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A NEED FOR CONTINUING EDUCATION IN JUDICIAL ETHICS

HOWARD T. MARKEY*

I. INTRODUCTION

Judges—both experienced and inexperienced—need continuing education in judicial ethics. Judges need to be educated about judicial ethics upon first taking the bench, and they also need to be reminded of and brought up-to-date about judicial ethics while they remain on the bench.¹ Further, judges need to be educated about judicial ethics at seminars or conferences, not only to learn the rules of judicial ethics and the application of the rules, but also to get reinforcement in ethical conduct from their fellow judges. Education about judicial ethics would benefit judges individually and collectively. Seminars on judicial ethics would provide a means by which judges, through exchange of ideas and experience, could anticipate and resolve the many and ever-increasing ethical challenges confronting judges.

II. JUDGES AND ETHICS

Unlike judges in other nations, judges in the United States learn the art of judging, for the most part, through on-the-job training.² Unlike judges in Great Britain who are selected from barristers who have spent their professional lives in the courts and Inns, judges in the United States may be elected or appointed

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1. As to the need to educate judges about judicial ethics when they first take the bench, see Howard T. Markey, *A Judicial Need for the 80's: Schooling in Judicial Ethics*, 66 NEB. L. REV. 417 (1987). As to the need to continue to educate judges about judicial ethics, I have addressed this issue many times over the years at seminars and conferences. The need still exists and will continue to exist.

2. Judges may receive schooling in the art of judging or the law at law schools, such as the masters program at the University of Virginia Law School; the National Judicial College in Reno, Nevada for state judges; the Federal Judicial Center in Washington, D.C. for federal judges; or at mandated judicial conferences for federal judges (see 28 U.S.C. 28, §§ 331, 333) or state judges such as those in Illinois (see ILL. CONST. arts. 6, 17) or Indiana (see IND. CODE § 33-13-14-1 (1988)). Illinois at one time required all of its judges to attend a half-day session on judicial ethics at its annual judicial conference. It later required ethical issues to be presented pervasively in sessions on substantive and procedural law at the conferences. Recently Illinois switched from an annual conference for all its judges to regional conferences.

from diverse professional backgrounds, often with limited courtroom experience.³ Once on the bench, a judge has much to learn about the art of judging. A judge must master both substantive and procedural law.⁴ But there are practical constraints. A judge may have a heavy caseload that requires managing a calendar involving diverse cases. A judge may at any time hear cases ranging from a simple contract case to a highly complex commercial class action. Some judges, by reason of locale or the assignment system, may be forced to be competent generalists in an area of the law that is considered by the practicing bar to be a specialty.⁵ A judge must be an expert in procedure and evidence. In addition, most judges have administrative duties and committee assignments.

Many judges take the bench without education in professional ethics other than a course in law school.⁶ The volume and diversity of cases leaves most judges little time to contemplate judicial ethics. The immediacy of managing and resolving cases, rather than a lack of concern about judicial ethics, limits time spent contemplating judicial ethics. Thus, a judge often is faced with ethical issues that pop up unexpectedly and unhappily like some evil genie. Without a sound education in judicial ethics, a judge may not timely recognize the ethical issue or be fully equipped to handle it effectively. Indeed, "[j]udges today are under increased pressure to discern proper ethical conduct not only in all of their judicial and extra-judicial activities, but also with respect to the activities of their families."⁷

3. On the whole, judges in the United States do remarkably well in the art of judging. This is a tribute to the judges themselves and the law schools that educate them.

4. Judges in our adversary system should comfortably rely on counsel in presenting the issues and the applicable law fully and fairly. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1990) (Candor Toward the Tribunal); FED. R. CIV. P. 11, Signing Pleadings, Motions and Other Papers. Unfortunately experience teaches that judges cannot take too much comfort in some adversarial presentations.

5. As to locale, rural judges may face different problems in application of judicial ethics than urban judges. *Thirteenth National College Involves Judges and Conduct Commissioners*, JUD. CONDUCT REP., Fall 1992, at 1, 7 [hereinafter *Thirteenth National College*]. See *In re Haddad*, 627 P.2d 221, 231 (Ariz. 1981), in which the court that censured a judge observed:

We are also aware that in a small precinct such as respondent's, many if not most of the people who appear before the court are well known to the judge. This puts strong and at times seemingly unfair pressure on the justice of the peace in discharging his duties, especially just before the election.

