ABA/BNA Lawyers' Manual on Professional Conduct
ISSN 1521-5083

ABA/BNA
Lawyers' Manual on Professional Conduct
CURRENT REPORTS

20 Law. Man. Prof. Conduct 73

Judges

ABA Commission Hears From Speakers Seeking to Modify Judicial Conduct Rules

SAN ANTONIO—What should elected judges be able to say and do during a campaign election? Must the judiciary refrain from all public comment on any pending or impending proceedings? Should judges be allowed to lobby the legislature for pet charitable projects? Can they use their position as a bully pulpit to promote pro bono work? What obligations do judges have to help fellow jurists and lawyers who they believe have substance abuse or mental health problems?

Those who testified Feb. 6 before the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, which met here in conjunction with the ABA Midyear Meeting, had varying ideas about when judges ought to be muzzled and when they ought to be encouraged to speak up.

But there was one thing the speakers seemed to agree on: The professional conduct rules for judges need to be more clearly drafted so that judges know what they can and can't do.

Time to Revisit Rules.

The first Canons of Judicial Ethics were approved in 1924 after U.S. District Court Judge Kennesaw Mountain Landis refused to resign from the bench when he was selected as the first Commissioner of Baseball and began supplementing his $7,500 federal judicial salary with the $42,500 per year he earned as national commissioner of baseball. Since then the judicial standards, which became the Model Code of Judicial Conduct, have undergone several major revisions, the last in 1990.

In September 2003, ABA President Dennis W. Archer Jr. announced the appointment of a new commission tasked with evaluating and recommending possible revisions to the ABA's model ethics code for judges. The 11-member commission includes judges and experts in the field of judicial and legal ethics, and is a joint project of the ABA Standing Committee on Judicial Independence and the ABA Standing Committee on Ethics and Professional Responsibility.

A small group of advisors are being invited to participate in the work of the Joint Commission as well.

In an interview with BNA, commission Chair Mark I. Harrison, of Bryan Cave in Phoenix, said that the commission hopes to present its recommendations at next year's midyear meeting in Salt Lake City. He added, however, that he wouldn't be surprised if responses to the commission's proposal take longer and delay submission of the final draft to the House of Delegates until the 2005 annual meeting in Chicago.

The commission will continue to hold public hearings across the country this year. The next one is scheduled for San Francisco on March 26, followed by another in New York City on May 7.

Speech Gets Judge in Hot Water.

Those who insist that some of the language in the current Code of Judicial Conduct is too vague and needs refinement see support for their position in the case of Judge Wendell Griffen, who narrowly avoided discipline for a speech on racial bias he gave to the Arkansas Legislative Black Caucus in March 2002.

Griffen, who currently sits on the Arkansas Court of Appeals and has recently announced his intention to run for chief justice of the state supreme court, was admonished by the Arkansas Judicial Discipline and Disability Commission for violating Arkansas Judicial Canon 4C(1) by exhorting legislators to cast their votes in budget appropriation bills in a way that would "send a clear signal" to the University of Arkansas that they will no longer tolerate racial inequities at the school.

Arkansas Judicial Canon 4C(1) provides:
A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

A bitterly divided Arkansas Supreme Court, in a 4-3 decision, quashed the letter of admonishment. The majority concluded that the "judge's interests" exception to the public comment ban was unconstitutionally vague and was used in a way that violated Griffen's First Amendment rights. See *Griffen v. Arkansas Jud. Disc. & Disability Comm'n*, 2003 WL 22725673 (Ark. 2003).

The majority encouraged the state commission to study the issue and recommend to the court an amendment with commentary that will clarify the meaning of the "judge's interest" exception to Canon 4C(1).

Charitable Activities.

In his testimony before the ABA commission, Griffen urged the members to define "judge's interest" so as to give guidance on when a judge's conduct crosses the line between permitted and prohibited conduct.

Harrison wondered whether the state judicial commission has tried to draft any clarification. "We might benefit from what they are doing," he said. Griffen said that, to his knowledge, the state commission has not yet taken any action.

Peter W. Bowie, a federal bankruptcy judge from San Diego, asked Griffen if he had any specific proposal in mind. Bowie is an advisor to the commission and is a liaison to the Judicial Conference of the United States.

