# The New ABA Judicial Code as a Basis for Discipline: Defending a Judge

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*The ABA's new Judicial Code represents major changes in format and substance from the previous Code. Both the previous and current Code serve two purposes, setting out high goals to which a judge should aspire and minimum standards of judicial conduct. The article addresses the recently updated Judicial Code from the perspective of a lawyer who defends judges. Topics covered include the inherent problems in a Code that seeks to serve two purposes seemingly at odds and particular issues, such as the appearance-of-impropriety standard, ex parte communications, gifts, impaired lawyers or judges, and political activity. The author concludes, on balance, that, from the perspective of defending a judge, the current revision of the Judicial Code is an overall improvement from the earlier Code.*

*"[But] I was still cursed with my duality of purpose."* Statement by Dr. Jekyll, *The Strange Case of Dr. Jekyll and Mr. Hyde*, by Robert Louis Stevenson

As was Dr. Jekyll given his alter ego, Mr. Hyde, so is the American Bar Association's Judicial Code "cursed [with its] duality of purpose." The Judicial Code expresses aspirational standards setting out the highest standards for a judge and also contains disciplinary rules setting out the minimum conduct required of a judge. This "duality of purpose" creates a real potential for problems in disciplinary enforcement. The perspective presented here is that of a practitioner who, since the late 1980s, has represented lawyers and judges in legal ethics and judicial ethics matters, respectively, including representation before their respective disciplinary bodies. Typically, when I am contacted by a judge concerning a judicial ethics disciplinary matter, a significant and recurring concern is the vague and ambiguous nature of the Code provisions at issue. This article looks at the extent to which the new ABA Judicial Code increases or decreases that concern from the perspective of defending a judge.

The judicial codes adopted in most states have, as a common ancestor, the 1990 version of the ABA Judicial Code. The 1990 Judicial Code, which is cumbersome to read and apply, placed greater emphasis on the aspirational purpose behind the Judicial Code and less emphasis on the Judicial Code as a set of disciplinary rules.

In 2003 the ABA, through two of its standing committees, created the Joint Commission to Evaluate the Model Code of Judicial Conduct. The purpose of the Joint Commission was to address matters of both form and substance in the Judicial Code, i.e., recommend changes of substance to the Code and make the Code easier to use through reformatting its cumbersome canons-and-sections format.

The new Judicial Code, approved by the ABA House of Delegates in February of 2007, essentially combined the first two canons to end up with four canons. The

new Code also replaced the sections with rules. In general, the idea was to make the new Judicial Code more like the ABA's *Model Rules of Professional Conduct,* which are the ethics rules governing lawyers. The new Judicial Code does a better job than the 1990 Judicial Code of setting out a more logical arrangement of the Code's provisions in a format easier to read and apply. Even if there were no changes of substance in the new Judicial Code, the mere reformatting of the Code would be reason enough for the new Code.

## ASPIRATIONAL GUIDELINES OR DISCIPLINARY RULES?

Unfortunately, and ultimately, even the new Code suffers from the same inherent inconsistencies that plague the old Code. Although the changes in the new Judicial Code, as to both format and content, go a long way toward reconciling the differences in purposes—between the Code as aspirational goals and the Code as disciplinary rules—the purposes are seemingly irreconcilable; however, that is exactly what the Code seeks to do, i.e., reconcile the irreconcilable. Thus, from the practical standpoint of a judge concerned about discipline and whether his or her conduct falls inside or outside the Judicial Code, the dichotomy of purpose is not merely an academic matter between aspirational language and disciplinary rules.

Judges, like all people, want to know, in advance, what conduct will get them in trouble. Understanding the mindset in favor of aspirational or "hortatory" language in the Judicial Code requires a brief review of the obligations of laypeople, lawyers, and judges in the judicial process. Laypeople, with little exception, do not owe fiduciary duties and obligations to other participants in the judicial process. A lawyer under the applicable lawyer-ethics rules has heightened duties and responsibilities beyond that of a layperson. However, the lawyer, with minor exception, acts as an advocate, possessing fiduciary duties to his or her client and correspondingly lesser duties to the adverse party. However, a judge is not an advocate for either party. A judge's function is to oversee the judicial process so that all participants, laypeople and lawyers, are dealt with fairly in the judicial process. Given this higher duty imposed on judges, proponents of the aspirational concepts behind the Judicial Code state that the Code should set the very highest standards, which must be upheld by a judge. In short, a pure aspirational approach to the Judicial Code would have the Code express the highest standards to which a judge should aspire.

