To promote the effective administration of justice

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Personal Use of Court Resources

A judge's use of court resources for extra-judicial activities may be judicial misconduct. Judges have been sanctioned for inappropriately using court staff, stationery, and equipment for campaign activities, personal errands, and charitable activities.

Using court resources for political activities clearly violates the code of judicial conduct. For example, in *In re King*, 857 So. 2d 432 (Louisiana 2003), the judge had required his court staff to sell tickets to a fund-raising event for his re-election campaign and to hand-deliver the tickets to lawyers and law firms on court time. Informing them that those activities were a priority, the judge told staff members that if they were unwilling to do what he asked, he would find more "enthusiastic" people to replace them. (The Louisiana Supreme Court removed the judge for this conduct and lying to the Judiciary Commission during its investigation. The judge has now been indicted for perjury and public salary extortion based on his solicitation of a public employee to sell campaign tickets upon suggestion or threat that the failure to sell the tickets would result in the loss of a job.)

In *Inquiry Concerning Gallagher*, 951 P.2d 705 (Oregon 1998), the judge

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Judicial Campaign Speech: Canon 5A(3)(d)

Excerpt from Annotated Model Code of Judicial Conduct *(ABA 2004)*

Canon 7B(1)(c) of the 1972 Code of Judicial Conduct provided that a judicial candidate, including an incumbent judge, "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact." These provisions were commonly referred to as the "pledges or promises" clause, the "announce" clause and the "misrepresent" clause.

In 1990, the ABA Model Code replaced the "announce" clause with the "commit" clause, which prohibited a judicial candidate from "mak[ing] statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." ABA Model Code of Judicial Conduct, Canon 5A(3)(d)(ii) (2000). Therefore, Section 5A(3)(d) of the 1990 Model Code of Judicial Conduct provided that a candidate for judicial office shall not: i) make pledges or promises of conduct in office other than the faithful performance of the duties of the office; ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or iii) knowingly misrepresent

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Recent Judicial Advisory Opinions: Charitable Fund-Raising

A judge may not appear as a "celebrity bartender" during a bar association fund-raiser. *New York Opinion 02-25.*

A judge may not participate in a "dunk a judge" booth to raise funds for charity. *New Mexico Opinion 04-4.*

A judge may not participate in a mock "lock-up" in which "bail money" raised would benefit the Muscular Dystrophy Association. *New York Opinion 04-96.*

A judge may not introduce a guest speaker at a public fund-raising event sponsored by a non-profit organization. *New Hampshire Opinion 02-8.*

A judge may help plan the fund-raising for the National Association of Women Judges annual conference and may personally solicit funds from judges over whom the judge has no supervisory or appellate authority. A "friends committee" may be created to carry out solicitation provided contributors are not disclosed to the judge or publicly identified in program brochures, banners, or materials. The judge is required to ensure that friends committee members do not solicit in a way that could reasonably be viewed as coercive and committee members do not convey to others that they are in a special position to influence the judge. A judge may solicit planning assistance or program presentations from bar associations. *Massachusetts Opinion 04-3.*

A judge may serve as chair of a steering committee formed for the development and construction of a YMCA building if the judge will not be involved in any fund-raising activities. *New York Opinion 99-154.*

A judge may be state membership chair for a national legal historical society unless membership is essentially a fund-raising mechanism and may solicit membership only if those solicited are not likely to appear before the court on which the judge serves. The judge's name, society position, and judicial title may appear on letterhead used for membership solicitation if comparable designations are shown for others. No membership solicitation may be sent on judicial or court stationery. *New Hampshire Opinion 03-3.*

A judge may serve as a member of the board of directors of a local YMCA but should not serve on its capital development committee. *New York Opinion 01-26.*

A judge may not serve on a mini-capital campaign committee to raise funds for the renovation of a local hospital. *Maine Opinion 02-2.*

A judge may be a member of a committee organizing a fund-raising ball for a charitable organization that supports bar association programs if the judge's name would not appear on any literature regarding the ball and the judge would not personally solicit any funds. *Nebraska Opinion 03-5.*

A judge may not solicit contributions from a civic organization to fund court-related education programs. *Arizona Opinion 03-2.*

A judge may not serve as the coordinator or chair of an organization whose sole function is to implement an annual run/walk event to raise money for local civic organizations including the auxiliary police. *New York Opinion 01-23.*

A judge may not personally solicit pledges from other members of Kiwanis even if they are not attorneys and live outside the state. *Arkansas Opinion 04-3.*

A judge may solicit funds on behalf of a law school alumni association from fellow judges within the circuit over whom the judge does not exercise supervisory or appellate authority, but the results of the solicitation may not be published if the purpose is to use the prestige of judicial office to encourage others to contribute. *Florida Opinion 03-15.*

A judge who is a member of the board of directors of a private middle school dedicated to providing quality, tuition-free education to students of limited financial means may not personally participate in fund-raising (other than solicitation of funds from family members or judges over whom the judge exercises no supervisory or appellate responsibility), participate in the school's fund-raising planning, or be a speaker or guest of honor at an organization's fund-raising event. *Massachusetts Opinion 04-2.*

