1972

The Code of Judicial Conduct

Walter P. Armstrong Jr.
THE CODE OF JUDICIAL CONDUCT

by

Walter P. Armstrong, Jr.*

THE ORIGINAL thirty-four Canons of Judicial Ethics were adopted by the American Bar Association on July 9, 1924. The draft, which was approved with only one minor modification, was prepared by a Special Committee of the American Bar Association consisting of five members, including its chairman, Chief Justice William Howard Taft. A brief review of the background of this committee may assist in understanding the nature of the problems which led to the formulation of rules of judicial conduct, as embodied both in the original canons and in the recent Code.

In 1905 the American Bar Association appointed a Committee on Professional Ethics. In 1908, as a result of the work of this committee, the first thirty-two of the canons were adopted in their original form. The committee, in the course of its investigation, solicited suggestions regarding judicial conduct as well as professional conduct. It collated this material, and, in the preliminary report which its secretary prepared for the information of the committee members, there was a section devoted to the ethics of the bench. The committee, however, did not consider the time ripe for its inclusion, and upon a close and careful inspection of the resolution under which it was appointed, concluded that it did not have the authority to incorporate in the canons a section on canons of judicial ethics.

However, as early as 1917 the Committee on Professional Ethics of the American Bar Association adopted a resolution "that the suggestion of the propriety of the formulation and promulgation of canons for the judiciary be referred to the Judiciary Section of this Association for consideration in order, if the way be clear, to the appointment [sic] of a committee to take the matter under advisement." Four years later, while still awaiting a reply from the Judiciary Section, the committee report expressed justifiable asperity, and referred to "the duty and expediency of action by the Association as a whole

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1 49 A.B.A. REP. 65-71 (1924).
2 Upon the recommendation of a Special Committee of the Judicial Section appointed to study the proposed Canons, the following words were, with the consent of the drafting committee, deleted from Canon 13: "And if such a course can reasonably be avoided, he should not sit in litigation where a near relative appears before him as counsel." Id. at 67. But cf. ABA CODE OF JUDICIAL CONDUCT Canon 3C(1)(d)(ii) [hereinafter cited as CODE OF JUDICIAL CONDUCT] which requires a judge to disqualify himself under such circumstances.
3 47 A.B.A. REP. 160 (1922). See also 49 A.B.A. REP. 68 (1924). The appointment of the committee was authorized by the Executive Committee of the American Bar Association. 47 A.B.A. REP. 112 (1922).
5 42 A.B.A. REP. 82 (1917).
6 46 A.B.A. REP. 303-04 (1921). The name of the committee had been changed to the Committee on Professional Ethics and Grievances.

708
with reference to the matter of judicial scandals." This reference was apparently prompted by the adoption of a resolution of censure of Judge Kenesaw Mountain Landis for "engaging in private employment and accepting private emolument while holding the position of a federal judge and receiving a salary from the federal government . . . ." John M. Harlan of Illinois, who spoke during the course of the debate on the censure motion, came closest to the heart of the problem when he said: "Perhaps unconsciously to itself the American Bar Association is on trial."

It was apparent that while the American Bar Association might deal with the occasional flagrant case, it could not possibly concern itself with the individual conduct of every judge throughout the country; and yet the difference was merely one of degree. The obvious solution was to establish standards of conduct for judges by which they could be guided in performing their judicial duties, and also in their day-to-day activities which might affect or reflect upon the performance of those duties. That goal was the charge given to the special committee appointed in 1922.

A draft of the proposed canons was completed in January 1923 and published in the February 1923 issue of the American Bar Association Journal, with an invitation to readers to comment. A redraft of the proposed canons was then submitted to the Association at its annual meeting of that year, and, with the concurrence of the committee, the proposed canons were referred to the Judicial Section for its consideration.

A careful comparison of this early draft with the version finally presented for adoption is revealing. One additional ancient precedent, taken from the Magna Carta, was added. There are numerous changes in language, including nine instances where a pronoun is substituted for the word "judge" or its plural.

7 Id. at 305.
8 Id. at 61. The authority for this action was said to be art. IV of the constitution of the American Bar Association, which gave as one of the objectives of the association "to uphold the honor of the profession of the law." But cf. CODE OF JUDICIAL CONDUCT Canons 5, 6, and accompanying comments.
9 46 A.B.A. REP. 66 (1921). Judge Landis was charged with accepting a salary of $42,500 a year from an association of baseball clubs while receiving a salary of $7,500 a year as a federal judge. See id. at 61-62.
10 As the committee said in its final report:
   "The situation ran along until three years ago, when a very forceful illustration occurred in the action of this Association itself at Cincinnati, when it proceeded to pass a resolution in disapproval of the conduct of an individual judge. It was then suggested that it would be much fairer and much better if the Association, instead of picking out individual cases for condemnation, should express its opinion of what the members of the American Bar Association expect from those who sit upon the Bench, to the end that its Canons of Professional Ethics should be as specific with respect to the conduct of judges as with respect to the conduct of members of the Bar."
   See 49 A.B.A. REP. 68 (1924).
12 48 A.B.A. REP. 452-60 (1923).
13 Id. at 74-76. It is interesting to note that the only suggestion made from the floor at the time of this action was that Canon 9 be amended so as to direct a judge to "protect, while they are in court, entering or leaving the same, parties litigant, witnesses and all others whose duties require their attendance upon court, from annoyance and humiliation by picture men and news gatherers." Id. at 76. This suggestion was not adopted but later blossomed into Canon 35. See 62 A.B.A. REP. 350-52, 767 (1937).
14 9 A.B.A.J. 73 (1923).
16 MAGNA CARTA XLV, in ABA CANONS OF JUDICIAL ETHICS, Ancient Precedents.
The original canon dealing with Promises of Candidates was expanded and re-designated Canon 30; Canon 27, dealing with Personal Investments and Relations, was omitted entirely; Canons 4 and 24 were combined into a new Canon 3, as were Canons 8 and 9 into a new Canon 7; Canons 17 and 30 were added, dealing with Ex Parte Communications and Candidacy for Office; Canon 13 was substantially contracted, and Canon 15 substantially expanded. On the whole, the result seems to reveal a tightening, strengthening, and clarifying of the canons, which resulted in a much improved product.

