

WHEN JUDGES SPEAK UP

ETHICS, THE PUBLIC, & THE MEDIA

STUDY MATERIALS



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American
Judicature Society



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WHEN JUDGES SPEAK UP: ETHICS, THE PUBLIC, AND THE MEDIA STUDY MATERIALS

OBJECTIVES

The extensive public preoccupation with the criminal and civil trials of O.J. Simpson and other recent high-profile cases has resulted in profound public interest in the justice system and judges. At the same time, political attacks, misinformation, and distortion have resulted in public cynicism and disillusionment about the justice system. Thus, the current climate creates both an exceptional opportunity and an unprecedented need for judges to respond with educational efforts that will ameliorate the public's misconceptions about the justice system and strengthen its commitment to an independent judiciary.

What do you think are the most important reasons judges should participate in programs to educate the public about the legal system?

- To build public support for the judiciary.
- We live in a society in which public officials are expected to be accessible and informative.
- To remedy misperceptions created by the media, judges have to do something to bypass the media and go directly to the public.
- The image of the justice system is improved if people see judges as human beings.
- A positive performance by a judge can improve the credibility of the judiciary.
- Public visibility is important to any judge who wants to be re-elected.

In response to these concerns, individual judges and entire court systems are working to educate the public about the courts. For example, Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court has described the outreach program of the Wisconsin judiciary designed to help the public become better informed about the work of the courts. "A True Partnership for Justice," 80 *Judicature* 6 (July-August 1996).

- A speakers bureau matches judges with speaking opportunities in their communities. A brochure promoting this free service is mailed yearly to all service organizations in the state.
- Once each year for two or three days, the supreme court holds oral arguments in locations other than its usual home in the state capitol and invites schools, community organizations, local attorneys, and the public to attend.
- Legislators, county board officials, and news reporters across the state are invited to spend a half day on the bench with a local judge.
- Informal, round-table discussions are held between news reporters and judges.

Further, some courts are creating sites on the World Wide Web to provide to the general public information such as opinions, answers to common question, court rules, calendars or dockets, forms, operating hours, directions to the courthouse, and biographies of judges. See "Courts Ride the Information Superhighway," by Tom Carlson, 80 *Judicature* 98 (September-October 1996).

The news media -- newspapers, magazines, radio, and television -- are obvious avenues for educating the public about the judicial system. What do you think are the most important reasons judges should talk to journalists?

- Competent news media coverage can build public support for the judiciary as an institution.
- If judges do not cooperate, journalists may become uncooperative, critical, or hostile.
- If judges do not talk to the media, journalists will rely on biased sources of information or on no expert sources at all.
- If judges talk to the press, news representatives will cover a case more intelligently and errors in stories may be avoided.
- Public visibility is important to any judge who wants to be re-elected.

Canon 4B of the code of judicial conduct expressly allows a judge to "speak, write, lecture, teach and participate in other extra-judicial activities concerning the law, the legal system, [and] the administration of justice" ¹ The commentary describes judges as persons "specially learned in the law" and "in a unique position" and encourages them to "participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession"

However, judges have been disciplined for what they have said when speaking up, particularly to the media, and advised against participating in certain public education efforts. Thus, judges may be reluctant to engage in dialogue with the public out of fear their comments will invite disciplinary sanctions by falling short of the code.

Although much is forbidden under the code, much is allowed, leaving judges ample opportunity to act as advocates for the current judicial system and for judicial reform with the public. By describing what is prohibited and what is permitted under the code, this curriculum hopes to encourage judges to educate the public directly and through the media by exercising their right to speak up in a manner that will meet the judiciary's need for all judges to be and appear to be impartial.

¹ Unless otherwise indicated, references to canons in the code of judicial conduct are to the 1990 American Bar Association Model Code of Judicial Conduct. The 1990 model code retains most of the basic principles of the 1972 ABA model code but makes several substantial changes and contains many differences in its details. These study materials note any relevant differences between the two model codes.

Although the model code is not binding on judges unless it has been adopted in their jurisdiction, 49 states, the United States Judicial Conference, and the District of Columbia have adopted codes of judicial conduct based on either the 1972 or 1990 model codes. (Montana has rules of conduct for judges, but they are not based on the 1972 model code.) These study materials note any relevant differences between specific state codes and the model codes.

These study materials list the formats and forums that have been permitted and forbidden for judges, discussing in detail participating in radio call-in shows and acting as a television commentator. In addition, the materials:

- Describe how a judge's education efforts can comply with the requirement that a judge refrain from commenting on pending and impending cases, including cases on appeal and consider whether the restriction applies to cases pending in other jurisdictions. The discussion includes exceptions to the rule such as comments in scholarly presentations and explaining court procedures. First Amendment cases are examined. The materials extensively cover guidelines for responding to criticism of a judge in a pending case.
- Explain the requirement that a judge's activities not cast reasonable doubt on a judge's capacity to act impartially and the effect that requirement has on a judge's speaking, writing, and teaching, including limiting statements on controversial or political issues, criticism of lawyers, expressions of bias and prejudice, and appearing before certain audiences.
- Relate under what circumstances and in what manner a judge can draw the public's attention to a problem in the courts or criticize judges and other public officials.
- Report how a judge can engage in education activities without lending the prestige of the judicial office to advance the private interests of others.

FORMATS AND FORUMS

In general, judicial ethics advisory committees have encouraged judges to participate in a wide variety of public education programs, including use of the media.² For example:

- ◆ Judges may create a speakers bureau and inform service organizations and churches of the judges' availability to present a court-oriented program. *Illinois Advisory Opinion 94-17*.
- ◆ A judge may speak to a non-partisan civic, social, or homeowners association on the role of a county court judge in the judicial system and the improvement of the administration of justice. *Florida Advisory Opinion 77-21*.
- ◆ A judge may speak at an open meeting of the Organization for Marriage and Family Therapy to describe court procedures in domestic violence matters. *New Jersey Informal Opinion 22-89*.
- ◆ A judge may discuss general reform in the area of bail bonds and may discuss his or her practice in dealing with bail bonds on a televised "guest editorial" program. *Florida Advisory Opinion 81-12*.
- ◆ A judge may give a radio interview on an educational program concerning consumer affairs. *Missouri Advisory Opinion 74* (1982).
- ◆ A judge may appear on a television talk show to discuss various legal issues such as plea bargaining, negligence cases, and small claims court. *New York Advisory Opinion 88-106*.
- ◆ A judge may act as a moderator for a five-minute bi-weekly television program designed to educate the public on the duties and functions of courts and related agencies dealing with the administration of justice. *Texas Advisory Opinion 22* (1977).
- ◆ A judge may host a regularly scheduled television show about the law and court procedures. *New York Advisory Opinion 89-146*.
- ◆ A judge may participate in a talk radio show designed to encourage the general public to write to the judge personally with questions, concerns, or comments relating to the operation of the courts. *New Mexico Advisory Opinion 96-5*.
- ◆ A judge may write a newspaper column that encourages the general public to write to the judge personally with questions, concerns, or comments relating to the operation of the court. *New Mexico Advisory Opinion 96-5*.
- ◆ A judge may write a series of articles for a newspaper concerning juvenile justice and the status of children and families in the state. *Alabama Advisory Opinion 90-396*.

²More than 35 states and the United States Judicial Conference have judicial ethics advisory committees to which a judge can submit an inquiry regarding the propriety of contemplated future action. In some states, the judicial discipline authority is bound by the advisory opinions; in others, evidence that a judge's conduct is consistent with an advisory opinion is considered evidence that the judge acted in good faith if he or she is charged with violating the code of judicial conduct. See *Judicial Ethics Advisory Committees: Guide and Model Rules* (AJS 1996).

- ◆ A judge may write a weekly newspaper column about the law and courtroom procedure. *New York Advisory Opinion 88-133*.
- ◆ A judge may write a weekly column concerning the improvement of the law, the legal system, and the administration of justice. *Texas Advisory Opinion 63 (1982)*.
- ◆ A judge may write a regular or occasional column for a local newspaper concerning the function of a county court judge and ways of improving the administration of civil and criminal justice. *Florida Advisory Opinion 77-21*.

Two opinions in which judges were advised *not* to engage in specific activities illustrate the factors a judge should consider in planning educational programs.

CALL-IN RADIO SHOW

The South Carolina Advisory Committee on Standards of Judicial Conduct concluded that a judge should not participate in a radio talk show in which listeners would call in questions to the judge. *South Carolina Advisory Opinion 14-1991*. The committee was concerned that:

The spontaneous interchange between the judge and the call- in listener could well affect the dignity of the judge, his office and interfere with his performance of his judicial office, as well as, having negative impact on the dignity of other members of the judiciary and the effectiveness of their performance of their judicial duties.

The committee noted:

- The judge could find himself rendering spontaneous legal opinions on matters, some of which could come before his court or may have already come before another court.
- The judge would be in the perilous position of having only partial facts supplied by the caller.
- The judge would be in the undesirable position of offering off-the-cuff advice without time for research or reflection.
- The judge could find himself answering or attempting to answer questions in areas where he is totally unqualified as judicial expertise on the law is not nearly as comprehensive as the public may believe.
- The judge may find himself at odds with callers bent on voicing their complaints with the judicial system, how their cases were handled, the wisdom of the law, the legislature, and the judge.
- Another judge would be placed in a difficult position if he or she later had to decide an issue on which the judge had already publicly given advice on the talk show.
- The judge's discussion could be viewed as the practice of law. *See Canon 4G*.

See also Louisiana Advisory Opinion 75 (1989) (a judge may host a television program dealing with current legal issues that does not have a call-in portion); New Jersey Informal Opinion 23-89 (a judge may not serve as a panelist in public hearings on domestic violence where the open format might require the judge to comment or refuse to comment on issues and prove embarrassing or damaging to the dignity of the judiciary).