However, while the aspirational goals behind the Judicial Code seek to set the *highest standard* for which judges should reach, the Judicial Code, as a set of disciplinary rules, should set out the *minimum* conduct expected of a judge. Under a disciplinary rules approach, a judge would be subject to being sanctioned by an appropriate judicial disciplinary authority if the judge's conduct fell below the standard of conduct set out in the Judicial Code.

The new Judicial Code contains Canon 1, which expresses very general concepts, followed by three canons, which address different but specific aspects of a judge's life: Canon 2, professional duties; Canon 3, personal conduct; and Canon 4,

political activity. The mnemonic devise could be "Triple P," Professional, Personal, and Political. With this in mind, we turn to the Code's major elements from the perspective of defending a judge.

## APPEARANCE OF IMPROPRIETY

Canon 1 expresses generalized concepts, including the admonition that a judge should avoid even the appearance of impropriety. Regardless of whether a person is in favor of, or in opposition to, the appearance-of-impropriety (AOI) standard, there is little dispute that this standard is perhaps the most controversial aspect of the Judicial Code. Appearance of impropriety logically assumes no impropriety in fact. In essence, under AOI, looking as if you did something wrong, even when you did not, is the same as actually doing something wrong. In my experience, determining when a judge has crossed the disciplinary line under an AOI standard is as elusive as Justice Stewart's definition of pornography, i.e., "I know it when I see it." *Jacobellis v. Ohio* (1964). The problem is that the "I" in the judicial disciplinary context is the disciplinary authority and not the judge. If a judicial disciplinary authority thinks there is an "appearance" problem, then that is something that has to be defended. And what is being defended is not whether the judge *actually* did something wrong, but whether it *looked* like the judge had done something wrong.

When the American Bar Association promulgated the *Model Rules of Professional Conduct* governing lawyers, the AOI standard was removed. However, the 1990 Judicial Code and the new Judicial Code include the AOI standard. In late 2006, the Joint Commission recommended that the AOI standard be changed from a disciplinary rule to aspirational guidance. As aspirational guidance, the AOI standard could not form the basis of disciplinary action against a judge. However, the hue and cry of a number of groups was so great that the ABA House of Delegates rejected this perceived "weakening" of the Judicial Code after lively debate in February of 2007.

As a standard for disqualifying a judge, the AOI standard is easier to apply in the sense that a disciplinary sanction is not going to result if the judge's conduct is found to have created an improper "appearance." However, AOI is a problematic standard as a disciplinary rule. In *Spargo v. New York State Commission on Judicial Conduct* (2003), the United States District Court enjoined the New York State Judicial Code Commission from enforcing certain portions of the Judicial Code. Although the case was later dismissed by the Second Circuit on federal abstention grounds, the underlying reasoning of the district court is nevertheless instructive. The district court held that no case law from New York state courts had upheld the constitutional validity of the phrase "appearance of impropriety," but as the court noted, numerous reported decisions from New York merely assumed that the standard was valid. Quoting from the dissenting opinion in a New York state case regarding the problems with the AOI standard, the district court in *Spargo* noted that the AOI standard was "very subjective" and was a concept "beset by legal and moral complexity" (at 4). The court also stated that: "The lack of specificity as to what conduct

makes a judge vulnerable to a charge of appearance of impropriety may bear serious due process implications." The court also noted a quote from United States Supreme Court justice Goldberg, who characterized the AOI standard as "unbelievably ambiguous" (at 4).

In *State v. Davis* (2004), a New Jersey state appellate court upheld the trial court's denial of a motion to disqualify an attorney in a criminal case. The court favorably quoted the following statement from the New Jersey commission appointed by the supreme court to review the Rules of Professional Conduct: "The appearance of impropriety provisions . . . seek to reduce the risk of improper conflicts. Because of their vagueness and ambiguity, those provisions, however, are not appropriate as ethics standards" (at 287).

Other cases from other jurisdictions have expressed great concern about using the AOI standard. For example, in *In re Entertainment, Inc.* (1998), the court noted that the AOI standard was a "vague concept" (at 423). In *Halligan v. Blue Cross and Blue Shield of North Dakota* (1994), the court referred to AOI as a "vague standard" for disqualification (at 2). Similarly, a Texas appellate court noted in *Golias v. King* (1995) that the AOI standard had been eliminated from the Disciplinary Rules of Professional Conduct regarding attorneys because of "vagueness" (at 5). In *Adoption of Erica* (1997), the Massachusetts Supreme Court referred to the AOI standard as a "nebulous standard," which most courts had rejected as the sole basis for disqualification, and noted that as the word "impropriety" was not defined, the phrase "appearance of impropriety" was "question-begging" (at 973 and 974).

In short, AOI, as an aspirational guideline, should be the goal of all attorneys and all judges. However, as a disciplinary standard for either judges or lawyers, the concept generally fails and can be difficult to defend against.