A judge's name may appear on the letterhead of a non-profit charitable organization of which the judge is an officer, and the letterhead may be used in fund-raising activities, but the judge should not be listed in the body of the letter as a contact person available to answer questions about the organization or the fund-raising activity. *New Hampshire Opinion 02-9.*

A letter soliciting contributions from bar associations in support of a high school essay contest sponsored by a judicial district's gender fairness committee should not contain the names of any judges or any references to the state or the court system. *New York Opinion 99-136.*

The Center for Judicial Ethics website has links to judicial ethics advisory committees at www.ajs.org/ethics/eth_advis_comm_links.asp.

Coercing Guilty Pleas: Recent Cases

Although judicial decisions regarding bail are usually exempt from review by judicial conduct commissions, two recent cases demonstrate that abusing bail to coerce guilty pleas can constitute misconduct subject to discipline.

The New York Court of Appeals found that a judge had induced many defendants to plead guilty by setting "shockingly high" bail for petty offenses and remanding defendants to jail when they could not post the bail. *In the Matter of Bauer* (New York Court of Appeals October 14, 2004). The court noted that some defendants were jailed in lieu of bail on charges for which imprisonment was not a penalty or for longer than the maximum sentence for the offense charged. In many of the cases, the defendants pled guilty to get out of jail without the judge informing them that they were entitled to counsel by statute.

For example, in one case, without informing the defendant of his right to counsel or determining whether he needed appointed counsel, the judge set bail at $25,000 for a charge of riding a bicycle at night on a sidewalk and without appropriate lights. The maximum fine for the violations was $100, without the possibility of incarceration. Nevertheless, the defendant was jailed for seven days because he could not afford to satisfy the bail. The defendant then pled guilty without defense counsel.

The court acknowledged that bail is discretionary and reasonable judges may set bail in a wide range. However, the court concluded, the judge's decisions constituted "a pattern of exorbitant bail so extraordinary that we must characterize it as abusive and coercive in the extreme, particularly when accompanied by petitioner's withholding from defendants their right to assigned counsel."

> In 26 instances, and without regard to the statutory criteria, petitioner set bails ranging from $10,000 to $50,000 for defendants who were charged with petty crimes or violations. By jailing defendants (in lieu of bail) for offenses that rarely, if at all, carry jail sentences upon conviction, petitioner abrogated his duty and abused his position as a judge. Punishing people by setting exorbitant bail, particularly where the offense does not carry a jail sentence, demonstrates a callousness both to the law and to the rights of criminal defendants. Moreover, when coupled with a failure to advise these defendants of their right to assigned counsel, petitioner's imposition of punitive bail all but guaranteed that defendants would be coerced into pleading guilty: it was the only way to get out of jail.

Strong-arm measures

In an Ohio case, the judge was found to have used a variety of coercive tactics to expedite dispositions in criminal cases, usually as a means to manage her docket. *Disciplinary Counsel v. O'Neill*, 815 N.E.2d 286 (Ohio 2004). For example, in three cases, the judge forced pleas from defendants by threatening to revoke or actually revoking their bonds, not for acceptable

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Solicitation of Pro Bono Legal Services; Invidious Discrimination; Service in National Guard

According to judicial ethics advisory opinions, a judge may not solicit attorneys to donate time to provide pro bono legal services to individuals. That rule is a corollary of the prohibition (Canon 4C(3)(b)(i)) on judges personally participating in the solicitation of funds for a charitable organization, however laudable the project. "Adopting the adage that 'time is money,' at least with respect to professional services by attorneys," there is "no meaningful distinction between judicial solicitation of funds and of time from lawyers." *Arizona Advisory Opinion 00-6*.

The prohibition includes direct solicitation (*Michigan Advisory Opinion J-7* (1998); *Alaska Advisory Opinion 04-1*); signing a letter (*Florida Advisory Opinion 00-6*; *Nebraska Advisory Opinion 02-3*; *West Virginia Advisory Opinion* (March 10, 2000)); and participating in a telephone bank (*Arizona Advisory Opinion 00-6*). The prohibition also applies to asking lawyers to contribute money in lieu of performing pro bono work. *Alaska Advisory Opinion 04-1*; *Florida Advisory Opinion 00-6*; *Nebraska Advisory Opinion 02-3. But see Maryland Advisory Opinion 124* (1996) (judge may personally ask attorney to volunteer for pro bono activity).

However, a judge may "write, speak, lecture, and otherwise participate in a wide range of activities designed to promote and encourage attorneys to engage in such *pro bono* representation." *Michigan Advisory Opinion J-7* (1998).