"We did not offer any specific language in our brief," Griffen said, because as a tactical matter his legal team did not believe that a "frontal assault" on Canon 4C(1) would succeed given that he was addressing the very body that had approved the language in the first place.

In any event, Griffen said, he now recommends that the commission give consideration to a definition that classifies "judge's interest" as conduct not involving the exercise of judicial power and that advances

charitable, educational, philosophical, religious, fiduciary, and other eleemosynary activities.

That language, he said, is consistent with the spirit of Canon 4 which, among other things, allows judges to serve as officers or nonlegal advisors in organizations devoted to those types of activities.

When Is a Judge Not a Judge?

Bowie wanted to get a clearer idea of where the line should be drawn in this scenario. Isn't there some danger of a judge using her position to advance her own agenda? he asked.

The issues that the Arkansas Supreme Court was understandably concerned with, Griffen replied, were separation of powers and collusion of power. "My argument to the supreme court was that as long as judicial officers do not purport to engage or actually engage in the exercise of judicial power, then it is not impermissible for judicial officers to meet with or to lobby members of the legislative branch."

"The phrase 'a judge is always a judge'is a truism," Griffen said, "but not necessarily the truth."For example, he continued, "I am not exercising judicial power when I fill out a credit card application."

"I would draw the line this way," Griffen said: "If a judge engages in a legislative interaction which approximates a legal opinion regarding the propriety of a particular course of conduct, then the judge would be exercising influence."

But that problem does not arise, Griffen argued, in the context of a judge's saying, either in a formal hearing or on a quail-hunting trip, "Listen, homelessness is a problem. There should be more funding."I am not sure that that is an impermissible exercise of judicial influence, he said.

Griffen stressed that in his own case, he was invited to speak in his capacity as a "double alumnus" of the University of Arkansas and past president of the university's Black Alumni Society on the issue of racial equities in higher education.

Fund Raising.

Judge Carol Bagley Amon of the U. S. District Court for the Eastern District of New York, who is serving as an advisor to the commission, asked Griffen how he reconciled his stance with the prohibition against soliciting funds. Judges can't raise funds for organizations, she said; how do you distinguish making a comparable pitch to the state legislature?

The reason that there is a bar against fund raising and having judges' names on fund-raising letters, Griffen replied, is because you don't want individual citizens to get the idea that they will curry favor by contributing or that they will lose ground if they don't chip in.

However, Griffen added, the concern over an appearance of impropriety ought not to lead to an "overinclusiveness" that would contravene the First Amendment.

In any event, Griffen said that he was advocating only that the commission acknowledge that judges have an "interest"in promoting the extrajudicial activities listed in Canon 4 which, according to Griffen, specifically include participation in educational and charitable activities.

Right, Amon said, but fund raising is still not allowed.

Yes, Griffen replied, but the legislative scenario is distinguishable since there is no exercise of judicial power when a judge asks legislators to provide more funding.

Of course, Griffen continued, the time-honored response when a judge is suspected of having approached or crossed the line is recusal, either on motion or sua sponte. “But to outright suggest that a judge who engages in such lobbying activities acts unethically puts a cloud over the judge,” Griffen said. This is particularly problematic in those jurisdictions where judges are elected, he added, “because ethical complaints are the new stalking horse for judges.”

Turn Negative Into Positive.

Commission member James J. Alfini, president and dean of the South Texas College of Law in Houston, speculated that part of the problem with Canon 4 is that it starts with a negative and then specifies exceptions. Wouldn’t it be better, he asked, if it began with the premise that judges may speak out and then elaborated on what is not permitted?

Yes, Griffen said, that would facilitate both enforcement and compliance. “It is easier for a member of the judiciary to account for his or her conduct if we know what is expected,” Griffen said, “rather than to presume that otherwise permissible conduct is impermissible under circumstances that are, to put it mildly, less than clear.”

“If it is any consolation, most of us outside Arkansas never really understood what the big deal was,” chimed in commission advisor Robert H. Tembeckjian, who is administrator and counsel to the New York Commission on Judicial Conduct.

“The phrase ‘a judge is always a judge’ is a truism, but not necessarily the truth. I am not exercising judicial power when I fill out a credit card application.”