TELEVISION COMMENTATOR

The Florida Committee on Standards of Conduct Governing Judges advised that a judge could not appear on news shows to comment on legal matters or explain proceedings during high-publicity trials in other courts. *Florida Advisory Opinion 96-25*. The committee cited several considerations.

- The judge would be commenting on pending cases. *See discussion infra*.
- In commenting on issues that arise in other courts, "it would be nearly impossible for the judge to avoid injecting his own legal opinion or foreshadowing how he might rule on a contested legal issue," casting doubt on the judge's capacity to act impartially as a judge. *See discussion infra*.
- The judge would be lending the prestige of the judicial office to advance the commercial interests of the television station. *See discussion infra*.
- "As recent experience with several high publicity legal proceedings has demonstrated, issues that come before courts are often not conducive to exposition in the 'soundbyte' format of television news. . . . [T]he commercial and entertainment aspects of a regular judicial appearance on a television news show might well outweigh the legitimate public information aspects," demeaning the judicial office. *See Canon 4A(2)*.
- Regular appearances on a local television news broadcast could lead to the perception that the judge "has priorities other than proper performance of judicial duties." *See Canon 4A(3)*.
- Members of the electronic media are frequent litigants, and judges must avoid engaging in continuing business relationships with persons likely to come before the court on which the judge serves. *See Canon 4D(1)(b)*.

See also New York Advisory Opinion 93-133 (a judge may not make observations about non-New York cases as a commentator on Court TV); *West Virginia Advisory Opinion* (July 23, 1992) (a judge may not continue to serve as legal correspondent for a local television station after assuming office); *In re Broadbelt*, 683 A.2d 543 (New Jersey 1996), *cert. denied*, 117 S. Ct. 1251 (1997) (a judge may not appear regularly on Court TV to comment on cases pending in other jurisdictions).

THE RULE AND THE RATIONALE

Canon 3A(6) of the 1972 American Bar Association Model Code of Judicial Conduct stated:

A judge should abstain from public comment about a pending or impending proceeding in any court

Concerned that that language was "overbroad and unenforceable," the ABA narrowed that provision in the 1990 model code. Milord, *The Development of the ABA Judicial Code at 21* (1992). Thus, Canon 3B(9) of the 1990 model code provides:

A judge shall not, while a proceeding is pending or impending in any court, make any public comment *that might reasonably be expected to affect its outcome or impair its fairness*

(emphasis added). Both versions also provide that judges must require "similar abstention on the part of court personnel subject to the judge's direction and control." There has been no authority interpreting the change in the code, so it is not clear what the addition of the qualification "might reasonably be expected to affect its outcome or impair its fairness" will have on judges' ability to comment on a pending proceeding. See discussions of commenting on a pending or impending case in another jurisdiction and commenting in scholarly presentations, *infra*.

Not all states have adopted the change in the public comments canon even if they have adopted other provisions of the 1990 model code. Explaining the decision to retain the broad language from the 1972 model code, commentary to the Maine code states that "the difficulty of assessing the impact of public comment on an unknown audience justifies the absolute bar."³

Commenting on a case pending before the judge.

Under both the 1972 and 1990 model codes, a judge is clearly prohibited from commenting on the merits of cases pending before the judge, because any such comments could "reasonably be expected to affect its outcome or impair its fairness." See discussion of exceptions, *infra*. Comments about a case pending before the commenting judge might:

- give the appearance that the judge has already decided the case, casting doubt on the judge's "objectivity and his willingness to reserve judgment until the close of the proceeding," or
- unduly influence or appear to unduly influence the jury.

Ross, "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 *Georgetown Journal of Legal Ethics* 589, 598 (1989).

³ Like the Maine code, the California, Delaware, Minnesota, New York, and U.S. codes also prohibit all public comment, not simply public comment "that might reasonably be expected to affect its outcome or impair its fairness."

Louisiana and Texas have adopted standards that differ from both the 1972 or the 1990 code. The Louisiana code states: "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or bring the judiciary into disrepute...." The impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case."

- ◆ A judge was disciplined for discussing with a journalist the progress of a murder trial over which he was presiding, his opinions and reactions to the conduct of participating attorneys, witnesses, and the jury. The judge had known that such discussions, comments, and expressions of opinion, though given "off the record," would be used by the journalist in material that he was preparing for publication. *In re Hayes*, 541 So. 2d 105 (Florida 1989).
- ◆ A judge was disciplined for talking to a newspaper reporter before a final disposition after the judge ordered two boys detained in family court for psychological exams. Among other statements, the judge had commented to the reporter: "I felt the need to put them in there so they can have the psychological (testing) and so they'll be here. It was either that or go ahead and send them to the Department of Youth Services." *In the Matter of Nice*, COJ 21, Judgement (Alabama Court of the Judiciary June 21, 1988).
- ◆ A judge was disciplined for (1) showing a decision to a newspaper reporter and discussing his rationale before the parties received copies of the decision; (2) informing a newspaper reporter that he planned to vacate an order of contempt, while defending the order in the press; the person held in contempt learned of the judge's intention to vacate the order by reading the newspaper while the validity of the order was pending in the superior court on a petition for writ of habeas corpus; and (3) defending his imposition of a 30-day jail sentence because a defendant requested a jury trial by discussing the pending matter with the press and writing a letter to the editor. *Ryan v. Commission on Judicial Performance*, 754 P.2d 724 (California 1988).
- ◆ A judge was disciplined for writing a letter to the editor and a guest editorial published in a local paper that criticized the district attorney. The Oregon Supreme Court found that the letter and the editorial were a direct comment on the quality of prosecution to be expected in pending and impending criminal matters that were to come before him. *In re Schenck*, 870 P.2d 185 (1994).

In addition to other considerations, under Canon 3E(1), off-the-bench comments about a pending case made by the presiding judge may disqualify the judge from presiding over a case if the comments cast doubt upon the judge's ability to act impartially.

- ◆ Where a judge made critical comments quoted in a newspaper about a particular teachers' strike and stated that he was "ready to jail more" teachers if the strike was not settled soon, he was disqualified from a case involving that strike. *Papa v. New Haven Federation of Teachers*, 444 A.2d 196, 206 (Connecticut 1982).
- ◆ A judge was disqualified from a custody proceeding when he made several comments to the press and on a national television program highly critical of the reputation, character, and motivation of one of the parties. *Judith R. v. Hey*, 405 S.E.2d 447 (West Virginia 1990).
- ◆ A judge's appearance on national television to state his views regarding continuing protests at abortion clinics, the protesters, and his determination that his injunction against the protests was going to be obeyed would create in reasonable persons a justified doubt as to his impartiality and required his disqualification from cases involving the protests. *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993).

Commenting on a case pending before another judge or jury in the same court or jurisdiction as the commenting judge.

Furthermore, comments about a case pending before another judge or jury in the same court or jurisdiction as the commenting judge can also be reasonably expected to affect its outcome or impair its fairness or at least create that appearance. A rule prohibiting such comments:

- guards against the danger that a judge would feel pressured or would appear to feel pressured by the comments of a peer and colleague;
- guards against the danger that a jury would accord deference or would appear to accord deference to an opinion expressed by a judge;
- ensures that proceedings remain immune from outside influences, even if such influences are not specially prejudicial; and
- guards against the creation of a public impression that citizens are not being treated fairly because different judges may not agree as to how those citizens' rights should be decided under the law.

Ross, "Extrajudicial Speech: Charting the Boundaries of Propriety," 2 *Georgetown Journal of Legal Ethics* 589, 598 (1989); *Matter of Benoit*, 523 A.2d 1381 (Maine 1987).

- ◆ A judge was reprimanded for statements in a television broadcast concerning a defendant in two murder cases pending before another judge in the same court, when at the time of the telecast, the jury selection in the case had been completed, the trial was in progress, and the jury was not sequestered. The judge had presided over the defendant's first murder trial, which had been reversed on appeal. According to newspaper reports, the judge stated "[the defendant] does a good job of portraying himself as innocent. . . . I think his first conviction was amply supported by the evidence, and I think that . . . the facts that were brought in that case show that he is a dangerous person." *Press Release Regarding Porter* (Minnesota Board on Judicial Standards May 28, 1992).

Commenting on a case pending on appeal.

Commentary to Canon 3B(9) of the 1990 model code expressly provides that judges are prohibited from commenting on cases that are on appeal, stating that the "requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition." The New Jersey Advisory Committee on Extrajudicial Activities, for example, has forbidden a judge to participate as a panelist for a symposium to discuss a decision authored by the judge and pending before the supreme court. *New Jersey Advisory Opinion 3-88*; *New Jersey Advisory Opinion 2-88*. The committee explained its advice.

- Extra-judicial comments might be used by counsel in their briefs.
- If the judge sought to defend the opinion, the perception of impartiality would be destroyed.
- Commenting on a case to assist the appellate court is tantamount to an amicus curiae brief in support of the judge's own opinion, which is unacceptable.
- The opinion should rest on its own footing without further elaboration.

Continuing the limitation on public comments until appeals are exhausted was implied in the 1972 code, and judges have been disciplined for commenting on cases that were no longer pending before them but were on appeal.

