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Judges

First Amendment Issues Predominate Latest Round of Judicial Code Hearings

NEW YORK—To what extent should judges and judicial candidates be prohibited from saying what's on their mind?

If it's beyond the pale for a judge to belong to the Ku Klux Klan, is there any problem with a connection to the Boy Scouts, or the Masons? Although prohibited from making sexually suggestive comments to their law clerks, should judges be disciplined for “vulgar” or “lewd”remarks?

And what about running for office? Can judicial candidates promise during a campaign stump that, if elected, they will crack down on drug dealers? Or is the public better served if candidates are restricted to making watered-down assurances that they will follow the law?

Those who testified May 7 before the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct tackled these questions and others concerning what the code ought to say about encouraging or discouraging judges to speak their minds.

This was the commission’s fourth public hearing, following sessions on Dec. 5 in Washington, D.C., Feb. 6 in San Antonio, and March 26 in San Francisco. See 20 Law. Man. Prof. Conduct 73, 179. The next hearing is scheduled for June 4 in Naples, Fla.

(The commission's first proposal for amending the code, pertaining to Canons 1 and 2, was released May 11. See 20 Law. Man. Prof. Conduct 262.)

Regulate to the Max.

Joan R. Salzman, who heads up the Association of the Bar of the City of New York’s Committee on Government Ethics, urged the commission to adopt a model code provision that will continue to prevent judges from making specific campaign promises or soliciting campaign contributions. These activities, she stated, undermine the public’s faith in the judiciary.

“I would argue for the greatest possible restrictions,”Salzman said. “Regulate it,” she said; “regulate it to the maximum because that’s the price we pay to have a good bench.”

According to Salzman, public confidence in the judiciary is exceedingly low due to “a few bad apples.”

She cited *In re Watson*, 794 N.E.2d 1 (N.Y. 2003), in which a judge was censured for asserting during his campaign that drug dealers were flocking to the community, and for sending out campaign literature exhorting voters to "put a real prosecutor on the bench."

Salzman acknowledged that the 5-4 majority in *Republican Party of Minnesota v. White*, 536 U.S. 765, 18 Law. Man. Prof. Conduct 402 (2002), declared violative of the First Amendment a portion of the Minnesota Code of Judicial Conduct that blocked judicial candidates from "announcing"their views on "disputed legal or political issues." However, Salzman encouraged the commission to read *White* "narrowly."

White, she argued, only addressed restrictions that inhibit judges from "announcing" their views on topical judicial and political issues. It did not say that states cannot prevent judges from engaging in campaign rhetoric or making promises that puts their impartiality in doubt, she said.

Of course, Salzman added, the root of the problem is the elective process itself. "The association has been saying for years that we should get rid of elections and go to a merit appointment system."

"It's a pretty intractable problem,"replied commission Chair Mark I. Harrison, of Osborn Maledon, Phoenix. Arizona has had merit selection for nearly 30 years, Harrison observed, but there are constant legislative efforts to undo it because some constituencies always feel that they are left out of the judicial selection process.

Public Confidence.

Is there any empirical evidence showing that public faith and trust are undermined when judges exercise their First Amendment rights? asked commission member Thomas Fitzpatrick, a prosecutor in Seattle and a member of the ABA Standing Committee on Ethics and Professional Responsibility.

Commenting on the sky-is-falling forecasts, Fitzpatrick said "I heard the same arguments about lawyer advertising." He added: "I didn't like it, but we got it, and the sun still comes up in the morning." Fitzpatrick wondered whether members of the public really are better served when they are asked to elect judges but then are denied any opportunity to know anything about the candidates' views.

Ronald C. Minkoff, a member of the New York City bar's Committee on Professional and Judicial Ethics, took issue with the suggestion that public confidence is not dented by election activity. He said that when he has cases in some of the more "politicized" counties neighboring New York City, he always tries to associate local counsel. Otherwise, Minkoff said, "I'm gonna get creamed because I'm not part of the clubhouse."

"When I tell the client that I have to hire local counsel to get a fair shake," Minkoff continued, that undercuts public confidence. Minkoff practices with Frankfurt Kurnit Klein & Selz in New York.

I agree that parochialism is a problem, replied Fitzpatrick, "but that doesn't have one damn thing to do with campaign contributions or judicial speech—it's the mentality of small towns."