> Our system of justice is improved when all are equal before the law and have equal access to our judicial system. The encouragement and promotion of attorney participation in *pro bono* representation of

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had directed his judicial assistant to perform services during work time in connection with an annual golf tournament held to raise funds to retire his 1984 campaign debt. From 1984 to 1995, his judicial assistant typed invitations while at the courthouse, answered telephone inquiries, and prepared the lists of pairings and tee times. On the day of the tournaments, the assistant took the prizes to the site, performed functions such as collecting money, and rode in a golf cart with the video-grapher recording the event. From 1985 to 1993, the assistant designated the fund-raiser days as workdays on her time sheets even though she attended to court business only briefly. In 1994 and 1995, on her own initiative, she designated the time as either vacation or compensatory time. The judge signed the time sheets. *See also In re Trudel*, 638 N.W.2d 405 (Michigan 2002) (using court equipment, supplies, and personnel for campaign to retain judicial office).

Personal business

In addition, Judge Gallagher's judicial assistant had assisted the judge during work time with personal tasks such as obtaining airline fares and schedules, booking a flight unrelated to his work, picking up his dry cleaning, and making haircut appointments. From 1988 through 1996, the judge also had her type about 300 pages of personal documents during the work day. Examples include a letter to the Consul General of France to secure a visa for the judge's daughter; letters of complaint to retailers; a letter to the president of the electric company about service at his residence; a letter to the president of an airlines about securing bereavement rates; letters to a computer publication and *Golf World* threatening to report them to the state attorney general; a pleading in his divorce case; letters to his lawyer and ex-wife about his divorce; letters about his financial interests in Ireland; letters to his lawyer and a trustee in bankruptcy concerning the collection of a personal debt; letters to his siblings about his father's estate; a letter about his family coat of arms; letters to acquaintances about his St. Patrick's Day party; and jokes and limericks.

The Oregon Supreme Court held:

> We conclude that the accused's extensive use of his judicial assistant's time, and of state property and equipment, for personal and campaign purposes violated . . . Canon 2 A. Taxpayers have a right to expect that the employees and the materials for which they pay will be used for public purposes. Obtaining substantial personal and political benefits directly from the use of those public employees and materials runs afoul of the requirement to "act . . . in a manner that promotes public confidence in the integrity . . . of the judiciary."

The court noted that judicial assistants are state employees who perform secretarial and other support services related to judges' official functions and that the job description does not include the performance of personal or campaign services for judges. Moreover, the court held that the judge's use of the judicial assistant's time was misconduct even though it had not adversely effected the assistant's performance of official duties.

Similarly, the California Commission on Judicial Performance sanctioned a judge for using court staff, stationery, and equipment for his personal activities. *Inquiry Concerning Hyde*, Decision and Order (California Commission on Judicial Performance May 10, 1996) (cjp.ca.gov/pubdisc.htm). For example, the judge had instructed court staff to:

- access DMV records to obtain the addresses of former classmates in connection with a class reunion;
- type and photocopy a lengthy lesson plan, mid-term and final examinations, and correspondence for a paralegal class the judge taught, photocopy class materials, and mail graded final examinations using court envelopes and postage;
- compose approximately 48 personal letters, most on official stationery, during the work day using county computers;
- type an affidavit in connection with a complaint regarding his neighbor's dog;
- type his application for a federal judgeship;
- obtain re-election forms; and
- watch his elementary school-

The American Judicature Society has proposed to the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct that the model code be amended to add: "A judge shall not use court staff, resources, stationery, equipment, or premises for personal, business, family, or political activities except for incidental or de minimis use for non-political activities or for matters concerning the law, the legal system or the administration of justice." For more information on the ABA Joint Commission, see www.abanet.org/judicial ethics; for more information on the AJS proposals, see www.ajs.org/ethics_eth_ABA_commission.asp.

aged daughter when he brought her to work and pick her up from a dental appointment during work hours.

Among the most time-consuming personal tasks performed at Judge Hyde's request by court staff were those for charitable organizations. For example, his court secretary spent the equivalent of approximately 24 work days creating a 94-page mailing list for a charity, generating a fund-raising letter, and typing labels, envelopes, by-laws, and personnel policies. The court secretary spent the equivalent of approximately 40 work hours doing work that benefited a club of which the judge was a member. She prepared a 73-page guest list, a seven-page ticket number list, a seven-page alphabetical list, and correspondence for the club's cabaret night; inserted approximately 1,000 pre-printed invitations into envelopes and addressed the envelopes; and typed the by-laws, constitution, committee forms, an information pamphlet, an affidavit, and an article for the club newsletter. She also typed approximately 61 pieces of club-related correspondence, approximately 32 on official court stationery and 20 sent on the courthouse facsimile machine or by using county postage.