As previously noted, the final draft was adopted with only one deletion, and, thus, the Canons of Judicial Ethics became the standards established by the American Bar Association for the conduct of judges. For the next forty-six years their history was relatively uneventful, with one exception. In 1933 amendments were adopted adding an additional sentence to Canon 28 and modifying Canon 30, so as to prohibit a judge from engaging in party politics, and to require his resignation if he became a candidate for non-judicial office. In 1937, on the recommendation of the Committee on Professional Ethics and Grievances, the words "A judge" were substituted for the pronoun "he" in seventeen of the Canons, including six where the opposite change had been made from the first draft in 1923. Two additional Canons, 35 and 36, dealing with Improper Publicizing of Court Proceedings and Conduct of Court Proceedings respectively, were also adopted.

In 1950 Canon 28 was further modified in order to permit an incumbent judge standing for re-election to engage in certain limited partisan political activities in support of his candidacy. Canon 35 was amended in 1952 by adding the word "televising" and the phrase "distract the witness in giving his testimony" to the first paragraph, and adding an additional sentence permitting the broadcasting and televising of ceremonial portions of naturalization proceedings under appropriate restrictions. Further minor amendments to the same Canon were made in 1963.

Since 1931 the interpretation of the Canons of Judicial Ethics has been in the hands of what is now the Standing Committee on Ethics and Professional Responsibility of the American Bar Association. From the time it was

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17 But cf. CODE OF JUDICIAL CONDUCT Canons 2B, 5C(3) which appear to restore these provisions.
18 See note 2 supra.
19 58 A.B.A. REP. 178 (1933); cf. CODE OF JUDICIAL CONDUCT Canon 7A(1).
20 58 A.B.A. REP. 179 (1933); cf. CODE OF JUDICIAL CONDUCT Canon 7A(3).
21 62 A.B.A. REP. 767 (1937). This report also resulted in substantial revisions of the Canons of Professional Ethics.
22 Id. at 352. In view of the subsequent history of Canon 35, it is interesting to note that the committee's report was not read and there was no discussion on any of the amendments.
23 75 A.B.A. REP. 121, 229 (1950); cf. CODE OF JUDICIAL CONDUCT Canon 7A(2).
24 77 A.B.A. REP. 110, 257 (1952). See also id. at 173, 607, for concurring committee reports, which were likewise adopted apparently without debate. Id. at 114, 429. But in 1963, when a Special Committee on Proposed Revision of Judicial Canon 35 filed an extensive report upholding the validity of Canon 35 and recommending only minor modifications in it, a major debate was precipitated which nevertheless resulted in the adoption of the recommendation. See 88 A.B.A. REP. 115, 305 (1963).
26 See 61 A.B.A. REP. 993 (1936). ABA By-Laws art. X, § 7(i), as amended. During this period the committee has been named variously the Committee on Professional Ethics
given that authority through December 11, 1965, the committee issued 277
formal opinions\(^8^7\) of which only thirty-eight interpret one or more of the
Canons of Judicial Ethics, while sixteen of the Canons have no interpretative
opinions at all.\(^8^8\) Thus, it is quite apparent that the major emphasis has been
placed upon the conduct of the bar and not that of the bench. But a series of
events which constitute a striking repetition of history soon changed all that.

In 1964 a special committee was appointed and authorized "to study . . . the
adequacy and effectiveness of the present Canons of Professional Ethics, in-
cluding their observance and enforcement, and to make such recommendations
for changes therein as may be deemed appropriate to encourage and maintain the highest level of ethical standards by the legal profession."\(^8^9\) No mention was
made of judicial ethics. In 1969 the committee filed its final report, which
was adopted, and thus the Code of Professional Responsibility came into being.\(^9^0\)
But again, no reference was made to judicial ethics, and the Code, by its terms,
applies to judges only to the extent that they are themselves members of the
bar.