Judge Wendell Griffen
Arkansas Court of Appeals

Another commission advisor, Seth Rosner of Greenfield Center, N.Y., asked Griffen if his research uncovered any other decisions raising this issue. Griffen noted that the only other place he has seen this subject addressed is in the commentary to the Alaska Judicial Code, which advises that the expression “judge’s interest” should be construed “liberally.”

We argued that the Alaska language was persuasive when we appeared before the commission, Griffen said, but the panel didn’t agree and the court did not cite it.

Push to Reinstate Ban on Public Comments.

Not all the speakers favored giving judges more room to maneuver when making extrajudicial remarks. Susan B. Lindenauer, who co-chairs the New York County Lawyers’ Association Task Force on Judicial Selection, pressed the commission to restore the restriction against judges' publicly commenting on any pending or impending proceedings.

In 1990, Lindenauer said, the ABA watered down the absolute prohibition on this in Canon 3B(9) of the Code of Judicial Conduct so that it now applies only to those public comments that “might reasonably be expected to affect [a proceeding’s] outcome or impair its fairness”and to nonpublic comments “that might

substantially interfere with a fair trial or hearing."

Lindenauer argued, however, that diluting the prohibition in this manner was not a good idea given the public's perception of judicial bias and lack of impartiality.

"Any diminution of a judge's or judicial candidate's obligation to avoid the appearance of impropriety is dramatically at odds with addressing the concern that all of us have about the public's poor perception of the judicial system," she stated.

Lindenauer pointed out that—in addition to New York—California, Delaware, Massachusetts, Maine, Minnesota, Missouri, and the federal judiciary all rejected this 1990 model code amendment.

Commission member Thomas Fitzpatrick, a prosecutor in Seattle and a member of the ABA Standing Committee on Ethics and Professional Responsibility, wanted to know whether New York's more stringent rule on public comments had "effectively neutered" judicial candidates and disabled them from staking out their views for the electorate. "Isn't there any equally compelling interest in the public's ability to make the proper judicial selections?" he asked.

We're not prohibiting general statements, Lindenauer replied, "we're just prohibiting a judge from making a commitment, pledge, or promise."

Exemption for Educational Forums.

Lindenauer said that the NYCLA Task Force was in favor of carving out an exception for judicial speech in nonpublic educational forums such as colleges, law schools, and bar associations. "I think it's unfortunate for the bar, for judges to be limited in their ability to participate in such programs," Lindenauer said.

Amon asked whether the exception for educational speech was practicable in the bar arena. A judge's speech to the bar association seems to be a "quintessentially public comment," she added.

Lindenauer agreed that a bar association meeting is different from a law school environment; however, she stressed that the rule could be invoked only where the course or speech was intended for students or bar members, and the media and general public were not invited—for example, in the context of bar-sponsored continuing legal education.

Isn't there a risk, Tembeckjian asked, that a judge could use the proposed classroom exception to circumvent the ban on promises and pledges? "I think that appears a bit far-fetched,"Lindenauer replied.

Partisan Elections.

Former Texas State Bar President Guy N. Harrison, of Longview, Tex., told the commission that the judges he has spoken with "want you to know that in Texas not only do we elect our judges, but we elect them in partisan elections." Consequently, Harrison said, the issues surrounding fund-raising are critical. It is not unusual, he observed, for candidates running for the higher offices to spend $1.5–2 million on a campaign.

One rising phenomenon, Harrison continued, involves so-called "issue ads" that really are attack ads calling for a response—which costs money. "It becomes a cycle of no-win propositions,"Harrison said.

Commission member Judge James A. Wynn of the North Carolina Court of Appeals in Raleigh, N.C.,

noted that his state has moved away from partisan judicial elections. Would it change, he wondered, if Texas moved to a nonpartisan approach?

Harrison conceded that it probably would alter the landscape, but added that it doesn't seem likely to happen. For one thing, he said, "the voters like partisan elections." Moreover, Harrison noted that when Democrats controlled the governor's mansion, Republicans wanted nonpartisan elections; but when a Republican governor took office, suddenly it was the Democrats who were in favor of nonpartisan judicial elections.

"So it really depends upon whose ox is being gored,"Harrison said.

Dallas Rule.

Harrison noted that the Texas Supreme Court has, like New York and the ABA, also appointed a commission to review their respective judicial codes of conduct "line by line." One standard it may look to for inspiration is a Dallas County tenet that prohibits judges from asking for support or money anywhere in the courthouse.