See also In the Matter of Davis, 946 P.2d 1033 (Nevada 1997) (conducted antique business from chambers, storing antiques throughout the courthouse; directed city employees and jail trustees to move antiques into and out of the courthouse; directed court employees during normal court hours to go to his mother's nursery business to provide Spanish translating services; directed court employees to perform other personal errands during court hours and to chauffeur him to and from his home for purposes such as antique shopping); *In re Decuir*, 654 So. 2d 549 (Louisiana 1995) (allowed former law partner to use court's secretary/receptionist, telephone system, post office box, office supplies, and law library); *In the Matter of Ramich*, Determination (New York State Commission on Judicial Conduct December 27, 2002) (www.scjc.state.ny.us/) (used court personel and facilities to perform legal services for former client and represent sister-in-law, friend, and cousin in real estate transactions).

"Obtaining substantial personal and political benefits directly from the use of those public employees and materials runs afoul of the requirement to 'act . . . in a manner that promotes public confidence in the integrity . . . of the judiciary.'"

De Minimis Activities

In *Inquiry Concerning Gallagher*, 951 P.2d 705 (Oregon 1998), the Oregon Supreme Court stated it assumed that there was a "de minimis" or "incidental use" exception to the rule, noting that human experience teaches that judges, like other workers, cannot completely separate personal life from work life. The court gave as an example of de minimis activity a judicial assistant making a personal telephone call to cancel a lunch appointment so that a judge may continue a trial into the lunch hour.

The code of conduct for federal judges provides that when engaging in extra-judicial activities to improve the law, the legal system, and the administration of justice, a judge should not use judicial chambers, resources, or staff "to any substantial degree." To qualify as insubstantial, the absolute amount of staff time devoted to extra-judicial law-related activity must be minor or limited in amount and must not interfere with the judge's official duties. *U.S. Advisory Opinion 79* (reviewed 1998). Moreover, if the extra-judicial activity is compensated, a judge may only use the court library, chambers, and computers within reasonable limits and without an increase in incremental cost to the government and may not use judicial personnel unless the use is de minimis.

For extra-judicial pursuits that are not law-related (avocational activities, civic and charitable involvement, financial interests, and fiduciary activities), the code of conduct for federal judges provides that a judge should not use judicial chambers, resources, or staff "except for uses that are de minimis," which is less than the insubstantial level of use that is acceptable for law-related activities. *U.S. Advisory Opinion 80* (reviewed 1998).

De minimis use of judicial resources includes occasional telephone calls, scheduling, and storage of files, books, or equipment, though not the use of staff to maintain extensive files, correspondence, or equipment. So long as the activity does not interfere with the full and prompt performance of judicial duties and so long as the government incurs no incremental costs, a judge may perform the activity in the judicial chambers. It is prudent for the judge to use his or her own funds to purchase separately supplies used in . . . activity [that is not law-related].

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References and Judicial Stationery

Judicial ethics advisory committees are divided on whether a judge may use official stationery to write a letter of recommendation.

In some states, a judge may not use official stationery for any letter of recommendation to prevent any implication that the judge is using the prestige of office to advance private interests. *Louisiana Advisory Opinion 76* (1989); *Louisiana Advisory Opinion 71* (1986); *New Mexico Advisory Opinion 1990-3*; *New Jersey Memorandum* (June 8, 1982); *South Carolina Advisory Opinion 5-1992*.

However, some states permit a judge to use judicial stationery to write any recommendation. *Florida Advisory Opinion 94-45; Illinois 96-2; Indiana Advisory Opinion 3-88*; *Maryland Advisory Opinion 56* (1977); *Pennsylvania Advisory Opinion 98-1*. The codes of judicial conduct in Arkansas, California, Florida, and West Virginia expressly allow the use of official stationery for letters of recommendation.

The New York advisory committee allows a judge to use judicial stationery for letters of recommendation only if the judge clearly adds the words ''personal and unofficial." *See, e.g., New York Advisory Opinion 93-26.* The Virginia code commentary states: "When using court stationery for letters of reference an indication should be made that the opinion expressed is personal and not an opinion of the court." The Arizona advisory committee stated that a judge may use judicial stationery to write a recommendation for an applicant who is a lawyer or former employee but should write "personal and unofficial" when recommending a personal friend. *Arizona Advisory Opinion 92-6*. The committee stated it was neither endorsing nor condemning the use of official stationery.

Finally, some states allow a judge to use official letterhead for a recommendation for court personnel or for attorneys who have appeared before the judge but require that such a letter be written on other stationery for a person whom the judge knows in a non-judicial capacity. *Maine Advisory Opinion 98-3; Washington Advisory Opinion 93-24*.

An initial draft from the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct proposes commentary that would provide: "Unless the recommendation is based upon information obtained through the judge's expertise or experience as a judge, the reference or recommendation should not be communicated on the judge's judicial letterhead." Similarly, the American Judicature Society's proposals to the Joint Commission include commentary that would provide: "A judge may use official or chambers stationery when writing a letter of recommendation for someone the judge knows in an official capacity, for example, a current or former staff member, but should not use official or chambers stationery if the basis for the reference is unrelated to the judge's office, for example, for a neighbor or personal friend."