Nevertheless, the formulation and adoption of the Code of Professional
Responsibility furnished the background for the instigation of the Code of
Judicial Conduct, just as the adoption of the original Canons of Ethics in 1908
resulted in the adoption of Canons of Judicial Ethics in 1924. As a result of
a series of occurrences, public interest in judicial conduct was at a new height.
The Standing Committee on Ethics and Professional Responsibility recognized
this in its Formal Opinion 322,\(^9^1\) which summarized virtually all of the com-
mittee's previous opinions on the subject, and concluded:

The public is conscious of problems of possible conflicts of interest at the
present time. The public is rightfully concerned with the interests of legisla-
tors, of lawyers, of businessmen and the basis on which their decisions are
made. The public rightfully is interested in the appearance of impropriety on
the part of its judges, and the public's judges should conform to the standards
set forth many years ago by the thoughtful members of the legal profession
and codified in the Canons of Judicial Ethics.\(^9^2\)

Shortly thereafter the committee was asked to express its view as to "the
ethical propriety of acceptance by a judge of an annual salary from a tax
exempt foundation."\(^9^3\) It declined to do so, pointing out that it did "not have
any procedures for investigation or determining facts, as a court or a grievance
committee does."\(^9^4\) Stating that the facts furnished by the inquirer were in-

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\(^8^7\)See ABA Opinions on Professional Ethics, supra note 26. December 11, 1965,
is the date of the last reported opinion in the bound volume.

\(^8^8\)Id. at 198-229. The remaining opinions, of course, interpret the Canons of Professional
Ethics.

\(^8^9\)A.B.A. Rep. 383 (1964). The italics, which are in the original, indicate words
substituted by amendment for the words "a high level."

\(^9^0\)A.B.A. Rep. 389 (1969). For a full account of the development of the Code, see
Armstrong, supra note 4, at 280-82.


\(^9^2\)Id. at 11-12.

\(^9^3\)ABA Comm. on Ethics and Professional Responsibility, Informal Opinion No. 1117
(July 20, 1969).

\(^9^4\)Id.
sufficient to afford a basis for a conclusion, the committee merely referred to Formal Opinion 322 as affording general guidelines for judicial conduct.

Only four days later, the committee issued Informal Opinion 1114 in the form of an advisory opinion to the president of the American Bar Association on the subject: "Did the conduct of a former federal judge in his relation to a Family Foundation violate the Canons of Judicial Ethics?" Although the federal judge was not identified, the committee rendered its opinion "in view of the importance to the profession and in recognition of the public interest in the controversy," and despite the fact that "during the pendency of the controversy, the judge resigned his judicial position."

The committee, reiterating its lack of fact-finding and investigative powers, nevertheless proceeded to state the facts upon which its opinion was based, taking them from the judge's letter of resignation. The judge, after his appointment, had accepted a $20,000 payment from the family foundation of a financier with whom he had previously had professional connections, and who was under investigation for possible criminal violation of the federal securities laws. The financier was subsequently indicted and convicted on one count, the conviction being subject to review by the court upon which the judge sat, although that court, without his participation, refused to review the case. The committee then cited eight of the Canons of Judicial Ethics under which it reached the conclusion that "the conduct of the judge described in the statement of the facts, was clearly contrary to the Canons of Judicial Ethics . . . ."

The parallel between this situation and that which gave rise earlier to the adoption of the original Canons of Judicial Ethics is readily apparent. Three weeks after Informal Opinion 1114 was issued, the board of governors of the American Bar Association approved the creation of a Special Committee on Standards of Judicial Conduct. This committee was to consist of not more than twelve members appointed by the president of the American Bar Association. Its purpose was to study and report to the board of governors and the house of delegates on the adequacy and effectiveness of the present Canons of Judicial Ethics, including their observance and enforcement. The committee was expected to make such recommendations for reformation of the canons as it deemed appropriate, in an effort to encourage and maintain the highest level of ethical standards by the judiciary.

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35 ABA Comm. on Ethics and Professional Responsibility, Informal Opinion No. 1114 (July 24, 1969). Note that although this opinion bears an earlier number, Informal Opinion 1117 antedates it. Although Informal Opinions are ordinarily summarized in the American Bar Association Journal, this does not appear to have been done in this particular case. Copies of the opinion can be obtained from ABA Headquarters. It was distributed to a limited mailing list upon publication.

36 Id.; see R. SHOGAN, A QUESTION OF JUDGMENT 265 (1972).

37 The committee noted: "Any substantial difference between these stated facts and any facts that may be subsequently disclosed might change our conclusion." Informal Opinion No. 1114, supra note 35.

38 ABA CANONS OF JUDICIAL ETHICS Nos. 1, 4, 13, 24, 25, 26, 31, 34.

39 Informal Opinion No. 1114, supra note 35. The opinion was unanimous on the part of those participating. The chairman disqualified himself from participation.

40 See note 8 supra, and accompanying text.

41 95 A.B.A. REP. 165 (1970). The chairman of the Standing Committee on Ethics and Professional Responsibility was subsequently made an ex-officio member of the committee. Id. at 168.
The preliminary report of the committee reflects the fact that before beginning its task the committee requested suggestions from each state bar association, major local bar associations, the Appellate Judges’ Conference, the National Conference of Special Court Judges, major news media organizations, members of the Conference of Chief Justices, each federal judge, law school deans, the American Judicature Society, the Federal Judicial Center, the Administrative Office of the United States Courts, and the Institute of Judicial Administration. In addition, the reporter for the committee examined judicial standards in state constitutions and statutes, as well as the canons of judicial ethics and standards of conduct for judges of the various states and the resolutions of the Federal Judicial Conference. Based upon this survey, the committee concluded that it should first concentrate on important matters that were “dealt with inadequately or not at all in the existing canons, including conflict of interest, financial reporting and public disclosure, and non-adjudicatory activities of judges such as law teaching and serving as officers or directors of business corporations, before turning to the revision of the present canons.”

Because of the pressing nature of this matter, the committee decided to formulate and submit specific conclusions, rather than written proposed canons, for the consideration of the bench, bar, public, and the media.