- ◆ A judge was publicly censured for discussing a child custody case on a nation-wide television program while an appeal from his decisions was pending. The judge had said, among other things, "My primary concern, and I want to make this clear, is for the welfare of that child, and I don't think it is in the welfare, the best interests of a child 13 years old to see her mother sleeping with a man that is not her father, and next week there may be a different man in the house, and the third week there may be a third one." *In the Matter of Hey*, 425 S.E.2d 221 (West Virginia 1992). (Subsequently, the West Virginia Supreme Court of Appeals held that the judge's remarks were not "judicial acts" for which he should have absolute immunity from the mother's suit for defamation. *Roush v. Hey*, 475 S.E.2d 299 (1996).)
- ◆ A judge was disciplined for commenting about a lawsuit while her decision was on appeal. The judge had presided over the jury trial of an action for breach of contract based on the alleged withdrawal by the defendant, actress Kim Bassinger, from the plaintiff's movie "Boxing Helena," which was completed and released with a different female lead. There was a verdict for the plaintiff, and the defendants filed a notice of appeal. While the appeal was pending, the judge was quoted in a newspaper article as saying, "The fact of the matter is that throughout the trial, a significant portion of my rulings were in favor of Kim." *Public Admonishment of Chirlin* (California Commission on Judicial Performance August 28, 1995).

Commenting on an impending case.

The prohibition on making public comments applies to impending cases as well as pending cases. A case is "impending" if charges are being investigated or if someone has been arrested although not yet charged or if it otherwise seems probable that a case will be filed.

- ◆ A judge was disciplined for comments to the press related to allegations that more than \$8,000 was missing from the court probation department funds, including a statement that the head of the probation department, who presumably would play a key role in the investigation and possible court proceedings, was stonewalling and being less than candid and forthcoming. The Indiana Commission on Judicial Qualifications held that a judge is prohibited from making public comments about the credibility or good faith of a witness in an impending proceeding. *Statement of Admonition of Letsinger* (June 13, 1997).
- ◆ A judge was disciplined for stating in reference to possible charges that might be filed against a man arrested for abusing his ex-wife, "At the most, this is a third degree assault, at the very most, and it probably won't even be filed, so there was no merit to the claims." The Missouri Supreme Court held that the statement reflected a pre-judging of the merits of criminal charges that might be filed without the benefit of investigation, evidence, or argument, revealed an attitude that was a discredit to the judiciary, and could be interpreted as an attempt to influence whether charges would ultimately be brought against the ex-husband. *In re Conard*, 944 S.W.2d 191 (1997).
- ◆ A judge was disciplined for writing a letter to the editor and a guest editorial that criticized the district attorney. The Oregon Supreme Court found that the letter and the editorial were a direct comment on the quality of prosecution to be expected in

pending and impending criminal matters that were to come before him. *In re Schenck*, 870 P.2d 185 (1994).

Commenting on a pending or impending case in another jurisdiction.

It might be argued that under the 1990 model code a judge may comment about a pending or impending case in another jurisdiction because, for example, a California judge or jury is not likely to hear about, much less be affected by, the comments of a New Jersey judge. However, the intent to exempt cases in other jurisdictions from the prescription on public comments is contrary to the retention of the "in any court" language in the 1990 model code revision.

Moreover, even if comments on cases pending in other jurisdiction are arguably not prohibited by Canon 3B(9), comments on such cases may be prohibited by the Canon 2A requirement that a judge "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." One court has explained that a rule applying to cases pending in any court avoids "the threat to public confidence posed by a judge from one jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction." *In re Broadbelt*, 683 A.2d 543 (New Jersey 1996), *cert. denied*, 117 S. Ct. 1251 (1997). One commentator has decried the "unseemly spectacle" of judges commenting on other judges' cases. Rothman, *California Judicial Conduct Handbook at I-39* (1990).

Similarly, in advising that a judge could not appear on Court TV to comment on actions out of state to identify important legal issues and discuss the procedural setting of the matter, the New York Advisory Committee on Judicial Ethics stated:

[W]hat constitutes an important legal issue in the particular case being commented on may very well be a subject of dispute between the litigants. . . . Remarks by the judge could thus be seen as lending a judicial imprimatur to legal positions being advanced by one of the parties in an existing legal action, which legal positions may not have yet been ultimately determined.

New York Advisory Opinion 93-133. The code adopted for New York judges in 1996 affirms that the rule applies to cases in other jurisdictions, adding "any court within the United States or its territories" to its version of the comment restriction.

However, several states have established different rules for a judge's public comments depending on where the case is pending.

- ◆ The **North Carolina** code provides: "A judge should abstain from public comment about a pending or impending proceeding *in any state or federal court dealing with a case or controversy arising in North Carolina or addressing North Carolina law . . .*"
- ◆ The **Oregon** code provides: "A judge shall not, while a proceeding is pending *in any court within the judge's jurisdiction*, make any public comment that might reasonably be expected to affect the outcome or impair the fairness of the proceeding."
- ◆ The **Texas** code provides: "A judge shall abstain from public comment about a pending or impending proceeding *which may come before the judge's court* in a manner which suggests to a reasonable person the judge's probable decision on any particular case."

See also discussion regarding lending the prestige of office to advance the private interest of others, *infra*.

Responding to criticism about a pending case.

The temptation for a judge to make a comment in a pending case is probably strongest if the judge is publicly criticized about his or her handling of the case. In response to such criticism, a judge may:

- explain court procedures (*see* discussion, *infra*),
- respond to criticism directed toward judicial procedures, the law, or the courts generally in regard to litigation, and
- give information to the public as to the status of the litigation.

California Advisory Opinion 24 (1976). However, the California Committee on Judicial Ethics cautioned that the judge's remarks must be

- circumspect and
- without suggestion of partiality or premature determination.

According to the committee, a judge should not:

- comment as to future decisions the judge or another trier of fact may make;
- comment as to his or her opinions regarding the credibility of witnesses or the validity of evidence; or
- respond to criticism directed toward the judge on the merits of the litigation.

The Illinois Judicial Ethics Committee received an inquiry from a judge asking if he could have answered a reporter's questions about a pending case in which the judge had reduced the child support payments of an unemployed father on the grounds that the father was not making an earnest job search. The judge had told the reporter that judicial ethics rules precluded him from commenting, and the reporter's subsequent story stated that the father could not find employment because he spent too much time reporting to the judge on his job search.

The committee replied that the judge could not have discussed his reasons for the ruling except to comment on "matters of public record, including reciting without elaboration, any explanation of the judge's ruling that appeared in the transcript of the proceedings or in the court's order." *Illinois Advisory Opinion 96-5*. The committee did make some recommendations to a judge faced with an inquiry from a reporter.

- "A preferable alternative to responding 'no comment' may be to explain the ethical constraints on a judge's ability to discuss pending cases and to direct the reporter to the location and language of [the relevant provision of the code of judicial conduct]. If the reporter continues to question the extent of the ethical constraints on the judge's ability to comment, consideration should be given to providing the reporter with a copy of [this advisory] opinion."
- "The judge may inform the reporter of the procedure for obtaining a transcript of the proceedings."

- "The judge should consider suggesting that the reporter contact the lawyers involved in the proceeding since lawyers are generally freer than judges to discuss pending cases with reporters. . . . It would be permissible for the judge to provide the reporters with the lawyers' names and telephone numbers."

Similarly, the Texas Committee on Judicial Ethics stated that a judge may not respond publicly to unfair criticism of his actions in a case that was still pending. *Texas Advisory Opinion 209* (1997). Critics had alleged that the judge, who was presiding in a massive tort litigation action, was biased because of personal ties to the attorney for the plaintiffs and suggested that the judge's political interests favored plaintiffs who reside in the judge's county.

The committee noted that it sympathized with the judge's desire to refute unfair or false criticism of his actions and defend his reputation. However, it concluded that a public response to unfair criticism went beyond explaining to the public the court's procedures and was, therefore, prohibited.

To engage in an editorial debate with his critics about the merits or motivations of his decision not to recuse himself or his ability to be impartial would place the judge in the position of taking sides outside the courtroom for or against parties urging certain positions inside the courtroom. That is to say that the judge's editorial efforts to defend his impartiality could unwittingly cast further doubt on his impartiality.

A judge asked the Louisiana Supreme Court Committee on Judicial Ethics whether the judge could respond to questions from the press prompted by a citizen's letter published in the local newspaper that contained inaccurate or misleading statements about a ruling or other action by the judge in a pending case. The committee advised that the judge could not respond "except to the limited extent of explaining procedures of the court." *Louisiana Advisory Opinion 144* (1997). See also discussion *infra*. The committee stated that such an explanation could include:

- General background information relating to the operation of the court system and
- An explanation in legal terms of the concepts, procedures, and issues involved.

The committee stressed that the judge's primary goal in responding must be to educate the public and to maintain the dignity of the judicial office and cautioned that the judge should avoid personalizing his or her comments and should be objective and dispassionate.

Several other committees have given similar advice in the context of a pending case.

- ◆ A judge may not comment publicly about a pending matter in the judge's court despite false, misleading, and inaccurate public statements being made by a litigant. *New York Advisory Opinion 94-22*.
- ◆ A judge may not discuss issues involving a pending case with a group that was formed as a result of the judge's sentence in the case. *Florida Advisory Opinion 85-9*.
- ◆ A judge may not publicly respond to letters to the editor criticizing his or her conduct involving a pending case in which the judge recused. *Florida Advisory Opinion 85-9*.

The California committee concluded that "criticism directed toward a judge in the context of the merits of pending or imminent litigation is more appropriately answered by a bar association or bar officials" *California Advisory Opinion 24* (1976). Recognizing that judges

cannot publicly defend themselves against improper criticism, many state and local bar associations have such committees. For example, the Committee on Public Comment of the Delaware Bar Association was created "to advise and consult with the President [of the Association] in identifying and framing responses to unwarranted criticisms of members of the judiciary and to matters appearing in the media that affect the legal profession, the judicial system, or the administration of justice," and to assist "in preparing statements in connection with such criticisms and matters on behalf of the Association" *See also Unjust Criticism of Judges* (ABA Subcommittee on Unjust Criticism of the Bench and Courts & Community Committee JAD Lawyers Conference 1986).