## EX PARTE COMMUNICATIONS

Rule 2.9 of the new Code changes certain aspects of the ex parte communications provisions. Under the new Code, a judge will be more limited in obtaining advice from a disinterested expert regarding an area of law before the court. If the judge wants such expert input, the court must indicate the substance of the advice to be solicited from the expert, give advance notice to the parties of the expert whom the court wishes to consult, and provide the parties a reasonable opportunity to object to the process. Opposition to this limitation in the new Code had been expressed by the Association of Professional Responsibility Lawyers (APRL), a national organization of lawyers who represents lawyers and judges in professional responsibility and ethics matters. (The author is a member.) That organization has expressed concern that the restrictions are overly broad and would preclude a judge from confidentially conferring with ethics counsel if a question arises regarding the judge's compliance with the Code.

Additional language in Rule 2.9, and the accompanying Comment, addresses the issue of a judge researching any particular issue of law or fact through the Internet.

Rule 2.9 prohibits a judge from conducting an independent investigation of the facts of a particular case. The Comment makes it clear that this prohibition also includes the use of electronic research. In short, judges cannot "Google" issues of fact before the court. Of course, factual issues in litigation are rarely pure issues of fact and may be an amorphous combination of fact and law. Therefore, a judge could begin doing proper online legal research and then, without recognizing it, slide into doing improper online factual research.

The rule on ex parte communications in the new Judicial Code does take into consideration the continued creation of specialty courts designed to address particular issues of social importance, such as drug courts to address chronic substance abusers and domestic-violence and domestic-abuse courts (see Arkfeld, in this issue). Typically, in such specialized courts, the judge takes a more active role in the success or failure of the individual's participation and compliance with the programs than would typically be the case in more-traditional courts. As a result, a judge's communication with individuals coming before such a specialized court could fall into the "authorized by law" exception to otherwise prohibited ex parte communications. Of course, if a judge becomes too involved with the active oversight of the persons coming before the court to the perceived detriment of some other person or entity before the court, the judge may run the risk of allegedly violating Canon 1, and the ambiguous prohibition against the appearance of impropriety. A judge being too proactive and too helpful when presiding in such special courts may end up losing his or her objectivity, a fatal flaw for a judge. As I have learned over the years, most disciplinary inquires against judges or lawyers can be explained by the phrase, "No good deed goes unpunished."

## IMPAIRED LAWYERS OR JUDGES

The 1990 Judicial Code indirectly addressed the issue of impaired lawyers or judges when it provided an ethical duty on a judge to take remedial action, including, in some instances, reporting to appropriate disciplinary authorities a possible ethics violation of a lawyer or another judge. The intervening years between the 1990 Judicial Code and the present have seen an increasing availability and use of programs for impaired lawyers and, in some instances, for impaired judges, in various jurisdictions. A key aspect of these programs is that they are separate and apart from the disciplinary process.

The new Code places an ethical duty on a judge to take "appropriate action" (an ambiguous term) if the judge believes that a lawyer's performance or a judge's performance is impaired by drugs, alcohol, or some other type of physical or mental problem. The irony from a disciplinary standpoint is that the *disciplinary* duty is on the reporting judge to take "appropriate action" regarding the impaired judge, preferably of a *non-disciplinary* nature, e.g., professional assessment, counseling, and treatment. For judges who practice in a rural area and rarely have daily contact with other judges,

this new Code duty may rarely come into play. However, the judge in a multi-judge courthouse in an urban area should be more concerned about being disciplined if an impaired judge comes before a disciplinary authority. I can easily see the judge's defense being that was no problem because no one came to him or her to express any need for any corrective action. Non-impaired judges could find themselves under disciplinary scrutiny for not having taken sufficient steps regarding an impaired judge. Given these potential ambiguities, APRL, while favoring the extension of help to impaired lawyers and judges, was concerned about the disciplinary enforcement problems under the Code.

## GIFTS

A potential problem for a judge in his or her daily activities is to avoid the abuse of his or her "prestige of office." One problem is gifts, but the problem with a judge receiving a gift is that typically the judge has not actively sought out the gift. A judge who does not proactively seek benefits because of his or her judicial office may nevertheless be the recipient of unrequested gifts. Therefore, the gift issue is an area for which judges, who want to do the right thing, needed more specific guidance than was the case under the current Code.