These specific conclusions, applicable only to full-time judges, were formulated in nine statements dealing with judicial duties, quasi-judicial activities, civic and charitable activities, fiduciary relationships, personal relationships, compensation and expenses, disqualification, and legal and political activity, together with a final section dealing with the effective date of compliance. Fourteen thousand copies of this draft were mailed to the members of the house of delegates of the American Bar Association, members of the Section of Judicial Administration, members of the Conference of Trial and Appellate Judges, and various other individuals and groups whose comments would be particularly helpful. Public hearings were held during the annual meeting of the American Bar Association in St. Louis in 1970, and those who could not attend were invited to submit their views in writing. Thereafter, it was contemplated that the committee would turn at once to the actual drafting of proposed new canons on the matters which were dealt with in this first draft, as well as an examination and, where necessary, revision of the remaining existing canons, the end product to be a new “Code of Ethics for Judges” which would be a comprehensive and symmetrical whole.

Although two more years were to pass before this objective was to be achieved, the proposals of 1970 constitute the first publicly available draft of what ultimately became the Code of Judicial Conduct. As such, it furnishes a starting point from which the evolution of certain basic concepts of the Code may be viewed. A comparison of this early version with the finished code is enlightening both as to those principles which remained firmly fixed during its development and as to the manner in which the Code has evolved over time.
velopment and those which were modified as a result of being tested against the day-to-day problems of the sitting judge.45

Such a comparison reveals that as early as August 1970 the committee had already developed the framework upon which all of its subsequent work was to be based. A further consideration of the committee's activities after the formulation of the preliminary draft will serve to corroborate this view.

At the conclusion of its 1970 annual meeting, Edward L. Wright became president of the American Bar Association, and voiced his support for the committee's project:

Confidence in the courts is vital to the stability of our society. The public's confidence has been shaken in recent years by occasional widely publicized examples of questionable conduct. The public is entitled to know that judges respect and conform to higher standards.

The overwhelming majority of judges want to do right and deplore judicial misconduct, and it is desirable that they have a modern statement of the norms and guides expected of them so they can conform fully. We will also welcome new and clearer standards that will permit them to know just what is expected of them. The Committee's proposals when perfected and adopted will make an important contribution to preserving the prestige of the courts and maintaining this country's heritage of judicial independence and integrity.46

Encouraged by this support, the committee immediately embarked upon a second tentative draft, which, however, was not completed by the time of the mid-winter, 1971, meeting of the American Bar Association. The committee merely filed a progress report,47 which predicted final submission of the Code at the 1972 annual meeting, a forecast which the committee was ultimately able to fulfill.

The second tentative draft was published in May 197148 under the title

45 The first standard of the preliminary draft is embodied substantially unchanged in the opening sentence and subsection A(1) under Canon 3 of the Code of Judicial Conduct, but the Code elaborates considerably upon that basic concept. The second standard is covered by Canon 4 of the Code, which somewhat broadens the scope of permissible individual activities in support of improvements in the administration of justice and the law. The third standard is almost identical with paragraph B under Canon 5 of the Code, which, however, adds a prohibition against giving investment advice. The fourth standard is the same as paragraph D under Canon 5 of the Code, except that "member of his family" is defined. The fifth standard corresponds to paragraph B under Canon 2 of the Code, except that an absolute prohibition against voluntary testimony as a character witness has been added. The sixth standard is somewhat modified by paragraph C under Canon 5 of the Code, which is more liberal in permitting participation in outside business activities, particularly under the alternative provided. The seventh standard coincides with the text under Canon 6 of the Code, except that the report is to be made at least annually rather than semi-annually. No report of expense reimbursement is required in view of the fact that excessive expense payments are defined as compensation. The eighth standard is carried forward in paragraphs C and D under Canon 3 of the Code, which also deals with disqualification other than on account of financial interest, and makes disclosure on the part of the judge voluntary rather than mandatory. The ninth standard is divided between paragraphs E, F, and G under Canon 5 and paragraph A under Canon 7 of the Code, under the first of which service as an arbitrator is strictly prohibited. The final provision of the preliminary draft under the heading "Effective Date of Compliance" is substantially the same as that which appears under the same heading in the Code.


47 Id. at 310.
"Canons of Judicial Ethics," and copies were immediately sent to 15,000 lawyers, judges, media representatives, and other interested individuals. As a result of the distribution of this draft, more than five hundred suggested revisions were received from twenty-seven committees of bar associations and other groups, from special committees of judicial organizations, and from individuals. All of these were considered, and many adopted, in formulating the final draft of the Code, a preliminary version of which was completed in January 1972 and distributed to the house of delegates prior to the mid-winter meeting in that year. Several members of the house of delegates made suggestions, some of which were embodied in the final draft which was released for general circulation in May 1972.

This draft, entitled "Code of Judicial Conduct," consists of a preface, seven canons with text and commentary, a section on compliance, and a final section on the effective date of compliance. The alteration in the title from that of the tentative draft is apparently in recognition of the fact that the Code contains more than merely canons of judicial ethics, embracing also standards of conduct and suggested means of meeting those standards. This fact is made explicit in the preface, which states: "In the judgment of the Association this Code, consisting of statements of norms denominated canons, the accompanying text setting forth specific rules, and the commentary, states the standards that judges should observe. The canons and text establish mandatory standards unless otherwise indicated."