The Internet

The courts' increasing use of e-mail and the Internet in the administration of justice is reflected in recent examples of judges misusing those services. For example, use of court-provided equipment and services to access pornographic sites and other personal purposes has been sanctioned. *In re Trudel*, 663 N.W.2d 471 (Michigan 2003) (accessing sites for personal benefit including adult-only pornographic sites); *Harris v. Smartt*, 57 P.3d 58 (Montana 2002) (accessing sexually explicit images); *In re Furman*, Stipulation, Agreement, and Order (Washington Commission on Judicial Conduct June 2, 2000) (www.cjc.state.wa.us) (accessing sites for personal benefit including adult-only sites, on-line auction sites, personal financial sites, shopping sites, and personal travel sites). Using Internet facilities is also misconduct if it is contrary to the directives established by the judicial department. *In the Matter of Abraham*, 583 S.E.2d 435 (South Carolina 2003). (For an example of a court policy regarding use of electronics communication by personnel, see www.supreme.state.az.us/orders/admcode/pdfcurrentcode/1-503.pdf.)

Judges have also been sanctioned for using e-mail to engage in inappropriate ex parte communications (*Public Admonishment of Caskey* (California Commission on Judicial Performance July 6, 1998)) or prohibited political activity. *Public Admonition of Katz* (Texas State Commission on Judicial Conduct December 19, 2000) (using county computer to forward e-mail containing political message from the Bush campaign).

Official Stationery

A judge's use of court stationery in extra-judicial business may represent not only a misappropriation of public

resources for personal reasons but an inappropriate use of the prestige of office to advance private interests.

In *Inquiry Concerning Gallagher*, 951 P.2d 705 (Oregon 1998), the judge used official letterhead for "probably 95 percent" of his "non-official " personal business letters, usually with the title "Circuit Court Judge" appearing immediately beneath his signature or otherwise making clear that he was a judge. For example, the judge wrote a series of letters to the San Diego City Treasurer protesting a notice of parking violation. The Oregon Supreme Court found that an objective observer would reasonably conclude that by using official stationery, the judge was lending the prestige of the office to advance his own private interests or in some cases the private interests of others.

Similarly, the California Commission on Judicial Performance publicly admonished a judge for sending numerous documents that were, or appeared to have been, designed to lend the prestige of judicial office to advance his personal interest. *Public Admonishment of Coates* (California Commission on Judicial Performance April 12, 2000) (cjp.ca.gov/pubdisc.htm). With the designation "judge of the municipal court" printed beneath the signature line, the judge wrote letters on official court letterhead to a bank president regarding a special request to secure the judge's line of credit, to the city treasurer complaining about a parking ticket, and to a book awards association with a form entering the judge's book in a competition. Using letterhead that was not the official court letterhead but did include the court's address and telephone number and had the designation "judge" printed beneath the signature line, the judge wrote letters to a local automobile dealership complaining about an undelivered part and to a mortgage company protesting an increase in the judge's loan interest rate. The letters were prepared at the judge's direction by court secretaries during court hours and using court resources. The judge also used court secretaries and other resources to prepare, and in many instances send, numerous other documents that involved the judge's personal business or interests, entirely unrelated to his judicial duties, such as letters to a radio network criticizing or commending its reporters, personal lists, poems, a letter to a local high school concerning its varsity/alumni baseball game, and letters to the president about matters such as the economy and the park service.

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reasons such as that the defendants posed flight risks or safety concerns or had failed to appear, but because the defendants wanted to exercise their rights to refuse an offered plea and go to trial. In another case, the judge, after rejecting a misdemeanor plea offered by the parties, threatened to impose the maximum sentence if the defendant did not plead guilty as charged and chose to exercise his right to a trial.

The court stated:

> Judges must routinely exercise their discretion in a myriad of ways while executing their duties in the administration of justice, and the abuse of that discretion typically generates an appeal, not disciplinary proceedings. But . . . judicial discretion does not extend to these strong-arm measures that respondent used to compromise defendants' right to trial. Thus, rather than classifying respondent's actions as an abuse of legitimate discretion, we agree that respondent's repeated use of the bond process and jail as leverage fell "outside any permissible discretion" and was "totally improper." For such an egregious departure from the bounds of judicial discretion, professional discipline is warranted.

Other abuses of the bail power have also led to discipline. *Inquiry Concerning Perry*, 641 So. 2d 366 (Florida 1994) (setting bonds of $10,000 for traffic offense and $5,000 for contempt offense to punish defendants rather than to assure presence for trial); *In the Matter of King*, 568 N.E.2d 588 (Massachusetts 1991) (setting high bail for four black defendants because large numbers of black voters voted for his brother's opponent in gubernatorial primary); *In re Yengo*, 371 A.2d 41 (New Jersey 1977) (using bail as arbitrary weapon for harassment of defendants); *In the Matter of LaBelle*, 591 N.E.2d 1156 (New York 1992) (failing to set bail for defendants in 24 cases although judge knew law required that bail be set); *In the Matter of McKevitt*, Determination (New State York Commission on Judicial Conduct August 8, 1996) (refusing to set bail because he had to get out of bed to conduct arraignment); *In the Matter of Jutofsky*, Determination (New York State Commission on Judicial Conduct December 24, 1985) (threatening defendants with high bail and jail for minor offenses, coercing guilty pleas from defendants who were often unrepresented and sometimes youthful); *In the Matter of the Ellis*, Determination (New York State Commission on Judicial Conduct July 14, 1982) (in 23 cases, deliberately incarcerating certain defendants for indefinite periods to coerce them to plead guilty); *In the Matter of Recant*, Determination (New York State Commission on Judicial Conduct November 19, 2001) (misusing bail to attempt to coerce guilty pleas in three cases).

