I think, with juvenile cases.
There's a specialized area, and it has a much smaller application than the code generally is handling. So maybe that would be a consideration.
Secondly --
JUDGE NEVILLE: We have particular concern about ex parte communication as it relates to those types of

16:02 situations. Because the judges do talk to people
16:03 individually except right in there. By having
16:03 standards, can you overcome the specific language of the
16:03 code.
16:03 JUDGE HOLLENHORST: Well, we're talking more about
16:03 conflicts of interest, when we view it, when judges move
16:03 on from one calendar to another. Say, for instance, you
16:03 had a case early on, and then later on that same person
16:03 appears in front of you and you have specialized
16:03 knowledge about that person.
16:03 We have handled 3D7 problems, however,
16:03 repeatedly, and the issue is whether or not meeting with
16:03 court attachTs and court officials is simply an
16:03 administrative discussion.
16:03 And up to this point, I think we view it as
16:03 such, particularly, in the areas of family law and
16:03 juvenile, to talk with somebody who's supervising for
16:03 purposes of scheduling an activity or whether it's an --
16:03 a court activity needs to be scheduled or simply a
16:04 progress report that might trigger something. We have
16:04 historically viewed those as permissible discussions
16:04 with court attachTs.
16:04 The other issue that we wanted to discuss
16:04 briefly is the issue of pro per litigation generally.
16:04 As everybody, I think, has witnessed nationwide, pro per

16:04 1 appearances nationwide have really spiraled in an upward
16:04 2 fashion.
16:04 3 I was startled not long ago in our appellate
16:04 4 court, where four cases out of ten on calendar involved
16:04 5 pro pers in a court of appeal. Fifteen years ago, when
16:04 6 I started the appellate court, we never saw a pro per.
16:04 7 It was rare.
16:04 8 Nowadays it's becoming increasingly prevalent.
16:04 9 You can hardly do a calendar these days without a pro
16:04 10 per appearing in appellate court, where the rules are
16:04 11 quite Byzantine and brief writing is a skill that only a
16:04 12 few lawyers are good at, let alone pro pers, who have
16:05 13 had no experience doing it.
16:05 14 So what to do? Do we change the -- do we
16:05 15 change the rules? Do we reinvent the system to address
16:05 16 this interesting phenomenon? Or, in my view, and I
16:05 17 think the view of my colleagues, is do we do an extra
16:05 18 effort to try to educate these people that are appearing
16:05 19 without lawyers, oftentimes for economic reasons, to
16:05 20 give them at least the basic skills to come into court
16:05 21 so that they get their day in court and, effectively,
16:05 22 are able to communicate well enough to advocate for
16:05 23 their side.
16:05 24 I think we're a little concerned about the
16:05 25 appearances of changing burdens of proof and giving

people a little bit of a head start with regard to courts maybe being a little too benevolent by court rule.

Our suggestion in handling this is, as we have done in this state, to do an extra effort with regard to creating kiosks or court information people to give pro pers further access to legal information that will allow them to overcome some of the burdens of getting into court and presenting their cases.

The Fourth District Court of Appeal Division One, our sister court, in San Diego just received an award because of a rather inventive -- or innovative approach to dealing with pro pers at the appellate level.

They've create on their Web site a fabulous step-by-step explanation of how to perfect an appeal in the Appellate Court. There are probably a lot of lawyers that are relying on that. But for a pro per, it tells you how to write a brief and what should be in a brief and how to make the brief legal and how to make it filable and what the time rules are in plain English.

And I think that a better approach to dealing with pro pers is not to change the system but to make the system more responsive, recognizing that pro pers are here to stay in greater numbers.

16:07 MR. HARRISON: Going once.

16:07 Any other comments or questions? I thank all

16:07 of you very much for taking the time.

(Meeting concluded at 4:07 p.m.)