The preface then goes on to express the hope that all jurisdictions will adopt the Code and establish effective disciplinary procedures for its enforcement. The Code itself does not undertake to provide procedures either for its implementation or enforcement. It merely sets forth principles, standards, and objectives by which the conduct of judges should be governed if they are to fulfill their judicial duties. A statement of each of the canons, with a brief summary of the accompanying material, will make this clear.

**Canon 1. A Judge Should Uphold the Integrity and Independence of the Judiciary.** The text under this canon is a rearrangement of that which first appeared in the tentative draft. It requires a judge not only to observe, but to assist in establishing, maintaining, and enforcing high standards of conduct. A proviso that the provisions of the Code should be construed to further this objective is also included.

**Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.** The text is substantially that of Canon 5 of the...
tentative draft, except that the word "voluntarily" has been inserted in the prohibition against testifying as a character witness. This is explained by a sentence added to the commentary which makes it clear that the canon "does not afford him a privilege against testifying in response to an official summons." The first paragraph of the text requires respect for, and compliance with, law and appropriate public conduct. The second, which reflects section 5 of the preliminary draft, warns against the influence or apparent influence of extraneous relationships upon judicial actions.

Canon 3. A Judge Should Perform the Duties of His Office Impartially and Diligently. This canon covers the entire range of judicial activities, which it provides shall take precedence over all other activities of a judge, a concept derived from section 1 of the preliminary draft. These duties are those prescribed by law, which presumably includes common law, statute, and rule of court. The text under this canon is divided into sections on adjudicative responsibilities, administrative responsibilities, disqualification, and remittal of disqualification.

A. Adjudicative Responsibilities. There are seven subheadings under this section. The first of those requires that a judge not only be faithful to the law, but maintain his competence in it, as well as his independence of judgment. While the term "faithful to the law" is reminiscent of the generalities of the pre-existing canons, the requirement that a judge maintain professional competence injects an entirely new idea into the Code, derived primarily from the Code of Professional Responsibility, where a similar requirement is established for lawyers.

The next four subsections require a judge to maintain order and decorum; to be patient, dignified, and courteous towards all with whom he deals, and require similar conduct of those subject to his direction and control; to afford every interested party a full hearing according to law; and to dispose promptly of the business of the court. In these days of disruptive trial practices, these are more than mere admonitions.

Section 4 prohibits the initiation or consideration of ex parte communications in a pending or impending proceeding, but makes one significant exception. It permits a judge to obtain the advice of a disinterested expert on the law applicable to the case before him if he gives adequate notice to the parties and affords them an opportunity to respond. This exception did not appear in the corresponding section of the tentative draft, and, therefore, presumably resulted from reaction to the strict prohibition embodied in that draft. The commentary makes it clear that it is intended to permit limited consultation by the judge with law teachers and others similarly qualified. Of course, a judge may always consult with his fellow judges, and the filing of amicus curiae briefs is encouraged.

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54 CODE OF JUDICIAL CONDUCT Canon 2, Commentary.
55 ABA CODE OF PROFESSIONAL RESPONSIBILITY Canon 6, Disciplinary Rule 6-101. See also id. Canon 8, Ethical Consideration 8-6, where it is said, "Judges ... ought to be persons of integrity, competence, and suitable temperament."
56 See ABA, STANDARDS RELATING TO THE JUDGE'S ROLE IN DEALING WITH TRIAL DISRUPTIONS (1971); AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS ON DISRUPTION OF THE JUDICIAL PROCESS (1970).
Section 6 requires a judge to abstain from public comment upon pending or impending proceedings before him, and to require similar abstention from those under his control. He may, however, make public statements in the course of his official duties or explain for public information the procedures of the court.57

The final section under this heading generally prohibits the broadcasting, televising, recording, or photographing of court proceedings. Exceptions are made for the perpetuation of a record or other purpose of judicial administration, for the publicizing of investive, ceremonial, or naturalization proceedings, and for instructional purposes in educational institutions with the consent of the parties and participating witnesses when the means of recording is not distracting and the recording will not be exhibited until after the proceeding is concluded and all appeals exhausted. This last exception is a departure from the language of the tentative draft, which made no mention of exhausting appeals. Obviously the final version is much more restrictive, although less so than the pre-existing Canon 35.

B. Administrative Responsibilities. The first two subsections under this heading require diligence and competence of the judge in the discharge of his administrative responsibilities, and also require him to facilitate the performance of such duties by other judges and court officials and to require similar standards of those under his direction and control. Here again, as in the case of adjudicative duties, the requirement of competence is a new concept.

Section 3 requires a judge to take or initiate appropriate disciplinary measures against a lawyer for unprofessional conduct of which he may become aware. Obviously this includes not only such conduct in a proceeding pending before him, where he may act directly through a citation for contempt, but also conduct which may come to his attention indirectly, where, as the commentary makes clear, he has an obligation to report such misconduct to the appropriate disciplinary body.58

Section 4 deals with a judge's power of appointment, admonishing that all such appointments should be on a basis of merit. It prohibits nepotism, favoritism, unnecessary appointment, and excessive compensation, which rule, as the commentary says, cannot be modified by consent of the parties.