EXCEPTIONS

There are exceptions to the rule prohibiting comments on pending or impending cases.

- Judges in their extra-judicial teaching and writing may refer to pending or impending cases in other jurisdictions. *See discussion infra.*
- Judges may "explain[] for public information the procedures of the court." *See discussion infra.*
- Judges may make "public statements in the course of their official duties . . .," an apparent reference to a judge's on-the-bench statements. Canon 3B(9).
- Judges may comment "on proceedings in which the judge is a litigant in a personal capacity . . .," although that does not include "cases such as writ of mandamus where the judge is a litigant in an official capacity." Commentary to Canon 3B(9).

Explaining court procedures.

As one express exception to the prohibition on making public comments on pending cases, under both the 1972 and the 1990 model codes, a judge may make public statements "explaining for public information the procedures of the court."

To distinguish between impermissible public comments and permissible public explanations, the Georgia Code of Judicial Conduct prohibits "valuative statements" but allows "generally informative explanations to describe litigation factors." *Georgia Code of Judicial Conduct, Terminology.* Examples of prohibited "valuative statements" are statements that:

- judge the professional wisdom of specific lawyering tactics, or
- judge the legal correctness of particular court decisions.

Examples of permitted "generally informative explanations to describe litigation factors" include:

- the prima facie legal elements of types of cases,
- legal concepts or principles such as burden of proof, duty of persuasion, innocent until proven guilty, and knowing waiver of constitutional rights,
- variable realities illustrated by hypothetical factual patterns of aggravating or mitigating conduct,

- procedural phases of unfolding lawsuits,
- the social policy goals behind the law being applied in pending cases, and
- competing theories about what the law should be.

Citing the exception for explaining court procedures, the Tennessee Judicial Ethics Committee stated that a trial judge may speak to groups on subjects related to but separate from the merits of a case while the case was on appeal. *Tennessee Advisory Opinion 89-13*. The case had attracted widespread media attention, and the judge who had presided was invited to speak at civic clubs, school classes, and bar-related functions. The committee explained that a judge could discuss:

- the rules and procedures regulating in-court media coverage of trial proceedings,
- the basic and fundamental procedures a trial judge is required by law to follow when sitting without a jury, and
- the general proposition that the personal opinions of the judge or the moral, ethical, theological, and political views of society should have no part in the decision of the court in a particular case.

Other opinions state:

- ◆ A judge may explain the procedures for detaining a witness who refuses to obey a subpoena, but may not speak to the ACLU concerning a case in which the judge had a recalcitrant witness arrested while a motion for post-conviction relief was impending. *Florida Advisory Opinion 96-18*.
- ◆ A judge may discuss procedures of the court in general terms for the information of the public, but may not relate trial strategies to a decision in a specific case. *Georgia Advisory Opinion 60* (1984).
- ◆ A justice of the peace may answer questions concerning inquest proceedings prior to a final ruling on a death certificate, but may not discuss the facts or other aspects of the case during the investigation or while the matter is pending. *Texas Advisory Opinion 95* (1987).
- ◆ A judge may express an opinion of the actions of a local conditional release commission generally, but should not mention the names of any specific defendants nor discuss pending cases. *New York Advisory Opinion 92-67*.

Citing the exception for explaining the procedures of the court, the Alabama Supreme Court suggested that a judge could:

- explain a case in abstract legal terms,
- provide background information relating to the operation of the court system, and
- explain legal terms, concepts, procedures, and the issues involved in the case.

In the Matter of Sheffield, 465 So. 2d 350 (1985).

An extra-judicial explanation by a judge of his or her ruling is not considered an appropriate explanation of court procedures. For example, in *Sheffield*, the Alabama Supreme Court rejected the judge's argument that his comments to a reporter were merely abstract legal explications of a pending contempt hearing and a part of his judicial duty. A witness in a case before the judge had written a letter critical of the judge that was published in the local newspaper. The judge issued an order directing the witness to show cause why she should not be held in contempt of court. The evening before the hearing, in a telephone call with the editor of the local newspaper, the judge explained the meaning of constructive or indirect contempt and the possible sanctions for contempt. The judge also said, "The contempt speaks for itself I think it is pretty obvious who she is talking about." Furthermore, the judge suggested to the editor that "the article [had] false information in it," and that the editor "might want to look at the libel laws; call an attorney." The court found that the judge had violated the restriction on making comments on pending cases.

The Texas State Commission on Judicial Conduct found that a judge's lengthy interview with reporters explaining his sentence in a case violated the prohibition on making public comments. *Order of Public Censure (Hampton)* (Texas Commission on Judicial Conduct November 27, 1989). The commission rejected the argument that the judge was merely explaining court procedures.

The judge had talked to two reporters while a motion for a new trial was pending in a case in which a defendant had been convicted of killing two men. To one of the reporters, the judge stated:

The victims were homosexuals. They were out in the homosexual area picking up teenage boys. Had they not been out there trying to spread AIDS around, they'd still be alive today. I hope that's clear. [The defendant] is an eighteen year old boy. He had thirty years in prison. You know that's a pretty heavy punishment for a kid that's never done anything wrong before. I balance the character of the defendant against the crime he committed. I tried to consider every fact that was presented to me. I've been prosecuting since 1955. Defending, I defended cases twenty years. I've been judging them for seven years and any sentence that I do is a sum total of thirty-three years experience in criminal law and it does not upset me if anybody in the Gay Alliance disagrees with me.

The Commission condemned the comments because they

- were lengthy,
- reviewed the specific details of the case, and
- formulated or pronounced the rationale for the judge's rulings or findings.

The Commission explained that to excuse such a discussion "would be to introduce and condone the use of off-record, extra-judicial considerations into the adjudicative process. Perceptions of fairness would decrease and mistrust increase." The Commission found that the judge's comments, per se, were destructive of public confidence in the integrity and impartiality of the judiciary, noting that the public had reacted to the judge's comments with disbelief, abhorrence, and indignation. The Texas advisory committee has also stated that a judge's explanation of his or her stated position in a case is not an explanation of court procedures. *Texas Advisory Opinion 191* (1996).

Similarly, the Maine Supreme Court held that the exception for explaining for public information the procedures of the court did not justify a judge's defense of sentences that he had imposed, which had been reversed on appeal. *In the Matter of Benoit*, 523 A.2d 1381 (1987). The nine cases were remanded for re-sentencing to the judge who imposed the original sentences. In letters to the editors of four newspapers, the judge criticized the decision vacating the sentences, defended the sentences he had previously imposed, and commented on the facts of the cases and the sentencing factors he had applied. Newspapers throughout the state published his letters. The court concluded:

It is difficult to conceive of a more egregious violation of the plain proscription of Canon 3(A)(6) than that which has occurred in this case. By publishing his letters, the content of which made readily apparent his lack of impartiality, Judge Benoit, at the very least, created the appearance that the judicial system was unfair. More specifically, citizens whose legal rights and freedoms were at risk, were subjected to a public prejudgment of their cases by the very judge who was assigned to reimpose sentence. We cannot tolerate such a conspicuous display of judicial bias regarding pending cases.

The Illinois advisory committee also stated that a judge should not attempt "to explain an action that he had taken in court with extrajudicial statements that were not a matter of public record." *Illinois Advisory Opinion 96-5*. The committee noted that a judge who discusses reasons for a ruling runs the risk of inadvertently providing information that is not a part of the public record and the risk that, even if the judge does not improperly comment on a pending case, the "reporter's accounts of the judge's remarks could give rise to an erroneous appearance that the judge violated the rule." The committee advised the judge to speak with the reporter only if the judge's comments were limited:

- to administrative procedures of the court or
- matters of public record.

But see Office of Disciplinary Counsel v. Souers, 611 N.E.2d 305 (Ohio 1993) (a judge's defense of his sentencing order, while less than judicious, was provided to publicly explain his procedure in the underlying criminal case and could not be the basis for discipline).

Scholarly teaching and writing.

Comments made during scholarly presentations on cases pending in other jurisdictions were one category of comments the 1990 model code apparently intended to permit by adopting the "might reasonably be expected to affect [a proceedings'] outcome or impair its fairness" qualification in its revision of the restriction on public comments. The reporter for the ABA committee that drafted the 1990 model code explained that "judges in their extra-judicial teaching and writing often refer to pending or impending cases in other jurisdictions without diminishing the fairness of those cases or the appearance of judicial impartiality." Milord, *The Development of the ABA Judicial Code at 21* (1992).

This exception was also implied in the 1972 model code restriction. Interpreting its provision based on the 1972 model code, the New York advisory committee stated that a judge who teaches a course in criminal justice and related topics may comment in the classroom on actual cases pending in courts in other jurisdictions. *New York Advisory Opinion 95-105*. The committee reasoned that the provision allowing judges to lecture and teach about the law "obviously contemplate[d] a reasonable degree of academic freedom within the confines of a class room." The committee concluded that "[e]ngaging in discussion with students about current events

involving cases being tried in other localities, generally speaking, can in no way negatively impact the criminal justice system." The committee did caution that the judge

- should refrain from making gratuitous and unnecessarily controversial statements about pending cases and
- should avoid any discussion of cases pending within the general jurisdictional locale of the judge's court and the college campus.

Without adopting the "might reasonably be expected to affect [a proceedings'] outcome or impair its fairness" qualification, some states have added an express "education exemption," at least for cases not involving the judge making the comments.