Anecdotally, Harrison said, lawyers have reported going into the courthouse and seeing a clipboard with a sign-up sheet to get a campaign yard sign for the judge's election. A lawyer entering the courthouse might feel a strong inclination to sign that sheet, Harrison surmised.

"Any diminution of a judge's or judicial candidate's obligation to avoid the appearance of impropriety is dramatically at odds with addressing the concern that all of us have about the public's poor perception of the judicial system."

Susan B. Lindenauer
New York County Lawyers' Association

Commission member Jan Witold Baran, of Wiley Rein & Fielding, Washington, D.C., asked whether the commission should incorporate something like the Dallas rule into the CJC. "Would it work?"he asked.

"It is certainly unseemly to be doing it at the courthouse," observed Marvin L. Karp, of Ulmer & Berne, Cleveland, but it can be done other ways. For example, he said, the bailiff can call your office and remind you to come pick up your tickets to the judge's fund-raiser. Karp chairs the ABA Standing Committee on Ethics and Professional Responsibility.

Getting the Message Out.

The theme of expensive campaigns was revisited by Judge Lamar McCorkle of the Harris County District Court in Houston. McCorkle is the past chair of the Texas Center for the Judiciary.

Given that Texas is a state that elects its judges, Harrison wanted to know whether the commission could "regulate the solicitation of funds issue in a meaningful way."

That sounds like a *White* issue, McCorkle replied. Judges need to get their message out, but they need to raise money to do so. (In *Republican Party of Minnesota v. White*, 536 U.S. 765, 18 Law. Man. Prof. Conduct 402 (2002), the Supreme Court struck down as violative of the First Amendment a portion of Canon 5A of the Minnesota Code of Judicial Conduct which blocked judicial candidates from

“announcing”their views on “disputed legal or political issues.”)

Harris wondered whether some sort of “recusal”feature would be appropriate when a certain dollar amount was involved—$500, say. A $500 limit would create a lot of recusal in Harris County, McCorkle replied, since contributions in the $5,000 to $10,000 range are not unusual.

Wynn quipped that $10,000 is about as much as they spend in an entire statewide contest in North Carolina.

Spreading Gospel of Pro Bono.

Debbie Segal, who chairs the ABA Standing Committee on Pro Bono and Public Services, asked the commission to make it clear that judges are allowed to promote, inspire, and encourage pro bono legal work.

Segal gave a list of concrete examples of what judges can do:
• send recruitment letters;

• remit thank you notes;

• publicly show appreciation to volunteer lawyers in the courtroom;

• write an article encouraging pro bono work;

• teach CLE programs addressing poverty law issues;

• lend their names to pro bono programs;

• give out the awards at bar functions; and

• give preference on calendar calls to lawyers doing pro bono work.

According to Segal—who is the pro bono partner in Atlanta’s Kilpatrick Stockton—the commentary to Canon 4 already allows such activities by acknowledging that judges are in a “unique position” to promote activities that will improve the administration of justice. But judges are reluctant to take a very active role, she said.

“Where does the reluctance come from?” Tembeckjian asked.

“We are told by judges throughout the country that, as much as they would like to help, they fear crossing the line and choose not to get involved not because they don’t want to,” Segal said, “but because they don’t know where the line is drawn.”

The idea of expressing gratitude to a pro bono lawyer in court sounds great, according to the commission's Ethics Counsel George Kuhlman. But Kuhlman expressed concern over the impression such accolades might have on the opposing lawyer and others in the courtroom. There is a strong likelihood that the judge’s singling out this lawyer might be misunderstood, Kuhlman said.

Perhaps the better practice would be for the judge to thank all the lawyers and then reserve particular recognition for the pro bono lawyer, Segal answered. Really all we are advocating, she said, is to let

judges know what they can do. “It may be as simple as including a parenthetical that encourages involvement in pro bono activities in the black letter and then including some of these examples in the commentary,”she said.

Wynn cautioned Segal against assuming that everyone wants to encourage pro bono work. Some businesses—particularly those defending pro bono actions—don’t have the same benevolent attitude about this kind of practice, he observed.

Duty to Speak Up.