C. Disqualification. This section originated in section 8 of the preliminary draft, which provided for mandatory, but, in the case of an insubstantial interest, waivable, disqualification. Full disclosure was required in any case where directly or indirectly the judge had an interest, however slight (including an interest in a mutual fund having a substantial interest) in a party or in the res or issue in controversy. This was considerably expanded in the tentative draft, which laid down the general rule that a judge should disqualify himself in any case in which his impartiality might be questioned, and cited specific examples of instances which would provide an adequate basis for disqualification.

57 Cf. ABA, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1966).
58 ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 167 (Final Draft, June 1970).
The final draft adopted in substance the language of the tentative draft concerning the first two instances of specific grounds for disqualification. In the first, "personal bias or prejudice concerning a party" was substituted for "fixed belief concerning the merits." The second was expanded to include participation as a lawyer or material witness by a former legal associate of the judge who was concerned with the matter during the period of such association, except, as the commentary points out, where the association was in government service, unless such association might furnish a reasonable basis for questioning the judge's impartiality. The next two subsections of the tentative draft were also adopted, but with significant changes and in reverse order. The family financial interest of which the judge must take cognizance was limited to that of his spouse or minor child living in his household. The word "trustee" was added and the phrase "an interest that could be substantially affected by the outcome of the proceeding" was substituted for "a substantial interest in the matter in controversy or the affairs of a party to the proceeding." The obligation of the judge to inform himself about his own personal and fiduciary financial interests was made absolute, and the requirement of reasonable effort to acquire similar information as to members of his family was limited to his spouse and minor children residing in his household. The definition of "financial interest" was not limited to an economic interest, and the exceptions recognize that the interest of a judge in securities held by a mutual fund may be substantial if he participates in the management of the fund. The offices which may be held in charitable and similar organizations without acquiring an interest in securities held by them were not limited to fiduciary offices. The words "government securities" were substituted for "government bonds" in the final subsection.

It is apparent that this particular section of the Code underwent a long and intricate evolution before reaching its final form. Obvious alternatives must have been considered and rejected, such as requiring full public disclosure of a judge's financial interests or requiring a substantial interest as a basis for disqualification. There are proponents of these and other possible solutions to this knotty problem, and that which the drafting committee has selected no doubt will not please everyone. It appears to be, however, a reasonable and workable compromise between the right which a judge shares with every citizen to privacy in his personal affairs, and the right of those who appear before him to a fair and impartial trial.

D. Remittal of Disqualification. This section provides for voluntary and discretionary disclosure by the judge of an economic interest or family relationship which he believes to be insubstantial or immaterial, but which gave rise to his disqualification. Based upon this disclosure, a waiver by the parties and lawyers in writing, independently of the judge's participation, agreeing that his interest is immaterial or insubstantial, will allow the judge to proceed to hear

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59 In class actions the parties are the named representatives of the class, according to the commentary.
60 The judge and his spouse are also brought within the direct prohibition of the section, thus eliminating a possible ambiguity.
61 But cf. CODE OF JUDICIAL CONDUCT Canon 5B(3).
63 See CODE OF JUDICIAL CONDUCT Canon 5C(6).
and dispose of the case. The waiver then becomes a part of the record in the case. This provision appears to follow substantially that of the tentative draft, although the language has been improved and the procedure somewhat simplified. In the commentary, the reference to class actions has been omitted, although it would still seem to apply. A provision was added that where a party is not immediately available, the judge may proceed upon counsel’s written assurance that his client’s written consent will be subsequently filed. The importance of this waiver provision in jurisdictions having a single judge or others having crowded dockets is apparent.

**Canon 4. A Judge May Engage in Activities To Improve the Law, the Legal System, and the Administration of Justice.** Subject to the proper performance of his judicial duties and the avoidance of the appearance of impropriety, this canon permits a judge to speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice. These are defined as “quasi-judicial” activities. “Other activities” include appearances at public hearings before executive and legislative bodies or officials. Private consultation, however, is limited to matters concerning the administration of justice, and serving as a member, officer, or director of, or assisting in the raising or management, but not public solicitation, of funds for, or contacting public or private fund-granting agencies on behalf of, organizations devoted to those purposes.

This was a broadening of the provisions embodied in the tentative draft, as the authority to appear before public hearings on matters other than the administration of justice and to contact fund-granting agencies has been added, and the word “assist” substituted for “endorse” in connection with fund-raising efforts. The commentary points out that a judge is in a unique position to contribute in these fields, and should be encouraged to do so either independently or through appropriate organizations. Two other paragraphs of commentary which appeared in the tentative draft but are inappropriate to the final text were omitted.

**Canon 5. A Judge Should Regulate His Extra-Judicial Activities To Minimize the Risk of Conflict with His Judicial Duties.** Under this canon there are seven subdivisions of varying significance. The first permits a judge to write, lecture, teach, or speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities if they do not detract from the dignity of his office or interfere with his judicial duties. The commentary recognizes that the isolation of judges from society is neither possible nor wise.

