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Interbranch Communication and Rule 3.2 of the 2007 ABA Model Code of Judicial Conduct

Raymond J. McKoski

Judges, legislators, and executives have one thing in common: they like to talk. Unfortunately, they do not talk enough to each other. As a result, the branches of government “move on in proud and silent isolation,” ignoring the nation’s need for interbranch understanding and cooperation.¹

The lack of effective interbranch communication does not mean that avenues of communication do not exist. The judiciary interacts with the political branches in many ways, including through judicial-impact statements, state-of-the-judiciary messages, judicial opinions, service on legislative and executive commissions, and testifying before—and consulting with—governmental committees and officials.²

Of course, every aspect of a judge’s conduct, including contacts with members of the other branches, is governed by a code of judicial conduct based on the 1972, 1990, or 2007 ABA Model Code of Judicial Conduct (hereinafter “1972 Code,” “1990 Code,” and “2007 Code”). Each of these codes restricts a judge’s ability to communicate voluntarily with executive and legislative officials.

Rule 3.2 of the 2007 Code provides that unless one of three exceptions applies, a judge shall not voluntarily appear at a public hearing or otherwise consult with an executive or legislative body or official. The exceptions permit judges to testify and consult in connection with (1) matters concerning the law, the legal system, or the administration of justice; (2) matters about which the judge acquired knowledge or expertise while performing judicial duties; and (3) the legal and economic interests of the judge or someone represented by the judge in a fiduciary capacity.³

This article examines the meaning and likely application of Rule 3.2. We begin with a brief overview of the Canons of the 1972 and 1990 Codes that served as the precursors of Rule 3.2.

THE ROAD TO RULE 3.2

Because of a judge’s unique experience in law-related matters, the 1972 Code authorized judges to testify publically before a legislative or executive body “on matters concerning the law, the legal system, and the administration of justice.”⁴ Canon 4B of the 1972 Code further authorized private consultations with a legislative or executive body or official “but only on matters concerning the administration of justice.”⁵ The authors of the 1972 Code believed that since judges have a direct interest in judicial-administration issues like personnel, budget, and facilities, they should be permitted to discuss those matters in venues other than public hearings.⁶ But private consultations on matters concerning the law or the legal system that did not involve the administration of justice were forbidden on the theory that a judge’s views on issues not directly related to the operation of the courts should be available to litigants and lawyers as well as legislators and executives.⁷

The 1990 Code abandoned this distinction and authorized a judge to both testify and privately consult “on matters concerning the law, the legal system or the administration of justice.”⁸ Canon 4C(1) of the 1990 Code also permitted a judge to testify before, or consult with, government officials about matters “involving the judge or the judge’s interests.”⁹ This “pro se” exception certainly made sense. It is hardly reasonable to expect a judge to stand idly by while a governmental entity plans to put an expressway through the judge’s backyard.

The 2007 Code continues to recognize that a judge’s unique professional experience should be shared with the other branches of government.¹⁰ Accordingly, Rule 3.2(A) reiterates the long-standing proposition that a judge may testify or consult regarding matters concerning the law, the legal system, or the administration of justice.¹¹ The 2007 Code, however, narrows the type of personal interest justifying a judge’s communication with government officials. Canon 4C(1) of the 1990

Footnotes

1. Shirley S. Abrahamson, *Remarks of the Hon. Shirley S. Abrahamson Before the American Bar Association Commission on Separation of Powers and Judicial Independence*, 12 ST. JOHN’S J. LEGAL COMMENT. 69, 80-81 (1996) (quoting Benjamin Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 125 (1921)).
2. See Julian Darwall & Martin Guggenheim, *Funding the Peoples’ Right*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 619, 652-53 (2012) (listing the methods by which the judiciary communicates with the other branches).
3. MODEL CODE OF JUDICIAL CONDUCT R. 3.2(A)(B)(C) (2007).
4. CODE OF JUDICIAL CONDUCT Canon 4B (1972).
5. *Id.*

6. E. WAYNE THODE, REPORTER’S NOTES TO THE CODE OF JUDICIAL CONDUCT 75 (1973).
7. *Id.* at 75-76.
8. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(1) (1990); see LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 33 (1992). A few states still retain the 1972 Code provision that restricts consultations to matters pertaining to the administration of justice. See, e.g., ILL. CODE OF JUDICIAL CONDUCT Canon 4B (2013).
9. MODEL CODE OF JUDICIAL CONDUCT Canon 4C(1) (1990).
10. MODEL CODE OF JUDICIAL CONDUCT R. 3.2 cmt. 1 (2007).
11. *Id.* R. 3.2 (A).

Code had broadly authorized testimony or consultation whenever “the judge’s interests” were involved. To avoid the possibility that the judge’s interests could be construed to include social and political matters, Rule 3.2(C) narrows the pro se exemption to matters affecting “the judge’s *legal* or *economic* interests.”¹² Rule 3.2 expands the pro se exception in one regard by permitting a judge to testify and consult, not only regarding his own legal and economic interests, but also the legal and economic interests of a person or entity the judge represents in a fiduciary capacity.¹³

Most significantly, the 2007 Code adds a new exception to the general rule barring judges from voluntarily providing information to members of another governmental branch. Rule 3.2(B) permits testimonial and private contacts with executive and legislative officials regarding matters “about which the judge acquired knowledge or expertise in the course of the judge’s judicial duties.”¹⁴ This exception represents a “significant loosening” of the restrictions contained in the 1972 and 1990 Codes.¹⁵ Under Rule 3.2(B), the matter about which the judge acquired knowledge need not have anything to do with the law, the legal system, or the administration of justice and may relate to social problems and public-policy issues.¹⁶

