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Judicial Ethics: Searching For Consensus

The American Bar Association Code of Judicial Conduct, adopted in most states, provides in seven "canons" the rules of ethical behavior expected from members of the judiciary. In some instances the canons are quite specific. Canon 3 addresses in detail the standards to be used by judges in disqualifying themselves from proceedings in which they have an interest. The first two canons, on the other hand, are overarching general principles. Canon 1 requires that judges observe "high standards of conduct so that the integrity and independence of the judiciary may be preserved" and Canon 2 entreats the judge to avoid "impropriety and the appearance of impropriety in all his activities".

Codes of ethical conduct inevitably include specific prohibitions as well as general principles. Specific prohibitions speak to precise misconduct about which a relatively wide consensus has developed. But fashioning a body of ethical restraints is not unlike the development of the common law; general principles can only be given content by a slow process of case by case articulation.

This process may be thought to characterize the ongoing efforts to establish a code of responsibility for practicing lawyers. The early American Bar Association Canons of Professional Ethics initially adopted in 1908, for the most part, contained statements of general principle. These were supplemented by the opinions of the ABA Committee on Professional Ethics. The current code which became effective in August, 1983, provides "canons" which are "statements of axiomatic norms", "ethical considerations" which are "aspirational in character", and "disciplinary rules" which are mandatory and specific prohibitions. The code is built upon several decades of advisory opinions by ethics committees, judicial opinions in enforcement cases, and a small but influential pool of academic scholarship. Broad statements of ethical aspiration are given content in the context of the very real and difficult ethical dilemmas that face a lawyer in his professional capacity. And, most importantly, it is recognized in several instances

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that the purity of traditional ethical principles, e.g. honesty, must occasionally be balanced against some other real value.

One might suppose that by now there would be a similarly forming consensus and fleshing out of the code of judicial conduct. The tradition of the independent and dispassionate judge is well established, and one would assume a substantial base of learning and insight refining the specific application of ethical imperatives that require independence, integrity, propriety and their appearance. But, the judicial code of conduct remains a sparse and general document with consensus rules limited to fairly obvious and egregious behavior; the judicial opinions enforcing the prohibitions are abrupt and conclusory with little analysis or recognition of the difficult trade offs involved; and the scholarship on judicial ethics is minimal.

That is not to say there is a lack of attention to issues of judicial conduct. As courts become more deeply entangled in the resolution of public policy issues, more attention is inevitably focussed on how judges behave. In the federal system with life-tenure and in many state systems with elongated terms and restrictive procedures for removal, the importance of ethical limitations on judges is magnified. Similarly, the independence and quality of the judiciary is threatened if judges are to be governed by an ethical standard that demands avoiding even the "appearance of impropriety" if that standard does not have limiting principles or content.

The papers in this symposium highlight the need for greater intellectual attention to matters of judicial ethics. Chief Judge Howard T. Markey of the United States Courts of Appeals for the Federal Circuit highlighted in an earlier piece the very real dichotomies that judges face when they attempt to comply with the code of conduct.¹ Here he observes that "perhaps ninety percent of the problems that arise in relation to judicial ethics arise from appearances, not from reality."² In such a context, his call for a system that provides judges with some schooling in judicial ethics before they take the bench is particularly important. As he recognizes, such schooling should not be limited to transmitting received wisdom but rather should be the start of the development of a consensus on some of these difficult dilemmas and some better understanding among judges that these dilemmas exist. It is unlikely that a more refined code of conduct for judges will emerge unless judges themselves move toward a finer appreciation of the issues.

Preaching judicial ethics requires little more than fervor; *teaching* judicial ethics requires an analytical framework to enhance understanding and consensus. Professor Steven Lubet of the Northwestern

1. Markey, *The Delicate Dichotomies of Judicial Ethics*, 101 F.R.D. 373 (1984).

2. Markey, *Judicial Need for the 80's: Schooling in Judicial Ethics*, *infra*.

University Law School observes there is little analysis currently available. He notes the paucity of academic scholarship, the absence of a treatise on judicial ethics, and more significantly, a "nationwide professional culture among judges that de-emphasizes the importance of ethical issues." He particularly decries the absence of analytical content in judicial opinions dealing with judicial misconduct. Here, he says, "easy cases don't make much law" and the absence of analysis and discussion prevents a better understanding of norms of judicial conduct.

The importance of Judge Markey's and Professor Lubet's global analyses and recommendations are highlighted by three commentaries. Chief Justice Ellen A. Peters illustrates that even where the current code attempts to be specific, its prohibitions are not only ambiguous but may also be counterproductive to good judging. Canon 3A(4) permits a judge to secure advice on the law from an independent expert as long as the judge gives notice to the parties and permits them to respond. Justice Peters demonstrates how strict compliance with that rule would insulate the judge from many continuing legal education programs, from new and innovative legal scholarship, and from participating in the cross currents of legal thinking that emerge in a variety of informal contexts.³

Chief Justice Edward F. Hennessey's remarks are directed to the disciplinary procedures that implement the code of conduct. He recognizes that procedures must balance accountability to the public with protection of judges against frivolous or unwarranted complaints. These procedures take on added importance when the substance of judicial ethics is in such disarray. The very high costs to a judge and to the judiciary generally associated with a finding of an "appearance of impropriety" may restrain the judiciary and its ethics committees from developing in a case by case methodology a more specific definition of the prescription.

Attorney-General Robert Spire explores the implications of the code of judicial conduct to the social relationships of judges. At one level of discourse, the direction to avoid the appearances of impropriety and to attain a high level of disinterestedness might be thought to require judges to live a monastic existence. But Attorney-General Spire rightly observes that to insulate judges from social processes not only makes it more difficult for judges to understand the world they judge but it also becomes more likely that qualified lawyers will refrain from becoming judges. Attorney-General Spire sees a potential

3. It is rumored that then Chief Judge Cardozo while a member of the Advisory Council to the American Law Institute on drafting of the Restatement of Torts listened to a debate on the New York Appellate Division's decision in *Palsgraf v. Long Island R.R.* before he wrote the opinion for the court of appeals. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 4-5 (1953).

for a code of judicial conduct to be both an agenda of prohibited conduct and also a statement of permitted conduct in order to help give content to the term "appearance of impropriety".

These papers and comments were originally presented at the annual meeting of the Conference of Chief Justices in August, 1986, in Omaha, Nebraska. The seminar on judicial ethics was developed by the University of Nebraska College of Law as part of its Program in Applied Ethics, a program financed by grants from the Peter Kiewit and Sons, Inc., Foundation and the Peter Kiewit Foundation.

The original objective was to select speakers who would provide a broad spectrum of issues relating to judicial behavior from divergent points of view. It is instructive that without prior consultation or design a very strong central theme emerged. The ethical imperatives governing judicial conduct do not appear to answer the real and important questions that well-intentioned judges are increasingly forced to ask. In many areas judges face unhappy choices between their obligation to be sensitive and informed judges and their obligation to avoid the appearance of impropriety. In this era where public officials are held up to magnified claims of ethical standards, the failure to clarify our expectations for judicial conduct and the failure to develop an analytical framework for evaluating judicial misbehavior has real implications for the future of the judicial branch.