The next section covers civic and charitable activities. This is an area which has been the subject of much dispute. The Code takes the position that a judge may participate in such activities, and may serve as an officer, director, trustee, or non-legal advisor of an organization so engaged, provided always that they do not interfere with his judicial duties or reflect upon his impartiality. However, he should not do so if the organization is likely to be engaged in proceedings which would ordinarily come before him, or is regularly engaged in adversary proceedings in any court. Nor may he solicit funds for such an or-

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*Canon 5 deals with "extra-judicial activities."*
ganization or lend the prestige of his office for that purpose or give investment advice, although he may serve and be listed as an officer, director, or trustee, even though the board of which he is a member passes upon investments, and may attend fund-raising events so long as he is not a speaker or guest of honor. 48

Financial activities, the subject of the next section, is perhaps the most difficult field with which the Code deals. The initial provision admonishes a judge to refrain from financial and business dealings that tend to reflect upon his impartiality, interfere with his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before him. Subject to this he may hold investments and engage in other remunerative activities, but should not serve as an officer, director, manager, advisor, or employee of any business. Clearly, he should arrange his investments and other financial interests so as to minimize any risk of disqualification. He should not use information acquired by him in his judicial capacity for non-judicial purposes. He is not, however, required to disclose his income, debts, or investments except as provided in the Code. 66

In theory, these requirements should be strictly enforced, and that was the position taken in the preliminary and tentative drafts. But such vigorous application presupposes adequate judicial compensation, and unfortunately this is not always the case. In some, if not many, state systems, the salary scale is such that a judge simply cannot live and support a family without access to outside sources of revenue. As the commentary notes, the remedy is to secure adequate judicial salaries. But this is often more easily said than done. Therefore, the Code provides for "[j]urisdictions that do not provide adequate judicial salaries but are willing to allow full-time judges to supplement their income through commercial activities" an alternative provision omitting the prohibition against serving as an officer, director, manager, advisor, or employee of any business, and substituting an explicit authorization to engage in other remunerative activity, including the operation of a business. Even then, a caveat is inserted against certain types of businesses such as banks, public utilities, insurance companies, and others affected with a public interest.

The Code, following the preliminary draft and the tentative draft, prohibits a judge or a member of his family residing in his household from accepting a gift, bequest, favor, or loan from a party or other person whose interests have come before him. 47 Exceptions are made for gifts incident to a public testimonial; books supplied by publishers on a complimentary basis; invitations to bar-related activities or those devoted to the improvement of the law, the legal system, or the administration of justice; ordinary social hospitality; a gift, bequest, or loan from a relative; a loan upon ordinary terms from a regular lending institution; or a scholarship or fellowship awarded on the usual terms.

Under Canon 5, following section 4 of the preliminary draft, a judge is prohibited from serving as executor, administrator, guardian, or other fiduciary, except for a member of his family, as there defined, and then only if such ser-

45 These provisions originated in § 3 of the preliminary draft. The last two, however, do not appear there or in the tentative draft.
46 See CODE OF JUDICIAL CONDUCT Canons 3D, 6C.
47 All other gifts in excess of $100 must be reported in accordance with Canon 6C.
vice will not interfere with the proper conduct of his judicial duties. He should not serve if it is likely that as such fiduciary he will be engaged in proceedings that would likely come before him. If he does serve, he is subject to the same restrictions that apply to him in his personal capacity.88

Finally, under this canon a judge is prohibited from practicing law, acting as an arbitrator or mediator, or accepting appointments to a governmental committee, commission, or other position concerned with issues of fact or policy other than the improvement of the law, the legal system, or the administration of justice.89 However, a judge may represent his country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities.

Canon 6. A Judge Should Regularly File Reports of Compensation Received from Quasi-Judicial and Extra-Judicial Activities. Canons 4 and 5 presuppose that a judge may receive compensation for quasi-judicial and extra-judicial activities, and Canon 6 makes this explicit, provided the amount is reasonable and the source does not give the appearance of influencing him in his judicial duties or other impropriety. However, the amount and source of such compensation, and the date, place, and nature of the activity for which it was received must be embodied in a public report filed at least annually with the clerk of the court or other designated office. Expense reimbursement in excess of actual expenditures is classified as compensation, and gifts in excess of one hundred dollars must be similarly reported.90 Income of a spouse attributed to the judge by operation of community property law is specifically exempted. This provision differs from section 7 of the preliminary draft, which required a similar report to be made within six months after the payment was received, and also required the reporting of the source (but not the amount) of all expense reimbursement.

Canon 7. A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office. The preliminary draft dealt with this entire subject in a single sentence: "He should not engage in political activity except to the extent necessarily involved in obtaining or retaining judicial office through an elective political process."91

The difficulty with this approach is that a great many judges in order to retain their position on the bench must prevail in periodic elections, and the extent of political activity necessary to do this varies widely. Therefore, some guidelines are required as to just how far an incumbent judge may go in his political activities in order to retain his office.

The tentative draft endeavored to supply those guidelines. This draft made the restrictions applicable to a "judge or candidate for elective judicial office,"92

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88 See CODE OF JUDICIAL CONDUCT Canon 6C.
89 The commentary gives as a reason for this latter prohibition, "the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial." CODE OF JUDICIAL CONDUCT Canon 5G, Commentary.
90 CODE OF JUDICIAL CONDUCT Canon 5C(4) (c).
92 Obviously an amendment to the Code of Professional Responsibility will be necessary to implement this provision, as the Code of Judicial Conduct applies only to incumbent judges, not to lawyers seeking election as judges.
thus putting both candidates on an equal footing. It then laid down six rules, dealing with the conduct of a judge who is not a candidate, of a judge who becomes a candidate for a non-judicial office, and of a judge who is a candidate for a judicial office, and the conduct of those under his control. The provisions of the tentative draft overlapped confusingly in a way which was only resolved when the final draft dealt with them under the two headings of “Political Conduct in General” and “Campaign Conduct.”