JUSTIFICATIONS FOR LIMITING COMMUNICATIONS WITH EXECUTIVE AND LEGISLATIVE OFFICIALS

It could be convincingly argued that communicating with legislators and executives on matters directly affecting the viability of the judicial system, like facilities, staffing, and funding, is an essential part of the judicial function. Indeed, judges have an ethical obligation to seek sufficient “court staff . . . and resources to discharge all adjudicative and administrative responsibilities.”¹⁷ But the 2007 Code classifies all interbranch communications, regardless of the subject matter, as nonjudicial, “extrajudicial” activities.¹⁸ As a result, the restrictions imposed by Rule 3.2 on testimony before, and consultations with, legislative and executive officials must be examined against the justifications for limiting the extrajudicial activities of judges. Four state interests support restricting a judge’s extrajudicial activities.

12. *Id.* R. 3.2(C) (emphasis added).

13. *Id.* The 2007 Code strictly limits the circumstances under which a judge may serve as a fiduciary. *See id.* R. 3.8.

14. *Id.* R. 3.2(B).

15. CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 59 (2009).

16. *See id.*

17. MODEL CODE OF JUDICIAL CONDUCT R. 2.5 cmt. 3 (2007).

18. *See* MODEL CODE OF JUDICIAL CONDUCT R. 3.2 (2007). Rule 3.2 falls under Canon 3, which is titled, “A Judge Shall Conduct the Judge’s Personal and Extrajudicial Activities to Minimize the Risk of Conflict with the Obligations of Judicial Office.”

19. *See id.* R. 3.1(A) (prohibiting participation in extrajudicial “activities that will interfere with the proper performance of the judge’s judicial duties”).

20. *See, e.g., In re DiBasi, Determination* (N.Y. State Comm’n on Judicial Conduct Nov. 19, 2001) (disciplining a judge for attending a college class each weekday from 9:15 a.m. until 1:00 p.m.).

21. *See* MODEL CODE OF JUDICIAL CONDUCT R. 3.2 cmt. 2 (2007)

INTERFERENCE WITH JUDICIAL DUTIES

First, personal and extrajudicial endeavors may cause undue absences from court or otherwise interfere with the performance of judicial duties.¹⁹ This concern most often arises in connection with a judge’s civic, charitable, and educational activities that require substantial time away from court.²⁰ It is less relevant to the interests served by Rule 3.2 because a judge’s contacts with governmental bodies and officials usually do not occur with sufficient frequency to compromise effective and timely case management.

[T]he restrictions . . . must be examined against the justifications for limiting the extrajudicial activities of judges.

ABUSING THE PRESTIGE OF JUDICIAL OFFICE

Second, a judge may misuse the prestige of office while engaging in nonjudicial activities.²¹ For example, when confronted by a judge soliciting money for a charity, a potential donor might feel coerced by judicial power and prestige into responding favorably.²² But the likelihood of judicial prestige having a bullying effect diminishes greatly when a judge is speaking with members of a coequal branch of government rather than with members of the lay public. Indeed, legislators and executives show little hesitance in ignoring, rebuking, and criticizing judges. Whether it is calling for a judge’s impeachment,²³ claiming that judges “bend the laws to let drug dealers go free,”²⁴ calling out a judge for crafting a decision to “put more money in her pocket and the pocket of her cronies,”²⁵ threatening to defy court orders,²⁶ or refusing to let a judge speak,²⁷ there is little chance of judicial status intimidating political-branch officials into blindly acceding to a judge’s request.

PROTECTING THE APPEARANCE OF IMPARTIALITY

A third and especially important basis for limiting a judge’s personal and extrajudicial activities is to protect the appearance

(reminding judges to avoid using the prestige of office while testifying or consulting).

22. Raymond J. McKoski, *Charitable Fund-Raising by Judges: The Give and Take of the 2007 ABA Model Code of Judicial Conduct*, 2008 MICH. ST. L. REV. 769, 779-81.

23. *See, e.g.,* JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED: A JUDICIAL INDICTMENT OF WAR ON DRUGS 117 (2001) (quoting Senator Robert Dole’s call for the impeachment of a federal district court judge who granted a motion to suppress evidence in a drug prosecution).

24. *Id.*

25. Charles Stile, *Christie Used Smear to Put Heat on Judges*, HERALD NEWS (West Patterson, N.J.), Oct. 20, 2011, at C1.

26. *See* Ginger Gibson, *If Court Orders School Aid, Christie May Not Comply*, STAR-LEDGER (Newark, N.J.), Apr. 22, 2011, at 1.

27. *See* Brad Cooper, *Kansas House Leader Turns Down Chief Justice’s Request to Address Legislature*, KANSAS CITY STAR, Dec. 31, 2012, available at 2012 WLNR 28186943.

[A]t what point does permissible assistance from the judiciary turn into a prohibited entanglement?

of judicial impartiality. Thus, judicial codes prohibit membership in a prosecutors-only bar association because it might reasonably call into question the judge's impartiality in criminal cases.²⁸ Similarly, testifying at a public hearing might adversely reflect on a judge's neutrality, depending to some extent on the subject matter of the presentation but even more

so on the tenor of the presentation. To illustrate the point, assume that two judges testify before a state legislature in support of a bill to legalize marijuana.

