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[Judicial Ethics and Legal Profession Social Interaction]

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Attorney General Robert Spire*

A good many years ago, the Montana State football team had a disastrous season. Before the new season opened, the coach was quoted in "Sports Illustrated" as saying, "This year we definitely will have an improved season. Last year we lost nine straight games. This year we have only scheduled eight games."

I mention this because after listening to what has been said by the other speakers here today, it would be very easy for us to adopt the attitude of the Montana State coach. We could decide that this discussion of judicial ethics is becoming too complicated, that we are raising too many questions we will not be able to answer. We could admit defeat and decide to ignore the questions. On the contrary, each of us in the legal profession needs to broaden his or her perspectives about what issues and questions are encompassed by the term "judicial ethics."

Dean Perlman began our discussion by saying the aim of this panel is to explore the boundaries of judicial ethics with you rather than to preach judicial ethics to you. I particularly want to emphasize his comment because I am not a judge and have never been privileged to be a judge. As a non-judge, I must at best appear presumptuous in speaking to judges about judicial ethics. But I believe that even though this concept is specifically related to how you men and women perform your judicial duties, it is more generally related to how the legal profession as a whole performs its duties.

I believe that judges have as much interest in lawyers' ethics and lawyers in judges' ethics as we all have in each other. Each of us is governed by a code of professional conduct, judges by the ABA Code of Judicial Conduct and lawyers by the ABA Model Code of Professional Responsibility. Each of these codes has a provision expecting judges and lawyers to "maintain the integrity of the legal profession." In addition, our legal system either has basic integrity and therefore earns the confidence of the public, or it does not. The public's perception of the judicial system is not based solely on the public's perception of the integrity of judges; it is based on the public's perception of the integrity of judges, of practicing lawyers, of lawyers in public service, and others in the legal profession.

In the area of judicial ethics I would like to address concerns about the proper relationship between judges and the rest of us in the legal profession. Specifically, what rules should govern the relationship be-

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tween judges and their personal friends who are attorneys, their former law partners, and their former business associates?

Canon 1 of the ABA Code of Judicial Ethics states:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

This first canon is the foundation of the Code, providing the principal duty of a judge. Not only does the Code require that judges be independent in fact in their decision making, it requires that they be independent in appearance. Canon 2A provides: "A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

It seems obvious to me that to produce quality determinations, judges must be independent and impartial. They must also be concerned with public confidence in the legal system so that respect for law is maintained. At the same time, in order to perform the judicial function properly, judges must know the world which requires them to settle its disputes. They must remain a part of the world they are required to judge on a day-by-day basis. Justice requires both understanding and detachment. These demands can certainly conflict with each other and produce tension for judges who, as you well know, must constantly preserve a balance between the need for impartiality in decision-making, and indeed the appearance thereof, and the need to avoid intellectual and social isolation.

The first requirement of any code of conduct is that it must be reasonably clear about what is or is not prohibited behavior. In the area of professional ethics this is true for two reasons. First, professionals must have a reasonably clear understanding of what is expected of them. Second, and equally important, the public must have some reasonably clear idea of what it can expect of its professionals. The traditional professions are accorded the privilege to define their own professional standards because the trade offs arising out of a professional relationship are subtle and sensitive and require professional expertise. Of course, the profession cannot depart widely from the general public consensus of appropriate behavior without undermining its authority and respect. At the same time, the profession can influence the general public's expectations of appropriate professional behavior.

In the area of a judge's continuing social relationships, the Code is simplistically vague as a guide to conduct. Canon 2B states: "A judge should not allow his family, social or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he con-

vey or permit others to convey the impression that they are in a special position to influence him." Because the Code refers to a judge's social relationships, total isolation is not expected. I agree that total isolation by judges is not necessary in order to insure unbiased judicial decision-making. Most judges are also lawyers. Lawyers are constantly asked to put aside their personal feelings and give advice the client does not want to hear to the client who is also a friend. These same individuals are able to maintain their independence while judging.