- ◆ The **Delaware** and U.S. codes add that the proscription does not extend "to a scholarly presentation made for purposes of legal education." Commentary states, "If the public comment involves a case from the judge's own court, particular care should be taken that the comment does not denigrate public confidence in the integrity and impartiality of the judiciary in violation of Canon 2A."
- ◆ The **California** code adds: "Other than cases in which the judge has personally participated, this Canon does not prohibit judges from discussing in legal education programs and materials, cases and issues pending in appellate courts. This education exemption does not apply to cases over which the judge has presided or to comments or discussions that might interfere with a fair hearing of the case."

THE FIRST AMENDMENT

Any limitation on speech invites a challenge on First Amendment grounds, but the prohibition on commenting on pending cases from the 1972 model code has withstood constitutional challenge. The decisions acknowledge that judges do not give up their First Amendment rights when they take the bench but stress that those rights can be circumscribed in light of the state's critical interest in an independent and impartial judiciary.

In response to a judge's challenge to an advisory opinion forbidding the judge from appearing on television to comment on cases pending in other jurisdictions, the New Jersey Supreme Court rejected the judge's argument that the prohibition violated the First Amendment. *In re Broadbelt*, 683 A.2d 543 (1996), *cert. denied*, 117 S. Ct. 1251 (1997). The court applied an analysis that allows the regulation of a judge's speech

- if it furthers a substantial governmental interest unrelated to suppression of expression and
- if it is no more restrictive than necessary.

The court held that avoiding material prejudice to an adjudicatory proceeding, preserving the independence and integrity of the judiciary, and maintaining public confidence in the judiciary are obviously interests of sufficient magnitude to uphold the restrictions. The court also stated it was satisfied that the restriction on a judge's speech was no greater than necessary.

In disciplining a judge for criticizing the district attorney, the Supreme Court of Oregon concluded that imposition of a sanction did not violate the judge's freedom of speech. *In re Schenck*, 870 P.2d 185 (1994). The judge had criticized the prosecutor in a letter to the editor and guest editorial, both published in a local paper. The court applied an analysis from public employee free-speech cases that weighs

- the First Amendment rights of a public employee against
- the interest of the state as an employer in regulating the speech of its employees to promote the efficiency of the public services the state performs through its employees.

The court found that the code restriction promoted an interest in protecting both the fact and the appearance of the impartiality and integrity of the judiciary and that that interest is "profound." The court held that the prohibition on making comments on pending cases is a limited restriction on the judge's right to speak that directly related to and was narrowly drawn so as to further the governmental interest.

See discussion of Scott v. Flowers, 910 F.2d 201 (5th Cir. 1990), *infra*.

COMMENTING WHEN A CASE IS NO LONGER PENDING

A judge may comment about cases the judge has decided after final disposition (including all appeals), although caution is still necessary.

- In referring to a final criminal case, the judge should consider whether the comments might afford a basis for collateral attack.
- In referring to any final case, the judge should avoid sensationalism and comments that may result in confusion or misunderstanding of the judicial function or detract from the dignity of the judicial office.

U.S. Advisory Opinion 55 (1977).

The Arizona Judicial Ethics Advisory Committee has stated that a judge may write articles for publication about the reasoning process by which he or she reached a decision in a particular case if the case has been fully resolved. *Arizona Advisory Opinion 95-4*. The committee imposed several conditions based on provisions of the code. The article:

- must be written in a manner that casts no reasonable doubts on the judge's capacity to act impartially (Canon 4A(2));
- must promote public confidence in the integrity and impartiality of the judiciary (Canon 2A);
- must not demean the judicial office (Canon 4A(2));
- must not interfere with the proper performance of judicial duties (Canon 4A(3)); and
- must not disclose any non-public information about the case that was acquired by the judge in his or her judicial capacity (Canon 3B(11)).

In contrast, the Texas advisory committee has stated that a judge may not write a newspaper article discussing his or her position in a case in which the judge participated even though the case had been finally resolved. *Texas Advisory Opinion 191* (1996). That committee stated:

Even though a matter has already been decided it can be revisited and the opinion/ editorial would be talking about more than just particular procedures of the court

(The Texas code prohibits public comment that "suggests to a reasonable person the judge's probable decision on any particular case." However, that difference between the model code and the Texas code does not seem to affect the reasoning of the advisory committee.) Further, as the request was from an appellate judge, the opinion cited a unique provision in the Texas code that provides:

The discussions, votes, positions taken, and writings of appellate judges and court personnel about causes are confidences of the court and shall be revealed only through a court's judgment, a written opinion or in accordance with Supreme Court guidelines for a court approved history project.

The New Jersey advisory committee has also stated that a judge should not "clarify, defend, or justify any of the judge's decisions or opinions, or reasoning therein even in the absence of an appeal." *New Jersey Guidelines for Extrajudicial Activities, III.A.2.b.*

IF A JUDGE IS CRITICIZED ABOUT A CASE THAT IS NO LONGER PENDING

"Nothing in the Code of Judicial Conduct prevents a judge from making a dignified response to public criticism" that does not involve a case pending or about to be brought before the court. *California Advisory Opinion 24* (1976). A judge who had been the subject of a negative letter to the editor about a case that was no longer pending asked the New York advisory committee if he could respond. *New York Advisory Opinion 92-13*. Entitled "System is Frustrating," the letter published in a local newspaper was critical of a court system where "judges and lawyers get together and decide who is right and who is wrong before they know the whole story." It also stated that the "whole country is slowly going down the tube and people of the judicial system don't care." The article did not identify by name any particular case or judge, but the inquiring judge knew which case the letter referred to by the names of the writers. The judge wanted to respond in a letter indicating that the author's statements were "completely false and unfounded, since both parties were represented by counsel, a fact-finding was held at which the parties testified under oath, there never was a pre-trial conference with or without the parties, and the entire matter is on the record."

The committee advised that, because the case was no longer pending, the judge was at liberty to publicly correct any of the procedural misconceptions in the letter. However, the committee warned that the judge must:

- scrupulously avoid personalizing the comments,
- refrain from invective, and
- be objective and dispassionate so as not to detract in any way from the dignity of the judicial office.

In addition, the committee stated that "[w]hile no ethical objection . . . is apparent to the judge's answering, the Committee considers this an unwise course," noting that a "judge must expect to be the subject of public scrutiny and, therefore, must accept criticism, however meritless, that might be viewed as opprobrious by the ordinary citizen." *See also Alabama Advisory Opinion 97-649* (a trial judge should not explain the rationale for a sentence imposed in a criminal case to a critic of that sentence even if the time for an appeal has expired and the judge is willing to recuse from any post-conviction petition brought by the defendant).

PRESERVING IMPARTIALITY WHILE SPEAKING UP

Like all of a judge's off-the-bench activities, a judge's public education efforts should not "cast reasonable doubt on the judge's capacity to act impartially as a judge." Canon 4A(1). This requirement:

- narrows the statements a judge can make on controversial issues,
- proscribes a judge's participation in campaigns regarding political issues,
- limits the statements a judge can make about lawyers,
- prohibits a judge from exhibiting bias or prejudice, and
- limits the types of audiences to which a judge can speak.

STATEMENTS ON CONTROVERSIAL ISSUES

Although judges are encouraged to work toward "revision of substantive and procedural law and improvement of criminal and juvenile justice," to comply with Canon 4A(1), they have also been cautioned against "indiscriminately voicing their objection to the law lest they be misunderstood by the public as being unwilling to enforce the law as written, thereby undermining public confidence in the integrity and impartiality of the judiciary." *In re Gridley*, 417 So. 2d 950 (Florida 1982).

In 1980, Judge William C. Gridley of Florida was in a difficult position. On the one hand, if a jury recommended the death penalty, as a circuit judge, he had the authority to impose the death penalty or override the recommendation and impose a life sentence. On the other hand, in accordance with his views of Christian forgiveness, he personally opposed the death penalty.

To share his dilemma, the judge wrote an article for his church newsletter and two letters that were published in a local newspaper. For example, the article in the church newsletter stated:

Because God has given me a new life in Jesus Christ, I choose not to condone our use of capital punishment.

I am not saying that I would refuse to impose capital punishment if I as a judge were required legally by our society to do so. A judge is in a particularly sensitive position because it is his duty to render a judgment on facts which legally compel the imposition of the death penalty.

But even as he judges and imposes capital punishment, the judge in his capacity as an individual citizen can express dissent from the course of action taken by the state.

The Judicial Qualifications Commission found that the judge's writings violated the requirement that a judge act in a manner that promotes public confidence in the impartiality of the judiciary.

In response, the Florida Supreme Court held that "a judge in an appropriate forum may express his protest, dissent, and criticism of the present state of the law." *In re Gridley*, 417 So. 2d 950 (1982). The court noted that there are "many authorized methods of protest, dissent and criticism within the framework of the judiciary." The court listed dissenting opinions, petitions to the supreme court

for changes in the rules of procedure, submission of suggested changes to various committees of the bar association, participating in legal seminars conducted by the bar association, and taking an active part in state and local conferences of judges. Three justices, writing in a concurrence, went further and argued that a judge's forum for expressing his or her views is not limited to the judicial and legal communities as suggested by the majority opinion but that there are "times and issues" that will compel judges to speak out to a "much larger community through other mediums."

However, the court held that in voicing his or her opposition to the law, a judge:

- must not appear to substitute the judge's concept of what the law ought to be for what the law actually is, and
- must express himself or herself in a manner that promotes public confidence in the judge's integrity and impartiality as a judge.

The court concluded that, while Judge Gridley had come "close to the dividing line between what is appropriate and what is not," he had stopped short of violating the code because he had "made it clear that he was duty bound to follow the law and that he would do so although he did advocate law reform in the area of capital punishment." The court emphasized that most judges "would not have expressed their dissent in the same manner as Judge Gridley because, even if this conduct did not violate the Code of Judicial Conduct, they would have considered it to be in poor taste and subject to possible misinterpretation by the public."