The first judge presents her remarks in an aggressive, partisan manner blaming Republicans for drug laws designed to disproportionately impact certain racial and ethnic groups, resulting in "prisoner-of-war" type incarceration. The judge promises to "take the next step" if the legislators fail to perform their "God given duty." She also promises to acquit anyone of a marijuana offense unless the defendant is "proven guilty beyond any shadow of a shadow of a doubt."

Also testifying in support of the bill, the second judge relates her courtroom observations of the racial and ethnic makeup of persons charged with marijuana offenses, the treatment alternatives available to the court, the advantages of treatment over incarceration, reoffender rates in her county, the internal conflicts judges face in imposing mandatory sentences, and how court resources could be devoted to more serious problems if marijuana were legalized.²⁹ The judge concludes by acknowledging the separate roles of legislators and judges and reaffirms her commitment to uphold the law, without regard to her personal views.³⁰

Both judges have testified on a controversial issue. The difference is one of approach. The first judge's personalization of the issue and combative tenor casts doubt on her impartiality. Therefore, her testimony constitutes an impermissible extrajudicial activity. The second judge, by maintaining the dignity and objectivity of the judicial office, basing her testimony on courtroom observations, and affirming her commitment to follow the law, allows her to advance the same position as the first judge without casting doubt on her impartiality. Thus, the second judge's testimony is a permitted extrajudicial activity.

SEPARATION OF POWERS

Fourth, regulating the nonjudicial activities of judges helps maintain the institutional independence of the judiciary. Ensuring judicial independence means "precluding debilitating entanglements between the Judiciary and the two political Branches, and prevent[ing] the Judiciary from encroaching into areas reserved for the other Branches" ³¹ But while encroaching on the legislative or executive domain is prohibited, providing assistance to co-branches is not. The separation-of-powers doctrine does not preclude the judiciary from providing information, advice, and other nonintrusive forms of assistance to governmental bodies and officials.³² It is simply impossible for the legislative and judicial branches not to be intertwined to some extent since legislatures control court appropriations, determine court jurisdiction, set judicial salaries and benefits, and enact statutes governing every aspect of substantive and procedural law.³³

In the final analysis, the separation-of-powers question becomes: at what point does permissible assistance from the judiciary turn into a prohibited entanglement? Rule 3.2 provides a bright-line test. As long as the judge's communication falls within one of the categories established by subsection (A), (B), or (C) of Rule 3.2, no interference with legislative or executive independence will result. This presumption recognizes the importance of interbranch communication and acknowledges that supplying information and recommendations is a far cry from usurping the legislative or executive function.

With this background in mind, we can turn to the meaning and application of Rule 3.2

RULE 3.2: THE GENERAL PROHIBITION

Unless one of three exceptions applies, "[a] judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or legislative body or official" ³⁴ Rule 3.2 does not attempt to interfere with a judge's duty to appear and testify when officially summoned to do so.³⁵ The Rule restricts consulting with government officials, but not every discussion is a consultation. The term "consultation" implies a fact-gathering purpose related to a pending or impending matter before the executive or legislative branch.³⁶ Informal conversations between, for example, a judge and a state legislator at a Fourth of July picnic concerning issues of the day should not be considered a "con-

28. See Fla. Comm. on Standards of Conduct Governing Judges, Op. 95-21 (1995) (disallowing membership in a plaintiffs' bar association).

29. Cf. *Rising Violent Crime in the Aftermath of Hurricane Katrina: Hearing Before the S. Comm. on the Judiciary*, 110 Cong. 37-39 (2007) (statement of Judge David L. Bell) (outlining the age and race of juveniles appearing before the court, treatment alternatives, success rates of treatment modalities, and caseloads).

30. Cf. MODEL CODE OF JUDICIAL CONDUCT R. 4.1 cmt. 13 (2007).

31. See *Mistretta v. United States*, 488 U.S. 361, 385 (1989).

32. *Id.* at 372 ("We also have recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of

its coordinate Branches.").

33. Russell R. Wheeler & Robert A. Katzmann, *Project Seeks to Improve Communications Between Courts and Legislatures*, 75 JUDICATURE 45, 45 (1991).

34. MODEL CODE OF JUDICIAL CONDUCT R. 3.2 (2007); see THODE *supra* note 6, at 59.

35. GEYH & HODES, *supra* note 15, at 59.

36. Cf. *California Wilderness Coalition v. U.S. Dept. of Energy*, 631 F3d 1072, 1087 (9th Cir. 2011) ("An ordinary meaning of the word consult is to 'seek information or advice from (someone with expertise in a particular area)' or to 'have discussions or confer with (someone), typically before undertaking a course of action.'") (quoting *The New Oxford Dictionary* 369 (2001)).

sultation” under Rule 3.2.³⁷ Neither should the Rule be implicated when legislators spend a day with judges to observe court procedures³⁸ or when a chief administrative judge contacts legislative officials to develop a working relationship with the legislature.³⁹

EXCEPTION ONE: TESTIFYING OR CONSULTING ABOUT MATTERS CONCERNING THE LAW, THE LEGAL SYSTEM, OR THE ADMINISTRATION OF JUSTICE