Not only is total isolation unnecessary, in the long run it would be detrimental to our legal system. Isolation of judges can result in an insensitivity to what is going on in the world which may lead to sterile decision-making. In addition, while a person changes his or her social position when he becomes a judge, he does not lose his social instincts. Most men and women who are lawyers are gregarious by nature. Forced isolation of judges would cause some highly qualified individuals to refuse judicial appointment.

If we agree that our legal system does not require total isolation of its judges, how do they maintain these needed social relationships with friends who are lawyers without acting or appearing to act improperly? In researching this topic, and indeed after serving on a lawyer disciplinary body for many years in this state, I am not aware of any long line of cases or significant instruction one can consult. The few cases on point primarily fall into three general areas: the circumstances in which it is improper for a judge to write a letter of recommendation for a friend who is an attorney, the circumstances in which it is improper for a judge to receive a gift from an attorney, and the situations in which a judge should disqualify himself from a proceeding involving attorneys who are friends.

While the general language of Canon 2B may be useful as a statement of ideals, it does not provide guidance to judges who want to know how often they may get together socially with a particular friend who is an attorney. Does it matter if they are both involved in a case that is pending? What posture do they take towards each other at public functions? Does the judge continue to attend his former firm's annual picnic? Can he co-host a firm get-together?

These questions are not easy to answer and the answer may vary depending upon the geographical area in which the judge lives. In the state of Nebraska where there are a number of small communities, if judges took the position they should not play golf with or be seen with former law partners or attorneys who are friends, they would be alone all the time.

Perhaps equally important, the Canon does not provide the public with a measure to evaluate judges' actions. The "appearance of impro-

priety" to be avoided by judges is thus left to public conjecture without assistance from the profession.

I personally have enough confidence in judges and lawyers to believe that they are able to maintain the integrity and impartiality our legal system requires despite the fact they often see each other socially. I do not believe the public shares my confidence. It is clear that the public is interested in the integrity of our legal system and is watching not only the private lives of judges, but everyone involved in public positions a good deal more than ever before. It is good that the public is watching us. It is appropriate that each of us in the legal profession is held accountable by and to the public. The Code supports this. The Commentary to Canon 2B provides: "A judge must avoid impropriety and the appearance of impropriety. He must expect to be the subject of constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly."

Propriety is a concept everyone understands; however, drawing the line between behavior that is proper and behavior that is improper is by no means an automatic process. There is also a big difference between conduct that is clearly improper—a judge rendering an opinion not based on the law and facts of the case—and conduct that the public may possibly view as improper but is not—a judge maintaining a friendship with an attorney who often appears in the judge's court. The Code makes no distinction between these positive acts of impropriety and behavior which may give the "appearance of impropriety" if not properly understood.

A judge may be faced with several alternatives all of which are ethical; however, the appearance of propriety may vary considerably from one alternative to another. To be effective as a guide for conduct, the Code should first of all prohibit those activities that are clearly improper. It should also enumerate those activities that could reasonably give the appearance of impropriety, and therefore should also be prohibited.

The Code should go farther and recognize that it can give content to the slippery concept of "appearance of impropriety". It should explicitly permit and even encourage activities by judges where the risks of judicial sterility and isolation far outweigh any risk of suspicion of impropriety. The profession should, in short, help define for the public a professional standard of "appearance of impropriety" that recognizes in a more sensitive way the trade offs between judicial objectivity and detachment.

Very candidly, I believe a judge must avoid situations where it appears to the public the judge has a special relationship with a particular attorney. A judge must avoid situations that reasonably give the impression his decisions are influenced by favoritism. I believe that

lawyers share equally the responsibility to avoid these situations. From a lawyer's point of view, I can tell you that I have many friends who are on the bench. It has been my experience that when a friend goes on the bench, our relationship immediately changes. It does not mean that I do not feel as interested in that friend or as close to him or her, but it is necessary and proper for our relationship to change. A judge is the highest representative of the court and our legal system. As a lawyer, I act with respect for that position. Hopefully, the public will follow this example and emulate those feelings of respect. In the final analysis, until the Code offers more guidance, all of us in the legal profession need to be sensitive to the public's perception of our conduct and act accordingly. Thank you.