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the identity, qualifications, present position or other fact concerning the candidate or an opponent.

This change in the ABA Model Code and in the Codes of several states was precipitated in part by a number of cases and commentaries finding the "announce" clause to be an overly broad restriction on a candidate's First Amendment free speech rights. *See, e.g., Buckley v. Illinois Jud. Inquiry Board*, 997 F.2d 224 (7th Cir. 1993) (rule prohibiting judicial candidates from announcing views on disputed legal or political issues violated First Amendment); *Beshear v. Butt*, 863 F. Supp. 913 (E.D.Ark. 1994) (holding that provisions of the Arkansas Code of Judicial Conduct that precluded judicial candidates from expressing views on disputed legal or political issues are substantially overbroad and vague); *ACLU v. The Florida Bar*, 744 F. Supp. 1094 (N.D. Fla. 1990) (holding that a Florida canon precluding candidates for judicial office from discussing disputed legal or political issues was not the most narrowly drawn means of protecting the state's compelling interest in protecting the integrity of the judiciary and was improper restraint on First Amendment freedoms); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953 (Ky. 1991) (finding Kentucky's announce clause overly broad because it prohibits all discussion of judicial candidate's views on disputed legal or political issues, and not merely false or misleading statements, pledges of judicial conduct in pending cases, and promises reflecting on a judge's impartiality); *but see Stretton v. Disciplinary Bd.*, 944 F.2d 137 (3d Cir. 1991) (holding that Pennsylvania's announce clause did not violate judicial candidates' free speech rights, to extent that provision was narrowly interpreted to prohibit candidates from expressing opinion only on issues that might come before them for resolution in their capacity as judges). *See generally* Robert M. Brode, *Buckley v. Illinois Judicial Inquiry Bd. and Stretton v. Disciplinary Board of the Supreme Court: First Amendment Limits on Ethical Restrictions of Judicial Candidates' Speech*, 51 Wash. & Lee L. Rev. 1085 (1994); Mark R. Riccardi, *Code of Judicial Conduct Canon 7B(1)(c): An Unconstitutional Restriction on Freedom of Speech*, 7 Geo. J. Legal Ethics 153 (1993); *but see* Daniel Burke, *Colloquy on Judicial Free Speech, Code of Judicial Conduct Canon 7b(1)(C): Toward the Proper Regulation of Speech in Judicial Campaigns*, 7 Geo. J. Legal Ethics 181 (1993) (arguing that Canon 7B(1)(c) is a necessary restriction fundamental for the continued protection of the right to a fair trial); Lloyd B. Snyder, *The Constitutionality and Consequences of Restrictions on Campaign Speech by Candidates for Judicial Office*, 35 UCLA L. Rev. 207 (1987).

In light of the holding in *White*, the ABA Working Group on the First Amendment and Judicial Campaigns suggested several changes in the Model Code of Judicial Conduct with regard to judicial campaign speech.

In September 2001, the ABA Standing Committee on Judicial Independence formed a Working Group on the First Amendment and Judicial Campaigns to review Canon 5 of the Model Code in light of First Amendment challenges to its restrictions on judicial campaign speech. The Working Group suspended its efforts, however, in March 2003, after the U.S. Supreme Court heard oral arguments in *Republican Party of Minnesota White*, 536 U.S. 765 (2002), a case that challenged the constitutionality of Minnesota's "announce" clause.

In *White*, the Court held in a 5-4 decision, authored by Justice Scalia, that "[t]he Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment." *White*, 536 U.S. at 788. The language ruled unconstitutional mirrored the "announce" clause of the 1972 version of the ABA Model Code of Judicial Conduct, which, as noted above, had been removed from the ABA Code in 1990 because of concerns about that clause's constitutionality.

As a content-based restriction on speech, the "announce" clause was subject to strict scrutiny, under which the respondents had the burden to prove that the clause was (1) narrowly tailored, to serve (2) a compelling state interest. According to the Court in *White*, the "announce" clause was not narrowly tailored to serve impar-

tiality (or its appearance) in the traditional sense of the word, *i.e.,* as a lack of bias for or against either party to the proceeding, because it does not restrict speech for or against particular parties, but rather speech for or against particular issues. Secondly, the Court held that although " impartiality" in the sense of a lack of preconception in favor of or against a particular legal view may well be an interest served by the announce clause, pursuing this objective "is not a compelling state interest, since it is virtually impossible, and hardly desirable, to find a judge who does not have preconceptions about the law." *White*, 536 U.S. at 766. The Court explicitly declined to rule on the "pledges or promises" or the "commit" clauses. However, because both of those provisions and the "misrepresent clause" are, like the "announce clause", content-based restrictions on a candidate's speech they would be subject to strict scrutiny if challenged in subsequent cases.