Judges may testify and consult about matters “concerning the law, the legal system, or the administration of justice.”⁴⁰ Although some disagreement exists as to the scope of this phrase,⁴¹ on its face the exception covers a lot of ground. As defined in the 2007 Code, the term “law” includes “court rules as well as statutes, constitutional provisions, and decisional law.”⁴² “Legal system” and “administration of justice,” undefined in the 2007 Code, are comprehensive terms. A legal system “refers to the nature and content of the law generally, and the structures and methods whereby it is legislated upon, adjudicated upon and administered.”⁴³ Equally broad, the administration of justice “establishes and maintains, and improves the methods and procedures by which the rights, duties, and obligations established by the legal system are litigated and adjudicated.”⁴⁴ Professor E. Wayne Thode recognized the breadth and flexibility of the phrase “the law, the legal system and the administration of justice” when it was first introduced in the 1972 Code by noting that it included “a broad range of organizations and projects . . . corresponding to the range of concerns that present themselves in the law under modern conditions.”⁴⁵

Judges frequently appear before legislators on an issue at the heart of the legal system and the administration of justice—funding for the courts. Judges testify before legislative bodies annually to maintain or increase a court’s appropriation.⁴⁶ In addition to providing testimony, judges consult with legislators about budgetary matters. In 2004, the chief judges of the Eastern, Central, Northern, and Southern Districts of the California federal district court presented a joint letter to California Senators Dianne Feinstein and Barbara Boxer and each member of the state’s congressional delegation urging adequate appropriations to dodge a “perilous situation.”⁴⁷ In the same year, Alaska federal district court judges sent a letter to the chair of the Senate Appropriations Committee warning that “the courts stand on the brink of a fiscal abyss” and that if funding did not increase, “it will plunge the courts over the precipice.”⁴⁸ In 2013, the chief judges of 87 federal district courts wrote to the ranking members of Congress expressing concern that “flat funding” and “sequester cuts” “have created an unprecedented financial crisis that is adversely affecting all facets of court operations.”⁴⁹ In the name of the administration of justice and the legal system, judges freely lobby legislators and executives concerning salaries and benefits,⁵⁰ courthouse facilities and safety,⁵¹ additional judgeships,⁵² methods of judicial selection,⁵³ judicial

Judges may testify and consult about matters “concerning the law, the legal system, or the administration of justice.”

37. Courts and judicial ethics advisory committees have not applied Rule 3.2 or its predecessor provisions in the 1972 and 1990 Codes to informal gatherings that include judges and legislative officials. See ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 347-52 (2011) (reviewing cases and judicial ethics advisory opinions construing restrictions on a judge’s ability to testify or consult with governmental officials).

38. See ABA TASK FORCE ON PRESERVATION OF THE JUSTICE SYSTEM, CRISIS IN THE COURTS: DEFINING THE PROBLEM 15 (2011) (highlighting an Oregon program in which state legislators spend a day observing court).

39. See Joint Legislative Hearing on the 2012-2013 Judiciary Budget 1 (N.Y. 2012) (remarks of Chief Administrative Judge A. Gail Prudenti) (“Over the last two months I’ve tried to contact as many legislators as possible . . . to better understand their views of the judiciary, its mission, and its challenges. I very much look forward to continuing that conversation here today—to working closely with you and getting to know each of you and learning your particular concerns.”).

40. MODEL CODE OF JUDICIAL CONDUCT R. 3.2 (2007).

41. See U.S. Judicial Conference Comm. on Codes of Conduct, Op. 93 (2009) (interpreting the phrase “matters concerning the law” narrowly).

42. MODEL CODE OF JUDICIAL CONDUCT Terminology (2007).

43. William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 681-82 (2000).

44. McKoski, *supra* note 22, at 797.

45. THODE, *supra* note 6, at 77.

46. See, e.g., *Funding Crisis Strikes Throughout Federal Courts, Judge Tells Senate Panel*, THE THIRD BRANCH NEWS (July 23, 2013), available at <http://news.uscourts.gov/funding-crisis-strikes-throughout-federal-courts-judge-tells-senate-panel>.

47. *Is Congress Listening?*, THE THIRD BRANCH (Aug. 2004), available at http://www.uscourts.gov/News/TheThirdBranch/10-10-28/Is_Congress_Listening.aspx.

48. *Id.*

49. Letter from Loretta A. Preska to Joseph R. Biden, Jr., Aug. 13, 2013, available at <http://www.ndttxblog.com/wp-content/uploads/2013/08/chief-judges-letter-to-joseph-biden.pdf>.

50. See Keith M. Phaneuf, *State Judges Press for Their First Pay Increase in Six Years*, RECORD-JOURNAL (Meriden, Conn.), Nov. 22, 2012, at 5.

51. See, e.g., Guy Clifton, *Bill Adds Security in Courts*, RENO GAZETTE-JOURNAL, Feb. 14, 2009, at A1 (reporting that Washoe District Court Judge Chuck Weller testified in support of a bill to increase protection for judges, courthouse personnel, and visitors).

52. See, e.g., *Responding to the Growing Need for Federal Judgeships: The Federal Judiciary Act of 2009: Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary*, 111th Cong. 10-11 (2009) (testimony of federal district court judge Lawrence J. O’Neill).

53. See, e.g., Anjeanette Damon, *Raggio Continues to Push Bill for Appointed Judges*, RENO GAZETTE-JOURNAL, Feb. 24, 2009, at A3 (summarizing the testimony of the Nevada Supreme Court Chief Justice before a state senate committee on the issue of merit selection).