However, the dissent in Gridley concluded that, despite the judge's commitment to follow the law regardless of his personal feelings about capital punishment, "no reasonable person could read Judge Gridley's letters or article and still realistically believe that the judge would actually impose a death sentence"

Similarly, other authorities restrict judges' discussion of controversial issues, apparently unpersuaded that a judge can debate such topics while maintaining the appearance of impartiality. For example, the Indiana Commission on Judicial Qualifications has explained:

While it is true that most judge will harbor personal views on [abortion] but will nonetheless rule with impartiality, the public perception of impartiality is as important as impartiality in fact, and it is crucial that a judge not appear to have cleaved to a position. *Indiana Advisory Opinion 2-90*.

Thus, the committee stated that a judge may not publicly express personal views on the issue of whether abortion is "right or wrong."

Moreover, to preserve the appearance of impartiality, the Washington Ethics Advisory Committee imposed several caveats on the permission it granted a judge to address a symposium on domestic violence. *Washington Advisory Opinion 97-10*. Although the committee stated that the judge could address the symposium to give a judicial perspective on the way domestic violence cases impact the court or act as a moderator, it also cautioned that the judge should not:

- speculate on what the law should be;
- speculate on how the law could be improved in particular cases;
- act as an advocate; or

- give the impression on how he or she might rule in a particular case.

The Florida committee gave comparable cautions when it stated that a group of judges could meet with concerned citizens to discuss sex-related misdemeanors that the citizens perceived to be a significant community problem. *Florida Advisory Opinion 94-09*. The committee warned the judges to "avoid committing themselves to a decided course of legal action in specific types of cases certain to come before them."

Similarly, advisory committees have stated:

- ◆ A judge may not publicly advocate handgun control. *Florida Advisory Opinion 93-64*.
- ◆ A judge may present a speech on the history of the death penalty to a non-partisan political organization where the speech is neither pro-death penalty nor anti-death penalty. *Florida Advisory Opinion 95-3*.
- ◆ A judge should not become involved in a political or controversial issue or appear to advocate or be identified with a particular position on a controversial issue. *New Jersey Guidelines for Extrajudicial Activities IIIA(2)(e)*.

In contrast, the Illinois advisory committee has given judges permission to discuss a wide variety of controversial issues as long as they do not cast doubt upon their ability to decide impartially any case that may come before them, although without more precise guidance on how to avoid that hazard. *Illinois Advisory Opinion 94-5*; *Illinois Advisory Opinion 94-17*. With that caveat, the committee advised that judges could publicly discuss abortion; the death penalty; a proposed "three-time loser" law; proposed or enacted legislation; local government issues, such as bond issues and school district tax referendums; gun control; and merit selection of judges. The committee warned that it was advisable but not mandatory for judges discussing controversial issues to state affirmatively that regardless of their personal views they would follow the law if called upon to decide any of those issues.

In the context of judicial election campaigns, a prohibition in Canon 5A(3)(d)(ii) on a candidate making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court" has withstood constitutional challenge. *Ackerson v. Kentucky Judicial Retirement and Removal Commission*, 776 F. Supp. 309 (W.D. Kentucky 1991); *Deters v. Judicial Retirement and Removal Commission*, 873 S.W.2d 200 (Kentucky 1994). That provision from the 1990 model code gave judges more leeway to discuss controversial issues in judicial election campaign than had the 1972 model code. Canon 7B(c) of the 1972 model code had prohibited a judicial candidate from "announc[ing] his views on disputed legal or political issues." That provision as adopted in several states had been declared unconstitutional. See *Donovan v. Arkansas Judicial Discipline and Disability Commission*, 863 F. Supp. 913 (E.D. Arkansas 1994); *American Civil Liberties Union v. The Florida Bar*, 744 F. Supp. 1094 (N.D. Florida 1990) (preliminary injunction); *American Civil Liberties Union v. The Florida Bar*, TCA 90-40122-WS, Order (N.D. Florida May 22, 1991) (permanent injunction); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Kentucky 1991); *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993). The ABA believed that the broad language of the 1972 code's version of the rule "could not be practicably applied in its literal terms" and that the 1990 revision was "more in line with constitutional guarantees of free speech." Milord, *The Development of the ABA Judicial Conduct* at 50 (ABA 1992).

STATEMENTS ON POLITICAL ISSUES

Another ethical limitation on a judge's speech is found in the canon regarding political conduct and prohibits a judge who is not currently a candidate for office, in general, from engaging in any political activity except on behalf of measures to improve the law, the legal system, or the administration of justice. Canon 5D. Under this rule, a judge *may not*:

- speak on the merits of an initiative measure that is intended to provide additional funds for children's services by means of a tax increase (*Washington Advisory Opinion 89-11*);
- join a group of citizens to encourage the passage of a school levy (*Washington Advisory Opinion 95-3*);
- address a rally for an anti-abortion organization that is pursuing a political agenda *In re Sanders*, No. 96-2173-F-63, Commission decision (Washington Commission on Judicial Conduct May 12, 1997) (this decision is being appealed to the state supreme court)); or
- speak publicly in opposition to a bond issue that had nothing to do with the administration of justice (*In re Chambliss*, 516 So.2d 506 (Mississippi 1987)).

However, under the exception for law-related issues, judges can take a stand on a plan to change the way judges are chosen, although how judges are chosen is obviously a political issue. *Arkansas Advisory Opinion 94-4*; *Florida Advisory Opinion 80-14*; *Kansas Advisory Opinion JE-5* (1984); *Kansas Advisory Opinion JE-5A* (1984); *Ohio Advisory Opinion 87-44*. Furthermore, under that exception, a judge may:

- comment on the need for additional funds to improve the law, the legal system, or the administration of justice (*Washington Advisory Opinion 89-11*);
- express an opinion regarding a sales tax to finance improvements to the county jail and courthouse (*Ohio Advisory Opinion 87-44*);
- campaign on the question of splitting a judicial district into two districts (*Louisiana Advisory Opinion 24* (1975));
- take a public stand in favor of or opposed to a bond election in which voters will decide whether to increase the sales tax to pay for a new courthouse and jail (*Arkansas Advisory Opinion 94-1*);
- take a public stand on a proposed constitutional amendment that would impose limits on judicial terms (*Arkansas Advisory Opinion 94-4*);
- participate in campaigns for or against initiatives concerning juvenile justice reform (*Arizona Advisory Opinion 96-8*); and
- criticize the legislature for cutting state court budgets (*Judicial Inquiry Commission v. McGraw*, 299 S.E.2d 872 (West Virginia 1983)).

STATEMENTS ABOUT LAWYERS

The competence, or lack of competence, of lawyers is "fair game for judges, particularly if the remarks are limited to lawyers generically." *Illinois Advisory Opinion 94-17*. However, the Illinois committee cautioned that "[u]nflattering comments about a specific lawyer would be more problematic," as such comments "could cast doubt on the speaker's ability to decide impartially cases involving that lawyer."

In *In re Schenck*, 870 P.2d 185 (1994), the Oregon Supreme Court found that a judge violated the code of judicial conduct by writing a letter to the editor and a guest editorial published in a local paper that criticized the district attorney. For example, the editorial was an extended essay on the district attorney's lack of competence, experience, professional demeanor, and personal maturity, citing specific instances in identifiable cases as well as general matters. The court concluded that after those public broadsides, the public reasonably might have questioned the judge's impartiality in any matter involving the district attorney. See further discussion of case *infra*.

EXPRESSIONS OF BIAS OR PREJUDICE

Whenever judges speak on any issue, they must be careful to refrain from insensitive and stereotyped statements. Commentary to Canon 4A explains:

Expression of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status.

- ◆ A judge was publicly censured for, in an interview with a newspaper reporter, expressing his displeasure with a state statute regulating abortions for minors and stating that one of the circumstances in which he might permit a minor to have an abortion pursuant to the act would be when a white girl was raped by a black man. *In the Matter of Bourisseau*, 480 N.W.2d 270 (Michigan 1992).
- ◆ A judge was removed as chief judge for remarks to a reporter concerning public schools, the provocative dress of female students, the prevalence of blacks on welfare and in the criminal justice system, and the propriety of making racial slurs and telling racial jokes in private. The Florida Supreme Court held that because a significant portion of the community had read the judge's statements as endorsing discriminatory stereotypes that were inimical to the law of Florida and the interests of the judiciary, his actions had significantly eroded his ability to work effectively with all segments of the community. *In re: Petition for Removal of a Chief Judge*, 592 So. 2d 671 (1992). The judge was subsequently reprimanded for the same remarks. *Re: Santora*, 602 So. 2d 1269 (1992).

SPEAKING TO THE APPROPRIATE AUDIENCE

Concerns about maintaining a judge's impartiality may limit the type of audience appropriate for a judge's education efforts. Therefore, prior to agreeing to a speaking engagement, a judge should consider the nature of the organization and whether speaking to the group may tend to identify the judge with the aim or purpose of the organization. (Judges cannot speak at fund-raising events. Commentary to Canon 4C(3)(b).) In assessing the nature of the organization, the relevant factors include:

- whether the organization advocates positions on disputed issues;
- whether the organization regularly engages in adversarial proceedings in court;
- whether the organization files amicus briefs on disputed issues;
- whether the organization endorses non-judicial political candidates;
- whether the organization subscribes to a particular legal philosophy or position that implies commitment to causes that may come before the court for adjudication;
- whether the organization is devoted to the improvement of the law, the legal system, or the administration of justice; and
- whether the organization serves primarily a social function.

Washington Advisory Opinion 93-19.