Under the first heading, a judge or candidate may at no time act as a leader or hold any office in a political organization, make speeches in support of such an organization or its candidate, or publicly endorse its candidate for public office. He may not solicit funds, make a contribution to such an organization, purchase tickets for political party dinners or other functions, or attend political gatherings. An exception is made for a judge holding an office filled by election between competing candidates or a candidate for such office, allowing him, insofar as permitted by law, to attend political gatherings, speak to such gatherings on his own behalf where he is a candidate for election or re-election, and contribute to a political party or organization. A judge who becomes a candidate for non-judicial elective office other than as a delegate to a state constitutional convention should resign his office.

During the campaign, the candidate for elective judicial office should maintain the dignity appropriate to judicial office, and endeavor to require the same standards of members of his family and those under his control. While he may not himself solicit funds or public support, he may, if he has active opposition, establish a committee to do so, provided it functions only for a fixed brief time before and after the election. Such funds and support may be solicited by the committee from lawyers, but, of course, none of the funds should be used by the judge for his personal purposes or those of his family. The commentary suggests that unless public filing is required by law, the names of the contributors should not be revealed to the judge.

There are two other sections to the Code, one dealing with compliance and the other with the effective date of compliance. The first requires compliance by all judges, which includes any officer of a judicial system performing a judicial function, including referees in bankruptcy, special masters, court commissioners, and magistrates. In the case of full-time judges, this requirement is unqualified. However, part-time judges are relieved from the restrictions on outside remunerative activities. A part-time judge may not practice law in any court upon which he serves or before a court which is subject to the appellate jurisdiction of the court upon which he sits, and, further, he should not act as a lawyer in any proceeding in which he has served as a judge, or any proceeding related thereto. A judge pro tempore—one who is appointed to act temporarily—is relieved of the same restrictions and also those requiring him to handle
his investments so as to minimize the possibility of disqualification. He should not, however, act as a lawyer in any proceeding in which he has participated as a judge, or in any related proceeding. A retired judge receiving full compensation, but subject to recall, may accept appointment to governmental committees or commissions concerned with issues of fact or policy, so long as he refrains from judicial service while doing so; otherwise, he is considered a full-time judge. All other retired judges subject to recall are considered part-time judges. A retired judge not subject to recall is by definition not a judge.

The final section of the Code requires compliance with its provisions as soon as reasonably possible. Yet it permits, if the demands on his time and the possibility of conflicts of interest are not substantial, a judge who holds office on the effective date of the Code to continue to act as an officer, director, or non-legal advisor of a family business, or as executor, administrator, trustee, or other fiduciary for the estate or person of one not a member of the judge's family.

On August 16, 1972, the final draft of the Code of Judicial Conduct was presented for approval to the House of Delegates of the American Bar Association at its annual meeting in San Francisco. After full discussion, it was adopted by unanimous vote with only two minor changes for purposes of clarification, both accepted by the drafting committee. Thus, the Code of Judicial Conduct became the official expression by the American Bar Association of its views on the public activities of the members of the judiciary.

But this is only the beginning. As a mere suggestion by the bar, the Code is obviously ineffectual until adopted by the judges themselves in such form as to be capable of enforcement. Ordinarily, this would be by rule of court of each of the state judicial systems and of the federal system. Accordingly, immediately following the approval of the Code, a member of the drafting committee moved that a special committee of twelve members be created to secure adoption of the Code of Judicial Conduct in each of these jurisdictions. This motion also passed without dissent.

When the task of this committee has been accomplished, then through the joint efforts of bench and bar, specific standards will have been established for the public conduct of judges. Not only should this serve to restore public confidence in the judiciary, but it should be beneficial to the judges themselves in affording them guidelines against inadvertent transgressions. Then perhaps

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78 Id. Canon 5C(3).
79 Canon 5G prohibits such service by full-time judges.
80 This is derived from § 10 of the preliminary draft. Canon 5D permits a judge to serve in a similar capacity for a member of his family under limited circumstances.
81 In Canon 3A(7) at the suggestion of media representatives the word "immediately" was inserted before the word "adjacent," and the Code was presented with this single change. From the floor a representative of the Conference of State Attorneys General offered three amendments which on vote were rejected. These would have added the word "employee" to Canon 5C(1)(d)(i), defined the civil law system of determining relationship under Canon 3C(3)(a), and clarified a suggested contradiction between the definition of a "financial interest" as "a legal or equitable interest, however small" and the reference to a financial interest as "insubstantial" in Canon 3D. An additional suggestion from the floor that the words "or judge" be added following the word "lawyer" in Canon 3B(3) was accepted by the Committee.
82 Mr. Whitney North Seymour of New York.
the ancient precedent prefixed to the original Canons of Judicial Ethics will at last find its fulfillment: "The place of justice is a hallowed place; and therefore not only the Bench, but the foot pace and precincts and purrise thereof ought to be preserved without scandal and corruption."  

88 The "Ancient Precedents," as a part of the Canons of Judicial Ethics, were reprinted in ABA CANONS OF PROFESSIONAL ETHICS, OPINIONS OF THE COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES (1957), but not in the subsequent replacement volume, ABA OPINIONS ON PROFESSIONAL ETHICS (1967). There appears to be no authority for this omission other than the whim of the editor.  

84 Bacon, Of Judicature in ABA CANONS OF JUDICIAL ETHICS, Ancient Precedents.