Rule 3.2(B) is tailor-made for judges presiding over drug courts . . . and other specialty tribunals.

conduct and disability,⁵⁴ and access to justice.⁵⁵

Judges also regularly testify and consult on matters of law and legislation.⁵⁶ In 2013, a federal judge testified in support of a bill before the Oregon legislature authorizing county courts to supervise inmates released from the department of corrections.⁵⁷ Bankruptcy judge Frank J. Bailey testified before a subcommittee of the House Judiciary Committee in

favor of the Chapter 11 Bankruptcy Reform Act of 2011.⁵⁸ Federal court of appeals judges James L. Oakes and Roger J. Minor, together with federal district court judge Pierre N. Leval, testified before Congress regarding a proposed amendment to the fair-use provisions of the Copyright Act.⁵⁹ Bills concerning sentencing,⁶⁰ juvenile delinquency,⁶¹ foreign intelligence,⁶² specialty courts,⁶³ immigration,⁶⁴ violence against women,⁶⁵ and televising court proceedings⁶⁶ have drawn judicial comment.

EXCEPTION TWO: TESTIMONY AND CONSULTATIONS BASED ON KNOWLEDGE ACQUIRED IN THE PERFORMANCE OF JUDICIAL DUTIES

Court proceedings encompass a wide variety of subjects,

including medicine, gangs, addiction, fetal development, child rearing, marriage, discrimination, natural resources, pollution, religion, labor, taxation, elections, and virtually every other area of human concern. In the course of their duties, judges frequently gain knowledge in non-law-related subjects that would be useful to legislators and executives in fashioning solutions to societal problems. Acknowledging this fact, Rule 3.2(B) of the 2007 Code boldly broadens the scope of information that a judge may voluntarily impart to the legislative and executive branches by authorizing judges to testify and consult concerning any matter “about which the judge acquired knowledge or expertise in the course of the judge’s judicial duties.”⁶⁷

Three aspects of Rule 3.2(B) are noteworthy. First, the information conveyed need not be law-related or concern the judge’s personal interests. There is no restriction on the subject of the judge’s communication, and as a result, social issues and matters of public policy appear to be fair game.⁶⁸ Second, Rule 3.2 requires only knowledge, not expertise. Third, the information conveyed by the judge must have been obtained during the exercise of adjudicative, administrative, or supervisory judicial duties. Knowledge developed during nonjudicial activities cannot be voluntarily conveyed under Rule 3.2(B).

Rule 3.2(B) is tailor-made for judges presiding over drug courts, mental health courts, veterans’ courts, and other specialty tribunals. By serving as leaders of the problem-solving courts’ “therapeutic teams,” judges gain knowledge about

54. See, e.g., *An Examination of the Judicial Conduct and Disability System: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113 Cong. 6-8 (2013), available at http://judiciary.house.gov/_files/hearings/113th/04252013_3/Scirica%2004252013.pdf (testimony of Judge Anthony J. Scirica, United States Court of Appeals, Third Circuit).

55. See, e.g., *Closing the Justice Gap: Providing Civil Legal Assistance to Low Income Americans: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 15-17 (2008) (testimony of Texas state trial judge Lora Livingston).

56. Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 955 (2000) (“Members of the [administrative office] staff and federal judges now regularly appear before Congress to testify on pending legislation.”).

57. Hannah Hoffman, *Judge Testifies in Favor of Re-Entry Courts*, OREGON STATESMAN JOURNAL, Mar. 20, 2013 (on file with author).

58. *Chapter 11 Bankruptcy Venue Reform Act of 2011 (H.R. 2533): Hearing Before the Subcomm. on Courts, Commercial and Administrative Law of the H. Comm. on the Judiciary*, 112th Cong. 30-52 (2011) (testimony of Frank J. Bailey, Chief Judge of the United States Bankruptcy Court, District of Massachusetts).

59. See H.R. REP. NO. 102-836, at 2 (1992).

60. See, e.g., *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Comm’n Six Years after U.S. v. Booker: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 112th Cong., 10-100 (2011) (testimony of Judge Patti B. Saris, Chair, United States Sentencing Commission); see also Gwen Filosa, *Judges Criticize Sentencing Laws: They Tell Lawmakers Rules Clog Prisons*, NEW ORLEANS TIMES-PICAYUNE, Nov. 21, 2002, at 1 (reporting that seven state court judges testified before members of the Louisiana legislature

concerning court backlogs, mandatory sentencing, and drug courts).

61. See, e.g., *Ending School-to-Prison Pipeline: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights of the S. Comm. on the Judiciary*, 112th Cong., 71-79 (2012) [hereinafter *School-to-Prison*] (testimony of Judge Steven C. Teske).

62. See, e.g., *Strengthening Privacy Rights and National Security: Oversight of FISA Surveillance Programs: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. (2013), available at 2013 WLNR 18825425 (testimony of James G. Carr, Senior United States District Judge, Northern District, Ohio).

63. See, e.g., *Drug and Veterans Treatment Courts: Hearing Before the Subcomm. on Crime and Terrorism of the S. Comm. on the Judiciary*, 112th Cong., 16-18 (2011) (testimony of Judge Jeanne E. LaFazia).

64. See Aileen B. Flores, *El Paso County Judge Veronica Escobar Testifies in DC, Urges Reform*, EL PASO TIMES, Mar. 21, 2013, available at http://www.elpasotimes.com/newupdated/ci_22832013/el-paso-county-judge-veronica-escobar-testifies-washington?IADID=Search-www.elpasotimes.com-www.elpasotimes.com (reporting the testimony of Judge Escobar regarding immigration reform).