In light of the holding in *White*, the ABA Working Group on the First Amendment and Judicial Campaigns suggested several changes in the Model Code of Judicial Conduct with regard to judicial campaign speech. First, the Working Group determined that it was necessary to add a definition of "impartiality" to the terminology section of the Code that comports with the discussion of impartiality in the majority opinion in *White*. By following the language found in the Court's opinion, the Working Group developed a definition that is narrowly tailored yet encompasses the general concepts of judicial impartiality that are vital to the maintenance of an independent judiciary.

The Working Group also carefully analyzed the "pledges or promises" clause, the "commit" clause and the "misrepresent" clause of Canon 5A(3)(d) and arrived at a series of recommendations to accommodate the important interest of preserving judicial impartiality, integrity and independence with the equally important concepts embodied in the First Amendment. The Working Group determined that it was appropriate to maintain the current format of the "misrepresent" clause.

With regard to the other two clauses, the Working Group decided to collapse certain portions of the "commit" clause into the "pledges or promises" clause and modified the language of the newly constructed clause. Specifically, members decided that restrictions on statements that commit a judge or judicial candidate "with respect to cases, controversies or issues that are likely to come before the court" serve to protect a compelling interest in the maintenance of judicial impartiality, integrity and independence. The Working Group decided, though, that restrictions that "appear to commit" were too vague to withstand strict scrutiny analysis and struck that language from the provision. The Working Group also determined that it would be best to provide one provision that clearly stated what type of speech was restricted in a judicial campaign. Therefore, the Working Group voted to combine the remaining elements of the "commit" clause with the "pledges or promises" clause. The Working Group also voted to amend the "pledges or promises" clause by removing reference to "conduct in office" and the "faithful performance of the duties of the office." Reference to "faithful" was removed after a determination that this did not adequately state the compelling state interest in the preservation of judicial impartiality, integrity and independence.

The new wording of Canon 5A(3)(d), therefore, provides a clear enumeration of the restricted speech ("with respect to cases, controversies or issues that are likely to come before the court") and a clear statement of what is being protected by the restriction of this speech ("inconsistent with the impartial performance of the adjudicative duties of the office"). *See American Bar Association Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility Report 105B to the House of Delegates*, (August 2003) (detailing rationale for amendments). These amendments to Section 5A(d)(3) were adopted by the ABA House of Delegates in August 2003.

Solicitation of Pro Bono Legal Services *(continued from page 3)*

needy clients only serves to improve our judicial system as a whole.

Similarly, although a judge may not solicit attorneys to participate in pro bono programs on behalf of specific organizations or to accept particular cases, a judge may encourage attorneys to fulfill their obligation to perform pro bono work as long as the judge does not promote a particular program or refer to a specific case. *Alaska Advisory Opinion 04-1.* Thus, a judge may:

- make monetary contributions to further pro bono activities,
- make general appeals, including referring to a list of available pro bono programs,
- participate in a workshop or CLE seminar that is made available at no (or reduced) cost for attorneys who agree to undertake pro bono cases,
- write articles for publication in bar or general-circulation media encouraging members of the bar to participate in pro bono work, and
- acknowledge the pro bono activity of particular attorneys publicly, such as in a newspaper advertisement or displaying a plaque in a court.

However, a judge may not send letters of congratulation directly to an attorney or host a social event for lawyers who have participated in pro bono activity. *Alaska Advisory Opinion 04-1. See also Massachusetts Advisory Opinion 03-7* (judge may not appear in video to be shown at dinner to raise funds to retire debt arising from costs of action seeking better quarters for court or send letter to be read aloud thanking attorney for pro bono work on that litigation but may contribute toward retiring that debt); *Missouri Advisory Opinion 157* (1991) (judges in juvenile division may publicly express appreciation to local bar for pro bono representation of juveniles by mounting plaque on wall of the juvenile justice center and giving annual award to individual attorney).

The American Judicature Society has proposed to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct that the model code be revised to expressly provide that "a judge shall not personally solicit attorneys to participate in specific pro bono programs or to accept particular cases" but "may encourage attorneys to participate generally in pro bono efforts, including referring to a list of pro bono programs."

Invidious discrimination

The 1990 ABA Model Code of Judicial Conduct provides that "a judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin." In New Mexico, which has adopted that provision, the advisory committee stated that a judge may not be a member of an organization that excludes women from membership (the inquiry was about the Freemasons) unless the organization is purely private or personal and dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members. *New Mexico Advisory Opinion 04-3*. The committee explained that the code seeks "to remove any suggestion that the Judge who is a member may appear to the public to carry biases by belonging to an organization that engages in discriminatory membership practices."