Commission advisor Robert P. Cummins, of Cummins & Cronin in Chicago, agreed with Fitzpatrick. If there is a crisis of confidence when counsel appears in a foreign jurisdiction it has more to do with the lawyer's not being familiar with local procedure and then telling the client that the judge "is calling a different strike zone," he said.

Public Wary of 'Political' Judges.

There has actually been “a ton of research”on this issue, according to another commission member, Judge James A. Wynn of the North Carolina Court of Appeals. And those studies confirm, he said, that “70 percent of Americans believe that political contributions influence decision-making.” The general public also believes, Wynn continued, that judges who speak their mind on issues have already committed themselves to one side of the debate.

If you are talking about African-Americans, he added, the figure is at least 10 percent higher. That doesn’t mean that judges are necessarily influenced, Wynn said, but it does reflect a significant crisis of perception.

Fordham University law professor Michael J.D. Sweeney corroborated Wynn’s contention that most registered voters believe the political process influences the way elected judges act on the bench. Sweeney serves as counsel to New York’s Commission to Promote Public Confidence in Judicial Elections, which is chaired by the former dean of the Fordham Law School, Professor John D. Feerick.

The “Feerick Commission” has just issued an interim report, Sweeney said, which details the results of polls, focus groups, and public hearings that support the contention that election activity has a negative impact on voter perception.

In the appendix to those findings, the New York commission reports, among other findings, that:
• “Eighty-three percent of registered voters in the state indicate that having to raise money for election campaigns has at least some influence on the decisions made by judges.”

• “About half of registered voters believe that a judge will be fair and impartial on a case involving an issue that they had taken a stand on during their election campaign.”

• “Seventy-nine percent of registered voters believe that having to run for re-election has at least some influence on the decisions judges make, and 78% believe that political parties have a great deal or some influence.”

• “Sixty-eight percent of registered voters in New York State believe the justice system would be improved if judicial candidates would agree not to raise money and limit spending to publicly financed funds.”

Addressing Bias.

Lynn Hecht Schafran, a lawyer at the National Organization for Women in New York, pressed the commission to expand on the anti-bias language in Canon 3, along the lines of the recommendations already proposed by the Center for Judicial Ethics of the American Judicature Society. That proposal calls for adding “marital status, parenthood, language, and ethnicity” to the list of areas in which judges must not show bias. The current rule lists “race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status.”

Schafran, who is director of NOW’s National Judicial Education Program, also recommended that the commission adopt the AJS's proposal to broaden the definition of bias to include “epithets, slurs, demeaning nicknames, negative stereotyping, attempted humor based on stereotypes, threatening, intimidating or hostile acts, suggesting a connection between race or nationality and crime, irrelevant references to personal characteristics, and insensitive statements about crimes against women.”

Finally, Schafran urged the commission to implement the AJS's proposal that judges be forbidden to

engage in “sexual harassment.”That term is defined, she said, as including “sexual advances, requests for sexual favors, comments about physical attributes, repeated and unwanted attempts at a romantic relationship, sexual gestures, offensive or suggestive remarks, sexually explicit questions, improper touching, lewd and vulgar language, suggestive or explicit pictures or images, and other verbal or physical conduct of a sexual nature that is unwelcome, regardless of gender.”

“One would think,” Schafran said, “that it is not necessary to spell these out.” Unfortunately, she added, this is not the case. Too many judges, courts, and regulators, she said, “are turning a blind eye” to bias and misconduct.

Schafran then proceeded to catalog a series of horror stories, including *Robinson v. Sappington*, 351 F.3d 317 (7th Cir. 2003), which involved an Illinois judge’s alleged sexual harassment of his law clerk. According to the victim, the judge’s misbehavior included inquiries about her marital life, sexual comments, jealousy of her relationships with other men, and monitoring of her daily activity. The clerk accused the judge of flying his private plane over her mother’s house to check up on her and of threatening to kill his clerk if he ever found out that she had been intimate with another man.

When the clerk complained of the misconduct, Schafran said, the chief judge advised the victim that “he had a judge to protect,”and transferred her to another judge.

Too Politically Correct?

Commission advisor Robert H. Tembeckjian asked whether judges who engage in this type of “over-the-top” misbehavior would really be deterred by a directive in the model code. Tembeckjian is administrator and counsel to the New York Commission on Judicial Conduct.

It may not necessarily deter the most egregious wrongdoers, Schafran replied, but it will force regulators to cope with the issue if the prohibition is in black and white.