65. See, e.g., *Leading the Fight: The Violence Against Women Office: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 107th Cong. 33-39 (2002) (testimony of Judge Vincent J. Poppiti).

66. See, e.g., *Televising the Supreme Court: Hearing Before the Subcomm. on Administrative Oversight of the Courts of the S. Comm. on the Judiciary*, 112th Cong. 84-91 (2011) (testimony of Judge Anthony J. Scirica).

67. MODEL CODE OF JUDICIAL CONDUCT R. 3.2(B) (2007); see GEYH & HODES, *supra* note 15, at 59.

68. See GEYH & HODES, *supra* note 15, at 59.

community problems and solutions to those problems.⁶⁹ And there is every reason for judges to share this knowledge with legislators and executives to assist them in improving the lives of their constituents.

The testimony of Chief Judge Steve Teske of the Clayton County, Georgia, Juvenile Court illustrates the valuable information that a specialty-court judge can impart.⁷⁰ In his appearance before Congress in 2012, Judge Teske testified to matters directly relating to the law, the legal system, and the administration of justice when he expressed his frustration with rising recidivism rates and the need to devote a disproportionate share of court resources to minor juvenile infractions.⁷¹ But Chief Judge Teske went further, advising the legislators of the adverse effects of zero-tolerance school policies that came to his attention as a juvenile court judge. He stated that zero-tolerance policies requiring that students be arrested, expelled, or suspended for minor infractions (1) negatively impact graduation rates, school safety, and the entire community; (2) increase juvenile crime; and (3) increase reoffender rates.⁷² He further testified that zero-tolerance is contrary to adolescent cognition, that “school connectedness” protects against delinquency, and that “[w]e are a nation in crisis when it comes to educating our children.”⁷³ Referring to school officials who promote zero-tolerance, Judge Teske opined: “It confounds the mind that professionals trained and certified to teach our children are duped into believing that suspending a student who doesn’t want to be in school is an effective tool.”⁷⁴

Some of Judge Teske’s testimony clearly concerned the law, the legal system, and the administration of justice and therefore was proper under Rule 3.2(A) and the analogous provisions of the 1972 and 1990 Codes. Less clear, however, is whether the judge’s comments regarding school officials, school policies, adolescent cognition, graduation rates, and school and community safety related to the law, the legal system, or the administration of justice. That question, while determinative of whether a judge’s testimony would be proper under previous ABA Model Codes, is of no import under Rule 3.2(B), which provides an avenue for the transfer of valuable, but not necessarily law-related, information from the judiciary to the other branches of government.⁷⁵

EXCEPTION THREE: ACTING PRO SE OR IN A FIDUCIARY CAPACITY

Canon 4C(1) of the 1990 Code permitted communication with an executive or legislative body or official on any matter involving “the judge or the judge’s interests.”⁷⁶ The Code did not define “judge’s interests” or otherwise cabin the apparent all-inclusive scope of the phrase. Permitting judges to determine for themselves which interests were sufficient to invoke Canon 4C(1) caused some apprehension that the exception might swallow the rule.⁷⁷ The disciplinary proceeding against Arkansas Appellate Court Judge Wendell Griffen highlighted that concern.

Judge Griffen spoke to the Black Caucus of the Arkansas legislature about funding for the University of Arkansas. He urged the legislators not to reward the University financially because of its “practices and policies that exclude, inhibit, and mistreat black students, faculty, staff, and citizens.”⁷⁸ The judge also suggested that the legislature “send them a budgetary vote of no confidence concerning sorry leadership about racial inclusion over the past 130 years at the University of Arkansas. Show them the money!”⁷⁹ The Arkansas Discipline and Disability Commission admonished Judge Griffen for testifying on a matter not concerning the law, the legal system, or the administration of justice.⁸⁰ Judge Griffen appealed, claiming that his remarks fell within Canon 4C(1) of the Arkansas Code of Judicial Conduct, which permitted testimony on matters involving the “judge or the judge’s interests.”⁸¹

The Arkansas Supreme Court struggled with the scope of the term “judge’s interests.” It considered whether the phrase included social and political concerns, or as Judge Griffen argued, any matter of interest to a particular judge.⁸² After a futile attempt to decipher what the ABA meant by a “judge’s interests,” the court held the phrase unconstitutionally vague and vacated the disciplinary sanction imposed on Judge Griffen.⁸³

In response to the *Griffen* decision, the drafters of the 2007 Code narrowed the type of personal interest triggering the pro se exception.⁸⁴ Accordingly, Rule 3.2(C) limits a judge’s ability to testify and consult to matters involving “the judge’s legal or

The Arkansas Supreme Court struggled with the scope of the term “judge’s interests.”

69. Jane M. Spinak, *A Conversation About Problem Solving Courts: Take 2*, 10 U. MD. L.J. RACE, GENDER & CLASS 113, 124-25 (2010).

70. Tamar M. Meekins, “Specialized Justice”: *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, 3 n.7 (2006) (“Juvenile courts were the first in the genre of specialty courts.”).

71. *School-to-Prison*, *supra* note 61 (testimony of Judge Steven C. Teske).

72. *Id.* at 71, 72, 74, 77.

73. *Id.* at 76-77.

74. *Id.* at 76.