The committee noted that it did not have extensive information on the membership practices of the Freemasons but directed the inquiring judge to consider whether membership rolls were capped, whether members were encouraged to recruit new members and invite strangers to meetings to expand membership and compensate for attrition, and whether the organization publicized its activities. The committee did note that the Freemasons' primary requirement for membership—a belief in God—was such a broad statement of purpose that it seemed "inclusive rather than private."

The committee also stated that an organization that excludes women cannot be considered to be dedicated to the legitimate values if the exclusion of women does not better serve those values or if the inclusion of women would enhance the achievement of those goals. The committee also advised that "while nothing prevents an organization from excluding individuals who do not share its views, it may not use sex as a shorthand measure for denying eligibility."

In an advisory opinion, the Washington judicial ethics committee stated that because the Boy Scouts prohibit membership and leadership positions based upon an individual's sexual orientation, a judge may not serve in a leadership role in the Boy Scouts as that participation may reflect adversely on the judge's impartiality and diminish the public confidence in the impartiality of the judiciary. *Washington Advisory Opinion 04-1.* (The Washington code prohibits judges from belonging to an organization that practices discrimination that is prohibited by law.) However, the committee advised that a judge may act in a position not actively involved in planning and implementing the national organization's policy, such as a troop leader, as long as the judge disqualifies himself when appropriate

and discloses his participation in the Boy Scouts if the parties or their lawyers may consider it relevant to his presiding over a case.

California, Massachusetts, New York, Oregon, and Vermont have added bias on the basis of sexual orientation to the list in the ABA 1990 model code. (California created an exemption for non-profit organizations.) The ABA Joint Commission currently reviewing the model code has also proposed the addition of invidious discrimination based on sexual orientation and ethnicity. Draft commentary explains, in part, that the rule "does not prohibit a judge's membership in any United States military organization, an organization dedicated to the preservation of religious, ethnic or legitimate cultural values of common interest to its members, or one that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited." AJS has expressed its agreement with that proposal.

Service in National Guard

According to judicial ethics advisory opinions, a judge may serve as a judge advocate general while on active duty in the United States National Guard and Reserve. *Alabama Advisory Opinion 03-820*; *Illinois Advisory Opinion 97-8*; *Kentucky Advisory Opinion JE-16* (October 1980); *Virginia Advisory Opinion 03-4*; *Washington Advisory Opinion 04-08. But see U.S. Compendium of Advisory Opinions* at § 5.3[1] (2001) (judge should not serve as staff judge advocate in state's National Guard, serve as hearing officer in disciplinary proceedings in National Guard, or accept JAG position to develop international procedure for handling civilian misconduct on foreign bases).

The Alabama judicial inquiry commission (which issues advisory opinions), in *Alabama Advisory Opinion 02-799*, stated that a judge who was a member of the volunteer state militia may not provide legal advice to another member regarding the business of the militia because it constituted the practice of law. Subsequently, a judge inquired about being deployed in the National Guard to perform duties such as providing legal advice concerning the mobilization of soldiers, reviewing targets for legality under the Geneva Convention, overseeing investigations of alleged war crimes, and giving advice on rules of engagement and other legal issues during operations.

Distinguishing the earlier opinion, the Alabama committee concluded that performing assigned legal duties when called to active duty in the service of United States armed forces was significantly different from giving legal advice after hours or on weekends to a state militia.

> It does not appear ... that there is any significant risk that acting as a judge advocate general on active duty with federal armed services would erode public confidence in the judiciary. There also does not appear to be any realistic prospect that the advice or advocacy efforts the latter would entail would create a potential appearance of either undue advantage to the judge/advocate or of reciprocal favoritism. Such work is unlikely to become the subject of any litigation, nor would an appearance be created that a judicial position was being exploited.

Alabama Advisory Opinion 03-820. Similarly, the Kentucky advisory committee stated that serving as a judge advocate officer in a National Guard or reserve unit does not constitute the practice of law within the meaning of the code because that service has a special nature and the judge is in effect on leave. *Kentucky Advisory Opinion JE-16* (October 1980).

The Illinois judicial ethics committee approved a judge on military reserve duty giving legal advice, serving on military courts, and helping prepare wills, leases, or other documents for military personnel (*Illinois Advisory Opinion 97-8*), and the Virginia committee also approved a judge, as a JAG officer, providing a full range of general and specialized legal services to the armed forces, including legal services to a commanding officer on matters of military justice, administrative and contract law, and the law of war, acting as a military judge, and providing legal services to individual service members (*Virginia Advisory Opinion 03-4*). The Washington committee cautioned that a judge must only perform those services authorized for officers of the Judge Advocate General's Corps and should not perform any services that resemble those provided by civilian attorneys for members of the military. *Washington Advisory Opinion 04-08.*

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