Representatives from the ABA Commission on Lawyer Assistance Programs (CoLAP)recommended that the CJC Commission consider putting something into the judicial code that encourages, if not requires, judges to speak up and intervene when they receive reliable information that other judges or lawyers have a substance abuse or mental health problem. CoLAP recommended this language:
Whenever a judge has reliable information that the performance of a lawyer or of another judge may be impaired by drugs or alcohol or other mental, emotional or physical condition, the judge shall take or initiate corrective action, which may include a [confidential] referral to an appropriate lawyer or judicial assistance program.

The proposal was introduced by John W. Clark Jr. of Dallas, who chairs CoLAP, Judge Sheila Murphy of Chicago, who is also on the commission, and Robert Seerden, the former chief justice of the Texas Court of Appeals for the 14th District, who is now of counsel to Barger, Hermansen, McKibben & Villarreal in Corpus Christi, Tex. All three identified themselves as recovering alcoholics who had been referred to assistance programs.

“We are told by judges throughout the country that, as much as they would like to help [promote pro bono], they fear crossing the line and choose not to get involved not because they don’t want to but because they don’t know where the line is drawn.”

Debbie Segal
ABA Standing Committee on Pro Bono
and Public Services

The problem, Clark said, is pervasive. One member of a judicial conduct commission in a large state, Clark said, reported that more than 60 percent of judicial misconduct is directly related to alcohol, drugs, or mental health issues.

Referral Does the Trick.

Commission member Harriet L. Turney, an administrative law judge in Phoenix, expressed concern that the reporting requirement in CoLAP's proposal goes no further than referral to an assistance program.

The lawyer code has a mandatory reporting requirement, Turney said, but under this proposal a judge is off the hook if she makes a referral to an assistance program. “There’s no assurance that the public will be protected,” she said.

It is almost impossible to come up with a hard and fast rule, Seerden replied, because this kind of evaluation often entails an element of deductive reasoning. “You don’t always know if somebody is just

having a bad day or under the influence," he said. "And I don't know if you can get language to tell you when that is."

In any event, he added, "if I were on this commission, I wouldn't worry that we're not going to catch and cover everybody because I don't think you're ever going to do that."

Commission member Loretta C. Argrett, Silver Spring, Md., pointed out that the lawyer conduct rules impose a duty to withdraw under Rule 1.16 when impairment becomes an issue. Argrett, a past member of the ABA Standing Committee on Ethics and Professional Responsibility, wanted to know if CoLAP would favor "putting a similar obligation on a judge not to serve or act" when the judge becomes impaired.

Clark doubted that a mandatory recusal provision would make the proposal any more effective since few lawyers ever voluntarily withdraw due to impairment. In any event, Clark added, self-reporting has proven not to be very effective in this scenario. A more dramatic outside influence is often required, he said.

'Disciplinary Hook.'

But shouldn't there be some sort of "disciplinary hook?" Fitzpatrick asked. That's not what assistance programs are about, Seerden responded. These programs are about "saving lives,"said commission advisor Robert P. Cummins, of Cummins & Cronin in Chicago.

Noting that lawyers risk discipline for not reporting suspected misconduct, Harrison wanted to know whether judges should be treated differently.

"I'm not aware of any lawyer that has been disciplined for failure to report" impairment-related conduct, Clark replied. In any event, he said, since reporting is done anonymously how would you ever know if a judge has breached her duty to report?

Judge Monica Gonzalez and Seana Willing of the Texas State Commission on Judicial Conduct gave thumbnail sketches of the state's judicial disciplinary diversion and education program—called Amicus Curiae—and the state commission's investigation and enforcement of complaints against judges.

Karp asked Gonzalez and Willing what they thought of CoLAP's reporting proposal.

Gonzalez expressed reservations about a mandatory requirement, noting that she was not sure when there is enough evidence to mandate a report under threat of discipline if a judge fails to relay information or observations. There is too much gray area, she said.

Willing agreed. For one thing, she observed, "not all impairment issues are violations of the Code."

Rosner asked where the bulk of the complaints against judges originate. Willing said that most come from litigants who are unhappy with the result of their litigation. The number of complaints from lawyers is lower, Willing said, and the number of referrals from fellow judges is smaller still.

by Lance J. Rogers

The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct has established a Web site at: http://www.abanet.org/judicialethics/home.html

ABA/BNA Lawyers' Manual on Professional Conduct
ISSN 1521-5083