Advisory committees have suggested that addressing an organization can constitute an identification with that organization's positions and, therefore, is prohibited if such an identification compromises the judge's impartiality. For example:

- ◆ A judge who presides over domestic violence cases may not speak at an event for a battered women's advocacy group if the organization is partisan, but may if it is service-oriented. *Illinois Advisory Opinion 93-4.*
- ◆ A judge may give an address on how juvenile cases are handled to a group that studies juvenile justice but not to an advocacy group. *West Virginia Advisory Opinion* (December 11, 1997).
- ◆ A judge who presides over criminal cases should not be an honoree at a dinner of the Fraternal Order of Police if that organization is controversial and advocates particular positions on issues coming before judges. *Illinois Advisory Opinion 93-4.*
- ◆ A judge may not accept an invitation from Mothers Against Drunk Drivers to speak at a dinner honoring the law enforcement officers who issued the most driving-under-the-influence citations in the past year. *Washington Advisory Opinion 95-8.*
- ◆ A judge may not speak at a club's annual recognition and awards luncheon where the club gives monetary and supportive assistance to police officers and fire fighters and the expected audience consists of members of the club, law enforcement professionals, and others. *New Jersey Informal Advisory Opinion 16-93.*

- ◆ A judge may not speak on the judiciary's approach to issues affecting children at a conference for foster parents because foster parents have an interest in cases of termination of parental rights although they are not parties. *New Jersey Informal Advisory Opinion 26-93*.

In contrast, in one opinion, the Illinois committee concluded that merely addressing an organization is not an implicit endorsement of the organization or its agenda. *Illinois Advisory Opinion 94-17*. Thus, that committee has stated that judges are free, as long as they do not say anything that casts doubt on their impartiality, to speak before groups, such as court watchers or MADD, that advocate new legislation or changes in the enforcement of existing laws.

The Washington advisory committee stated that a judge may not speak on the topic of "The Role of MADD and the Court System" because to do so would cast doubt on the judge's capacity to decide impartially DUI issues that may come before the judge. *Washington Advisory Opinion 96-9*. The committee concluded:

- Singling out and defining the role of one advocacy group could create the appearance that the judge favors or listens to MADD associates more than other participants.
- Defining what should be the role of an advocacy group necessarily involves expression of a series of value judgements about the subject that might cast doubt on the judge's capacity to decide DUI issues impartially.

Further, the New Jersey advisory committee has cautioned judges against educating or being perceived as educating "a special interest group to the disadvantage of any other group." Thus, the committee has stated that a judge should not accept speaking invitations from law firms and others that frequently appear in court. *New Jersey Advisory Opinion 1-89*. See also *U.S. Compendium* § 4.1(f) (1995) ("it is impermissible for a judge to participate in training lawyers at a particular law firm.") However, several advisory opinions have stated that a judge may accept invitations from law firms to speak at meetings or dinner training sessions if the judge:

- speaks on a subject that will qualify the meeting as legal education,
- is available to all law firms for similar lectures, and
- avoids repetitive visits to the same law firm.

Maryland Advisory Opinion 116 (1988); *California Advisory Opinion 29* (1983).

Several advisory committees have stated that a judge may not teach law enforcement officers. For example, the New York committee stated that a judge should not give a seminar on how to successfully prosecute certain traffic cases to police officers who act as prosecutors in such traffic cases. *New York Advisory Opinion 95-121*. The committee reasoned that, in effect, the judge would be advising the prosecution how to obtain convictions. Similarly, the Utah Ethics Advisory Committee stated that a judge may not teach law enforcement officers about proper courtroom demeanor and testimony because such a course would be devoted not to the improvement of the legal system overall, but to the improvement of a single adversarial component. *Utah Advisory Opinion 88-5*. See also *Nebraska Advisory Opinion 96-9* (a judge may not write an occasional column for a local newspaper that is published by law enforcement officers primarily for law enforcement officers). But see *Missouri Advisory Opinion 121* (1985) (a judge may speak at a training session for police officers to discuss the problems that arise in driving-while-intoxicated cases and the steps police may take to better prepare cases); *Washington Advisory Opinion 92-10* (a judge may participate in a seminar sponsored by the state toxicologist to provide prosecutors with information regarding breath and alcohol testing).

SPEAKING TO POLITICAL GATHERINGS

Although, in general, judges who are not candidates for re-election or retention may not speak at political gatherings (Canon 5A(1)(d)), in some states there is an exception to that rule that allows judges to attend political gatherings in order to speak about the justice system. Thus, judges may speak to political organizations, including partisan organizations, on non-partisan topics such as:

- the role of the judiciary,
- the problems the judiciary faces, or
- the dispute resolution process in general.

The appearance is appropriate as long as:

- the judge does not answer any questions involving issues that might come before the judge;
- the judge does not endorse any candidate, legislation, or proposition that might be the subject of voter action;
- the judge will not be present for any portion of any business meeting;
- the judge's appearance will not be announced to the general public, although the members of the organization may be informed of the judge's address beforehand;
- the judge's speech will not give the appearance that the judge is supporting a particular candidate; and
- the judge's speech will not violate the prohibition against judges actively taking part in any political campaign other than their own.

Washington Advisory Opinion 95-7; Georgia Advisory Opinion 1 (1976); Arizona Advisory Opinion 76-1.

However, not all states approve of judges speaking to political gatherings about the justice system. The Florida committee, for example, stated that a judge may not accept an invitation to speak before a local partisan political meeting for the purpose of explaining and discussing the new judicial system. *Florida Advisory Opinion 74-3*. Noting that a judge should not use, or appear to use, the judicial position on behalf of any political party, the committee stated, "[t]here is a question of, 'how educational the educational talk would be' or appear to be." *See also New York Advisory Opinion 88-136* (a family court judge who is not running for election may not speak to a political club about the function of the family court).

SPEAKING UP ABOUT A PROBLEM IN THE COURTS

Although drawing the public's attention to a problem in the court may undermine public confidence in the judiciary, under some circumstances, candid discussion may actually reassure the public that the judiciary is aware of and addressing problems, rather than ignoring them. One court has distinguished between constructive criticism and destructive criticism. Constructive criticism "is likely to be, in its ultimate result, beneficial to the community which [the judge] serves"

In re Kelly, 238 So. 2d 565 (Florida 1970). Destructive criticism:

raise[s] suspicion of motives among the judges, and renders the courts all suspect to the public, [and] the result can only be an increase in disrespect for law and order, an increase in lawlessness, a greater tendency among some of our citizens to let loose their tendencies to disorder.

Thus, no absolute ethical prohibition prevents a judge from thoughtfully criticizing other judges or the justice system, although it is not encouraged, and unprovoked, disrespectful attacks are not condoned.⁴

ACCUSING OTHER JUDGES OF MISCONDUCT⁵

The California Commission on Judicial Performance also noted that it, not the news media, was the appropriate forum if a judge wanted to make allegations of misconduct against other judges. *Inquiry Concerning Velasquez*, Decision and Order Imposing Public Censure (California Commission on Judicial Performance April 16, 1997). The commission disciplined a judge for making public statements disparaging fellow judges during a dispute about the judge's "get tough" sentencing policy in DUI cases. The judge consented to the censure.

The judge's statements were made both on and off the bench, in open court, in documents filed in court, in newspapers, and on television broadcasts. For example, in an interview with a television station, the judge stated:

And even though I say that Judge Sillman is racist, and [Judge] Wendy Duffy is racist, and [Judge] Richard Curtis is racist and [Judge] Russell Scott is racist, I have told them that it will be my intent to make friends of them. . . . They're wanting to use statistics against me; that I am not carrying my own weight, that is caseload. But the reason for that is the defense attorneys are disqualifying me because I will give convicted drunk drivers a serious sentence and not a slap on the wrist.

The Commission found that the judge's public accusations of racial bias by fellow judges were especially troubling as they called into question the integrity and impartiality of those judges and the judicial system.

⁴ Judges who are lawyers are also required to comply with their jurisdictions' version of Rule 8.2 of the ABA Model Rules of Professional Conduct, which prohibits a lawyer from making "a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office."

⁵ Criticism of judicial opponents in an election campaign is beyond the scope of these study materials. See "Advisory Opinions Set Limits on Campaign Speech," 18 *Judicial Conduct Reporter* 2 (Summer 1996); "Campaign Ad Earns Reprimand for Ohio Judge, 18 *Judicial Conduct Reporter* 4 (Winter 1997); Judicial Campaign Ads Violate Code of Conduct," 19 *Judicial Conduct Reporter* 1 (Spring 1997).

The Indiana Commission on Judicial Qualifications has stressed that a judge will not be disciplined for speaking publicly about a difficult situation in the courts as long as the judge's comments:

- are temperate and judicious;
- contain fact-based information from which the public could benefit; and
- do not create an unfairly negative perception of the judiciary.

Statement of Admonition of Letsinger (June 13, 1997). However, the commission publicly admonished Judge Letsinger, pursuant to his consent, for commenting to the press about allegations that over \$8,000 was missing from the court probation department funds. Among other comments, the judge stated that one of his colleagues was being less than candid and forthcoming relating to the investigation and had prior knowledge about problems with missing funds. He said about the other judge, "he knew about this. The can of worms is starting to smell, and it's smelling higher and higher," and that the other judges on the court were protecting the judge.

The commission found that the judge's comments were intemperate and injudicious and not fact-based information from which the public could benefit. The commission stated that his comment about the "can of worms smelling higher and higher" created "an inflammatory association between his colleague and a somewhat unclear but distinctly negative circumstance involving the investigation into the missing funds." The commission noted that if the Judge Letsinger believed that other judges were acting inappropriately, he should report them to the commission, not make unconstructive comments to the press. *See* Canon 3D(1).