Previous Canon 4D(5) does not address the issue of a judge receiving gifts in any real detail or provide significant guidance to judges, but the new Judicial Code seeks to address this issue in a more comprehensive manner to give real guidance to judges. In particular, Rule 3.13 establishes specific categories of gifts that could require public reporting. It sets out a long list of gifts that may be accepted by the judge without publicly reporting the receipt, and a shorter list of gifts that may be subject to a public-reporting obligation. From a disciplinary standpoint, any time the Code can give specific guidance as to what conduct falls above and below the line of proper conduct is a good thing.

## POLITICAL ACTIVITY

From a disciplinary-enforcement standpoint, the rules concerning political activity are easier to deal with than the rules set forth in Canons 1 through 3. The rules regarding political activity and campaign conduct are more specific than is the case in the earlier canons as to what conduct is or is not permitted by a judge or judicial candidate. Additionally, election campaigns typically implicate state or federal laws regarding campaign spending and reporting of financial contributions. The "flip side" to the ease of application as disciplinary rules is that the substantive content of judicial campaigns raises serious constitutional issues in the areas of free speech and political activity. This may be because the provisions of the Judicial Code, in either its 1990 version or the current version, represent a conflict between what the ABA would like to be the law and what the law is, as defined in various court decisions. Admittedly, the body of case law

around the country remains somewhat volatile as to what courts have said a judge may or may not say or do during a judicial campaign (see Raftery, this issue).

The new Code eliminates the "announce clause," which prohibited a judicial candidate from announcing his or her views on disputed legal or political issues, and which was struck down by the United States Supreme Court in *Republican Party of Minnesota v. White* (2002). (For treatment of *White* and of its aftermath, see the articles by Bopp and Woudenbreg; Eakins and Swenson; Goldberg; Morrison; and Salokar, and the Legal Note by Raftery, all in this issue.) The new Judicial Code prohibits a judicial candidate from making a pledge or promise to reach a particular result on a particular issue that may come before the court. This prohibition reflects the Code's attempt to balance the public's right to know a judicial candidate's position on given topics and avoidance of a judge's guarantee to voters what the result will be when certain issues come before the judge. The new Code, in the commentary to Rule 4.1, gives judges guidance as to conduct that would have violated the old "announce clause" and conduct that would fall within the current "pledges-and-promises clause."

The new Code opens up the categories of campaign activity that a judge may undertake. For example, the new Judicial Code permits a judge to seek public support not related to the solicitation or acceptance of campaign contributions, where the now-replaced Code permitted the seeking of public support from political organizations only in partisan judicial races. Someone seeking an appointed judgeship may be more proactive in seeking such an appointment than is permitted under the current Code. For example, a candidate may request an endorsement for the appointment without having to wait to be invited to seek the endorsement. Furthermore, an appointive candidate may seek endorsements from any individual or organization, and not just from persons who regularly make such recommendations to the appointing authority. Strangely enough, many judges do not want such broader campaigning rights. Some of the new rights make the judicial candidate more "political" than "judicial" and could create an AOI problem.

In general, the new Judicial Code gives more freedom to a judicial candidate than the current Code. However, as a practical matter, there are always going to be judicial candidates who will feel that the Code is too restrictive and inappropriately favors the incumbent, and persons or organizations seeking to influence the judicial selection process will, in all likelihood, still contend that the Code does not go far enough in opening up the process. If past experience is any teacher, such persons will likely file lawsuits challenging the scope and limitations set forth in the new Code. In addition, only time (and additional court decisions), will tell if the Judicial Code's limitations on campaign speech represent either a nonenforceable aspiration or an actual disciplinary rule, a violation of which would subject the judge to sanction.

The new Judicial Code adopted by the ABA House of Delegates in early 2007 represents a significant change in the format and substance of the Judicial Code. The new format, even as to the ethics rules that carry forward into the new Code, will be

easier for judges and others to review and apply. In these terms, the new Judicial Code represents a significant improvement from the 1990 version.

No doubt, as individual states consider adopting the Judicial Code, changes will be made to state enactments. Additionally, portions of the Judicial Code will be attacked in court on constitutional grounds, as was the case with the current Judicial Code, primarily judicial campaign conduct will be a major subject of each litigation. The Judicial Code as a general format will become the law, albeit modified from jurisdiction to jurisdiction and always subject to ultimate judicial review. Having said that, the new Judicial Code represents a significant improvement from the 1990 version of the Judicial Code.

## CONCLUSION

From my perspective of an attorney who has represented judges in judicial ethics inquiries, the new ABA Judicial Code is, in general, an improvement over the old Code. The new Code is easier to read and apply and, overall, gives judges more guidance on how they should act in their personal and professional lives. Unfortunately, since the Code still tries to do two things at the same time, i.e., provide aspirational guidance *and* disciplinary rules, the new Code still carries over a number of the same problems as the prior Code. **jsj**

## CASES CITED:

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