Another commission advisor, Seth Rosner of Greenfield Center, N.Y., wondered whether it might not be better to drop the “lewd and vulgar language” proposal, given that “vulgar can be sexually neutral.”

Harvard law professor Andrew Kaufman focused his testimony on the constitutional tension and practical problems raised by Canon 2C’s dictate that judges “shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.” In Kaufman’s view, the provision is over-inclusive and can be read to bar judges from being members of the Boy Scouts, women’s bar groups, the Masons, or acting as trustees at single-sex educational institutions.

Rosner and the commission’s ethics counsel, George Kuhlman—both of whom were involved in the 1990 revisions to the code—noted that 15 years ago “invidious discrimination” was the buzzphrase of the time and that the alternative of barring “unlawful” discrimination was likely not selected because the law on what was illegal seemed to be in “flux”back then.

Wynn, along with commission reporter Charles G. Geyh of the Indiana University School of Law, postulated that removing the prohibition in Canon 2C would be worse than leaving it in because, they said, deletion might make it appear that the commission was condoning membership in organizations that engage in racial and ethnic discrimination.

Drug Assistance Referrals.

Judge Sarah L. Krauss of the Kings County Civil Court in Brooklyn, N.Y., recommended that the

commission adopt the suggestion of the ABA Commission on Lawyer Assistance Programs that the new judicial code incorporate a provision stating the following:
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.

Studies reveal, Krauss said, that the rate of addiction in the general public is around 10 percent but that the legal profession suffers double that rate—between 18 and 25 percent. Referring to the instances of sexual harassment and other judicial misbehavior cited by previous speakers, Krauss suggested that in many of the truly strange cases one would find that substance abuse was the culprit.

Harrison wanted to know how appropriate it would be to use a “carrot and stick” approach for an attorney or judge in denial. If someone resists getting help or doesn’t cooperate, Harrison asked, can you tell them “cooperate or else I’ll be forced to report you”?

If the judge is in denial, Krauss replied, “it's probably not a good idea to just march into his office and start making demands.”A better idea would be to refer the judge to an intervention program, she said.

Ex Parte Communications.

Some commission members have suggested that neither the current Model Code of Judicial Conduct nor preliminary drafts of proposed amendments adequately address the types of ex parte communications that are required of judges serving on “specialized” or “problem-solving” courts. Judge Eileen Koretz, who presides in Manhattan’s Midtown Community Court that covers Times Square and surrounding neighborhoods, lent some perspective on this issue in her testimony.

Koretz’s “community-based” court was set up to clean up the Times Square area by handling what she called the “low-level quality of life crimes” such as prostitution, minor drug offenses, petit larceny, graffiti, ticket scalping, and jumping subway turnstiles. Sentencing is swift, immediate, and often involves community service, drug treatment services, or other innovative solutions.

What has Koretz concerned is that much of her work—like that of other specialized courts such as drug treatment panels—occurs outside the traditional boundaries, particularly when it comes to ex parte communications. Although a defendant might be represented by counsel at the initial sentencing, Koretz said, that same defendant is rarely represented when he or she returns for updates and the defendant has violated the terms of the sentencing. So the defendant gets sentenced without an attorney, perhaps based on an ex parte communication between the court staff and the parole officer or probation officer, and none of it is on the record.

Koretz noted that she often “sentences”defendants to education programs or English for Speakers of Other Languages(ESOL), but wonders whether the judiciary can force defendants to become better educated, to work, or to become more proficient in English.

Kuhlman noted an “escape hatch” in Canon 3 which permits a judge to engage in ex parte communications “when expressly authorized by law to do so.” Doesn’t that give you an out? he asked.

We are struggling with two models, Geyh added. “Do we adopt a uniform overarching code that applies to traditional and problem-solving courts alike or do we set up the rules for the traditional courts with the recognition that a secondary set of rules will be required for problem-solving courts?”

It depends on how pervasive these problem-solving courts become, Koretz replied. “It’s my understanding that they are planning to use this model for all the courtrooms in the Bronx,” Koretz said. Given the significant overlap, she added, it might be more desirable to just have one set of rules.

by Lance J. Rogers

Further information on the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, including comments and testimony it receives, is available on the commission’s Web site at http://www.abanet.org/judicialethics/home.html

The interim report of the New York Commission to Promote Public Confidence in Judicial Elections may be found at http://law.fordham.edu/commission/judicialelections/main.ihtml