Some courts and conduct commissions have adopted a suggestion from the dissent in *Kelly* that a judge who has been publicly attacked by colleagues has "a kind of 'qualified privilege,' to borrow a phrase from the law of libel, to publicly explain his side of the affair" *In re Kelly*, 238 So. 2d 565 (Florida 1970) (Ervin, C.J., dissenting). *See In re Miera*, 426 N.W.2d 850 (Minnesota 1988); *In re Conard*, 944 S.W.2d 191 (Missouri 1997); *In re Lange*, No. 95-66, Dismissal (Minnesota Board on Judicial Standards November 26, 1996). However, this privilege is limited and excuses a judge's conduct only if the response:

- is provoked;
- is not an inappropriate comment on a pending or impending case;
- does not reveal an attitude that is a discredit to the judiciary;
- is in moderate, unmalicious, respectful, and unabusiv language;
- avoids profane and personal attacks; and
- has a reasonable factual basis.

CRITICIZING THE JUSTICE SYSTEM

The Florida Supreme Court has disciplined two judges for sweeping attacks on the administration of justice in their jurisdictions. In *Inquiry Concerning Miller*, 644 So. 2d 75 (1994), the judge had written two letters to the editor of a local newspaper that criticized the criminal justice system. For example, the judge wrote:

The plain truth of the matter is that rather than alter a system that has now proven without a doubt to be incapable of dealing with crime, our society has altered itself and ignored the problem by sticking our heads in the sand like the proverbial ostrich until he wound up in the belly of the lion.

The Judicial Qualifications Commission had found that the letters "called into question the impartiality of Judge Miller to try criminal cases." The court agreed, holding that, although the judge indicated in his writings that he would uphold the law, "it is nonetheless apparent that some of his comments could be interpreted as making him less than impartial."

In *Kelly*, the judge was reprimanded for filing a public petition in the supreme court that stated, for example, that "[v]irtually every phrase of the criminal administration at the present time is burdened with inefficiency." *In re Kelly*, 238 So. 2d 565 (Florida 1970). The judge also argued that any suggestion to improve administration was met with "crisis, controversy and ill-will among judges."

However, after one judge stated that a case in which a defendant had held his wife hostage at gunpoint for two hours was not a criminal offense but should be in divorce court, the Illinois committee advised the other judges in the jurisdiction that they could clarify the court's philosophy of the law and procedures in the area of domestic violence. *Illinois Advisory Opinion 94-8*. The judges wanted to speak out to assure the public that they did not accept that out-dated approach to domestic violence and that they were strongly behind the laws prohibiting such crimes.

Moreover, the First Amendment protects a judge's truthful public statements critical of the administration of the judicial system. *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990). Judge Scott became concerned when he noticed that the great majority of defendants who appealed their traffic offense convictions from justice or municipal courts to the county court-at-law succeeded in having the charges against them dismissed or the fines reduced. In an "open letter" to county officials, Judge Scott attacked the district attorney's office and the county court-at-law for dismissing so many traffic ticket appeals and called upon the county officials to offer suggestions to remedy the problem. The letter was circulated to the local press and prompted several newspaper articles. The Texas State Commission on Judicial Conduct reprimanded the judge, and he filed a suit challenging the sanction on First Amendment grounds. The truth of Scott's allegations was not contested.

The court noted that it should be expected that the judge, as an elected official, would not only exercise independent judgement in the cases brought before him but would also "be willing to speak out against what he perceived to be serious defects in the administration of justice in his county." Applying case law regarding the First Amendment rights of public employees, the court:

- Asked whether in light of its content, form, and context, the speech in question addressed a matter of legitimate public concern or dealt with a condition of the judge's employment, and
- Weighed the judge's free speech rights against the "interest of the State, as an employer in promoting the efficiency of the public services it performs through its employees."

The court found:

- "[I]n airing his views on the administration of the . . . [c]ounty justice system, Scott was speaking not as an employee about matters of merely private interest, but rather as 'an informed citizen regarding a matter of great public concern.'"
- The goals of promoting an efficient and impartial judiciary "are ill served by casting a cloak of secrecy around the operations of the courts, and . . . by bringing to light an alleged unfairness in the judicial system, Scott in fact furthered [those] goals"

CRITICIZING OTHER PUBLIC OFFICIALS

Judges have even less license to criticize public officials other than judges. For example, in *In re Schenck*, 870 P.2d 185 (1994), the Supreme Court of Oregon disciplined a judge for publicly criticizing the district attorney in a letter to the editor and guest editorial. The court held that a judge had no duty to report his evaluation of the performance of the district attorney, much less to a newspaper. Similarly, in *Inquiry Concerning Graham*, 620 So. 2d 1273 (1993), the Florida Supreme Court disciplined a judge for, among other misconduct, repeatedly using his position to make allegations of official misconduct and improper criticisms against fellow judges, elected officials and their assistants, and others, without reasonable factual basis or regard for their personal and professional reputations. See also *In the Matter of Martin*, 434 S.E.2d 261 (South Carolina 1993) (discipline for interrupting a town council meeting, levying accusations of criminal conduct against the town police chief, and calling on the council to suspend the chief). But see *In re Jimenez*, 841 S.W.2d 572 (Texas Special Court of Review 1992) ("a judge should reveal, not conceal, acts by police officers that may constitute crimes").

LENDING THE PRESTIGE OF OFFICE TO ADVANCE PRIVATE INTERESTS

Concerns that a judge's appearance on television or in a newspaper may "lend the prestige of judicial office to advance" private interests (Canon 2B) have also resulted in limitations on the formats permitted for judges' educational activities. For example:

- ◆ A judge's regular participation on a question-and-answer radio talk show would clearly lend the prestige of office to advance the radio station in an area where the public perceives the judge to be an expert. *South Carolina Advisory Opinion 14-1991*.
- ◆ Judges could rotate authorship of a newspaper column designed to educate the public about matters such as child abuse and child support laws, jury service, and criminal sentencing only if their authorship did not appear to promote one local newspaper over others. *Alabama Advisory Opinion 86-265*.
- ◆ A judge's appearance on news segments for a television station to explain diverse legal matters to the public, including high publicity trials such as the O.J. Simpson civil trial, would lend judicial prestige to the commercial interests of the station. *Florida Advisory Opinion 96-25*.
- ◆ A judge's regular appearances on Court TV to comment on cases pending in other jurisdictions allowed the prestige of his judicial office to be used to advance the private interests of commercial television. *In re Broadbelt*, 683 A.2d 543 (New Jersey 1996), *cert. denied*, 117 S. Ct. 1251 (1997).

However, not every appearance by a judge on a media outlet, even a commercial enterprise, is improper. The court in *In re Broadbelt* gave several examples of acceptable appearances:

- A municipal court judge may make an isolated appearance on public television to comment on the role of municipal court judges in the judiciary.
- A superior court judge may make a one-time appearance on a commercial television program dealing with the benefits and disadvantages of televising civil trials.

To determine whether appearing would be appropriate, the court stated a judge should consider:

- the frequency with which the judge appears on the program,
- the intended audience,
- the subject matter, and
- whether the program is commercial or non-commercial.

In the circumstances before it, the court concluded that the frequency of the judge's appearances resulted in an identification of the judge with the program, thereby lending it the prestige of his judicial office. The judge had appeared on Court TV more than fifty times in four years as a guest commentator and appeared on CNBC three times in two years to provide commentary on the O.J. Simpson case.

Another consideration is the use of the accouterments of judicial office in the program. The California advisory committee stated that a judge's participation as a judge in a weekly half-hour commercially sponsored re-enactment of actual traffic court cases created a reasonable suspicion that the

power and prestige of his office was being utilized to promote a commercial product. *California Advisory Opinion 10* (1958). The television show was sponsored by an automobile dealers' association, began and ended with announcements of the sponsor, and was interrupted with commercials designed to sell cars. The committee noted that:

- the program used the judge's name, official title, and robes;
- the judge portrayed the main role on the program in his capacity as a judge, performing the same acts he performed in the exercise of his official duties; and
- the judge served as technical advisor and controlled the selection, preparation, and presentation of material.

The committee asked, "is it not really the use of his name and the power and prestige of his title and judicial office that attract the attention of the viewer, first to the program, and then to the sponsor and its product?"

In contrast, in a subsequent opinion, the California committee stated that a judge could participate as a moderator on a public educational television program to facilitate responses to viewers' questions by a panel of three attorneys. *California Advisory Opinion 28* (1983). To distinguish its earlier opinion, the committee noted that:

- the judge would not be wearing judicial robes;
- the program was not set in an authentic courtroom setting;
- the format did not portray the judge as a judge performing judicial duties; and
- the program was not commercially sponsored but was funded by a grant from a lawbook publishing company, which was announced at the beginning and conclusion of the program.

The committee concluded that because "the program is not commercially sponsored, it should not be susceptible of appearing that the power or prestige of judicial office is being utilized to promote a business or commercial product," noting that "[i]t is common knowledge that production of even the most modest of television programs requires considerable financial backing, and but for that contribution would not be possible." The committee found that:

the public benefit in sparking interest in the law, educating prospective clients on certain areas of interest, and presenting the law in a dignified and professional setting far outweigh any remote possibility present here that the judge will be perceived as a salesman for those making the grant; the judge will not announce the grant nor be identified personally with the grantor's product.

See also New York Advisory Opinion 95-94 (a judge may host a television show with no commercial sponsor on a public access station).

The Indiana code of judicial conduct created an apparent exception to Canon 2B to allow judges to participate in educational activities without being concerned about inappropriate use of the prestige of judicial office. Commentary to Canon 2B of the Indiana code reads:

Lending the prestige of the judicial office to advance the public interest in the administration of justice in a free society may be done appropriately without the appearance of impropriety. The public has an interest in hearing the ideas of its judiciary within the public forum on matters concerning the administration of justice.

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