75. Canon 4B of the Georgia Code of Judicial Conduct does not include a provision permitting judges to testify or consult regarding matters about which the judge gained knowledge in the course of performing the judicial function. Nor does it contain a provision permitting judges to communicate with legislators and

executives about the judge’s own interests. GA. CODE OF JUDICIAL CONDUCT Canon 4B (2013). Canon 4 of the Georgia Code only authorizes appearances at public hearings on matters concerning the law, the legal system, or the administration of justice. *Id.*

76. MODEL CODE OF JUDICIAL CONDUCT CANON 4(C)(1) (1990).

77. See GEYH & HODES, *supra* note 15, at 59.

78. *Griffen v. Ark. Judicial Discipline and Disability Comm’n*, 130 S.W.3d 524, 526 (Ark. 2003).

79. *Id.* at 526-27.

80. *Id.* at 529-30.

81. *Id.* at 530.

82. *Id.* at 531-35.

83. *Id.* at 538.

84. See ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 351 (2011) (“The [2007] Code tried to address the problem raised by *Griffen* . . .”).

Neither the Rule nor its comments provide an example of a judge's legal interests.

economic interests.”⁸⁵ The Code does not define the term “legal interests.” The Code defines “economic interest” in the context of judicial disqualification⁸⁶ but not in the context of Rule 3.2(C).⁸⁷ Comment 3 to Rule 3.2 gives one illustration of an economic interest—a zoning proposal that adversely affects the

value of the judge's real property.⁸⁸ Neither the Rule nor its comments provide an example of a judge's legal interests.

Does Rule 3.2(C) permit the type of remarks concerning race relations offered by Judge Griffen? Most likely, the drafters did not intend the Rule to condone commentary on a social or political matter unless it directly impacted the judge's financial position or an interest protected by a state or federal law. At least one ethics expert opined that Judge Griffen's remarks would not find protection under Rule 3.2(C).⁸⁹ But even assuming that conclusion is correct, it would not take much to turn the prohibited social interest in race relations into an economic or legal interest. For instance, if the judge's child attended the University with tuition assistance from Judge Griffen, the judge might very well possess an “economic interest” in the payments to the school or a “legal interest” in his child's treatment by the institution. Certainly, “[i]t is not a novel proposition to say that parents have a recognized legal interest in the education . . . of their child.”⁹⁰ Similarly, if the judge enrolled in a course at the University, a strictly social interest in the treatment of African-Americans by the administration might be transformed into a legal or economic interest. Moreover, if Judge Griffen had presided over a case involving a discrimination claim against the University of Arkansas, his testimony before the state legislators likely would have been permissible under Rule 3.2(B).

Virtually all states revising their judicial codes since the issuance of the 2007 Code have adopted the ABA's recommendation and narrowed the judge's personal interests to those of an economic or legal nature.⁹¹ Indiana has broadened the

exception slightly by providing that a judge may testify or consult regarding not only his own economic and legal interests but also those of family members residing with the judge.⁹² Most notably, the Code of Conduct for United States Judges adopted in 2009 rejects the ABA recommendation to narrow the pro se exception and retains the language of Canon 4 of the 1990 Code permitting judges to consult and testify on any matter involving “the judge or the judge's interests.”⁹³ A few states fail to provide any pro se exception.⁹⁴ And most jurisdictions not yet revising their code of judicial conduct in light of the 2007 Code include the broad language of the 1990 Code permitting appearances and consultations on any matter involving the “judge's interests.”⁹⁵

To avoid the need to distinguish between social issues on the one hand and economic issues on the other, Alaska permits judges to testify and consult on both economic and social interests.⁹⁶ Although the Alaska Code leaves “social interests” undefined, the term is often used to encompass a virtually limitless array of interests, including “safety, order, and morals; economic interests; and nonmaterial and political interests.”⁹⁷

A PRACTICAL APPLICATION OF RULE 3.2

Assume that a judge assigned to a misdemeanor court wishes to make a statement during the public-comment portion of a city council meeting.⁹⁸ After introducing himself as a resident of the community, the judge plans to voice the opinion that the city should amend its liquor ordinance to reduce the number of hours that establishments may serve alcohol from 23 hours per day to 16 hours per day. The judge will inform the mayor and city council that he (1) is concerned for the safety of late-night bar patrons and others who may be harmed by late-night bar patrons; (2) believes that the current ordinance unnecessarily diverts court resources to deal with numerous alcohol-related incidents occurring between 2:00 a.m. and 5:00 a.m.; and (3) believes that the current ordinance fosters a negative community image.

Clearly, Rule 3.2 governs the judge's remarks since the judge plans to voluntarily speak at a public hearing conducted by the city's legislative body and the city's top executive official. There-

85. MODEL CODE OF JUDICIAL CONDUCT R. 3.2(C) (2007).

86. *Id.* Terminology (defining “economic interest”).

87. *Id.*

88. MODEL CODE OF JUDICIAL CONDUCT R. 3.2 cmt. 3 (2007).

89. See Howard W. Brill, *The Arkansas Code of Judicial Conduct of 2009*, 2009 ARK. L. NOTES 1, 11.

90. *Winkelman ex rel. Winkelman v. Parma City School Dist.*, 550 U.S. 516, 529 (2007).

91. See, e.g., ARK. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); COLO. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); IOWA CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); KAN. CODE OF JUDICIAL CONDUCT R. 3.2(B) (2013); MARY. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); MINN. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); MI. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); OHIO CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); OKLA. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013); *but see* ARIZ. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013) (permitting a judge to testify or consult concerning the “judge's interests.”).

92. IND. CODE OF JUDICIAL CONDUCT R. 3.2(C) (2013).

93. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4(A)(2) (2009).

94. See, e.g., ALA. CODE OF JUDICIAL CONDUCT Canon 4B (2013); ILL. CODE OF JUDICIAL CONDUCT Canon 4B (2013); TEX. CODE OF JUDICIAL CONDUCT Canon 4 (2013).

95. See, e.g., FLA. CODE OF JUDICIAL CONDUCT Canon 4C (2013); MISS. CODE OF JUDICIAL CONDUCT Canon 4C (2013); N.Y. CODE OF JUDICIAL CONDUCT Canon 4C (2013); S.C. CODE OF JUDICIAL CONDUCT Canon 4C(1) (2013); VA. CODE OF JUDICIAL CONDUCT Canon 4C (2013); WIS. SUP. CT. R. 60.05(3) (2013).

96. ALASKA CODE OF JUDICIAL CONDUCT Canon 4C(1) cmt. (2013).

97. *State v. Hutchinson Ice Cream Co.*, 147 N.W. 195, 199 (Iowa 1914); see Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 17-38 (1943) (defining “social interests” to include the security of domestic, religious, and political institutions; general morals; conservation of social resources; protection and training of dependents; aesthetics; and general progress, including political progress).

98. This illustration is based on Illinois Judicial Ethics Committee Opinion 07-05 (2007).

fore, the judge's comments are prohibited unless an exception contained in subsection (A), (B), or (C) of Rule 3.2 applies.

Most of the judge's proposed statement appears to be authorized by subsection (A), which permits testimony regarding "the law" since a city ordinance is a law.⁹⁹ Indeed, "[t]he plain language of the [2007] code does not prevent a judge from acting on his or her own initiative with regard to legislative issues."¹⁰⁰ Rule 3.2(A) also permits judicial input on matters concerning the administration of justice. And since the administration of justice includes case management and the use of judicial facilities, personnel, and funds,¹⁰¹ the judge's comments about the impact of late-night alcohol consumption on court resources appears permissible.¹⁰² The judge's concern about the safety of bar patrons and others might not qualify as matters of law or court administration but should fall within Rule 3.2(B)'s window for concerns about public safety developed by the judge while on the bench.

A more difficult aspect of the proposed statement is the judge's view that the ability to purchase alcohol 23 hours a day fosters a negative community image. An interest in a city's image is most probably a personal interest. But is it a legal or economic interest as required by Rule 3.2(C)?

An argument can be made that the city's image affects the judge's economic interests. A positive or negative reputation dictates for many communities whether they will attract new residents and businesses, which in turn impacts property values, tax revenues, and home resale values. For example, the city of Winston-Salem considers its image important because:

The image our community has beyond its borders as a place to live, work and do business influences the decisions of individuals and companies considering to move to our area. So our image and reputation are very important. A community with a positive reputation will have a competitive advantage in attracting visitors, residents and business investment.¹⁰³

Regardless of whether community image suffices as a legal or economic interest, it is difficult to conclude that the judge's comment implicates any policy consideration underlying the need to restrict a judge's communications with legislators and executives. In the context of the judge's entire statement, the reference to community image does not misuse judicial prestige, undermine judicial impartiality, or interfere with the independence of another branch of government.

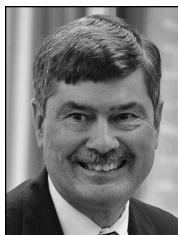
CONCLUSION

Judges provide information, unavailable from other sources, to the political branches. When providing this valuable service, however, judges must avoid (1) detracting from judicial impar-

tiality in fact or in appearance; (2) misusing judicial prestige; and (3) interfering with the independence of a co-branch of government. To help keep testimony and consultations within ethical constraints, a judge should:

- Clearly state whether the testimony or consultation is offered in a personal capacity or in an official capacity as a representative of the judicial branch;
- Present information in an objective, fact-based manner;
- Mention judicial status only when it directly relates to the manner in which the judge obtained the information being conveyed;
- Not mention judicial status when the judge is communicating about a personal interest;
- Confirm that personal views do not play a role in the judge's decision-making process;
- Confirm that the judge will continue to apply the law without regard to personal opinions or preferences;
- Acknowledge the separate functions of the legislative, executive, and judicial branches;
- Avoid commenting on any pending or impending court proceeding;¹⁰⁴
- Avoid statements that might affect the outcome or impair the fairness of a pending or impending court proceeding.¹⁰⁵

These cautionary measures will help ensure the free flow of important information from the judicial branch to the executive and legislative branches while maintaining judicial independence, integrity, and impartiality.



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99. See *Pittman v. Wilson County*, 839 F.2d 225, 228 n.7 (4th Cir. 1998) ("Like a statute, an ordinance is a law binding on all concerned.").

100. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 340 (2011).

101. See *Jorgensen v. Blagojevich*, 811 N.E.2d 652, 667 (Ill. 2004) ("The court's administrative authority over the judicial branch carries with it the corresponding authority to require production of the facilities, personnel and resources necessary to enable the judicial branch to perform its constitutional responsibilities.").

102. See Ill. Judicial Ethics Comm., Op. 07-05 (2007) ("Reduction of

public harm from alcohol consumption is part of the administration of justice to the extent it decreases alcohol related offenses, civil litigation, and other court matters.").

103. City of Winston-Salem, North Carolina, LEGACY DEVELOPMENT GUIDE 128 (2001), available at http://www.cityofws.org/portals/0/pdf/planning/publications/legacy/chapters/community_character.pdf.

104. See MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A) (2007).

105. *Id.* R. 2.10(A).