As to specialty, a patent case is tried before a federal district court judge who is a generalist but appealed to the Court of Appeals for the Federal Circuit, *inter alia*, a court specializing in patent cases. 28 U.S.C. § 1295 (1988).

6. Judges, however, are expected to be knowledgeable in the rules of judicial ethics on taking the bench. *Wenger v. Commission on Judicial Performance*, 630 P.2d 954 (Cal. 1981); *In re Seal*, 585 So. 2d 741, 746 (Miss. 1991).

7. *Thirteenth National College*, *supra* note 5, at 6.

Many states have adopted the 1990 American Bar Association Code of Judicial Conduct.⁸ The Code mandates judges to uphold the integrity and independence of the judiciary; to avoid impropriety and appearance of impropriety; and to be impartial and diligent. It also requires judges to conduct themselves in their extra-judicial activities so as to minimize the risk of conflict with judicial obligations. Finally, it restricts judges from inappropriate political activity. The Code instructs judges in their ethical obligations in general directive statements. It obviously leaves application of these statements to particular fact situations, first to the judge faced with an ethical issue, then to the courts and boards. Nevertheless, because the Code is intended to guide conduct, the terms of the Code could be discussed among judges at conferences so as to minimize the risk that ethical issues would arise unexpectedly and in unhappy circumstances.

The Judicial Discipline and Disability Digest published by the American Judicature Society catalogues the opinions of courts and boards on judicial ethics. It is an excellent resource for judges faced with ethical issues. It catalogues the opinions involving substantive conduct by breach of judicial duties and the extra-judicial activity that constitutes a breach of the canons. The reported opinions, particularly those in which a violation of a rule was found, are instructive. They are instructive as a guide to ethical judicial conduct, the broad and varied range of ethical issues judges face, and the need for seminars on judicial ethics.

Seminars in judicial ethics would benefit judges in two ways. First, seminars would educate judges in the rules of judicial ethics and their application. Second, seminars would allow judges to exchange their thoughts on and experiences with ethical issues. Education in the rules and their application would arm the judges with knowledge of the rules and would make colleagues available as resources for judges who are faced with ethical issues in the future. Also, the exchanges that take place in a seminar might provide examples of ethical ideals and conduct that would deter unethical conduct.

Despite seminars on judicial ethics, a few judges may be uneducable. The only solution for these few may be removal from the bench for willful or

8. For example, both Illinois and Indiana have adopted the Code. See Cynthia Gray, *1990 ABA Model Code Adoption Update*, JUD. CONDUCT REP., Summer 1993, at 4, 5 (Illinois); Cynthia Gray, *1990 ABA Model Code Adoption Update*, JUD. CONDUCT REP., Fall 1993, at 1, 7 (Indiana). The Reporter regularly identifies the states that have adopted the Code, amendments to the Code, and variations to the Code particular to different states. Curiously, unlike rules governing the professional conduct of lawyers that now abandon "the appearance of impropriety," the Code still emphasizes that judges shall avoid conduct that gives the "appearance of impropriety." MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990).

knowing violation of judicial ethics.⁹ Of these, some may have been corrupted by financial greed, lust for power, or excessive self-righteousness.¹⁰ Others may have succumbed to misplaced loyalty or concern for family or friends.¹¹ But even those judges who were corrupted or who succumbed to temptation might have been guided, helped, or saved by meeting ethical colleagues at seminars whom they could model their conduct after or call on for assistance or advice when tempted.

Rather than willful or knowing violations, most judges who violate judicial ethics do so through inadvertence due to pressure of time, failure to recognize the ethical issue, or even from ignorance of rules of judicial ethics. Obviously inadvertence or ignorance of the rules is not an excuse.¹² However, mandatory seminars on judicial ethics would provide judges with the needed time to quietly think about ethical issues and to learn the rules of judicial ethics and their application. Time to quietly think about judicial ethics and knowledge of the rules would go a long way in benefitting judges individually and collectively in

9. In *In re Anderson*, 451 So. 2d 232 (Miss. 1984), the court explained "willful misconduct":

Willful misconduct in office is the improper or wrongful use of the power of his office by a judge acting intentionally, or with gross unconcern for his conduct and generally in bad faith. It involves more than an error of judgment or a mere lack of diligence. Necessarily, the term would encompass conduct involving moral turpitude, dishonesty, or corruption, and also any knowing misuse of the office, whatever the motive. However, these elements are not necessary to a finding of bad faith. A specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of his authority constitutes bad faith

Willful misconduct in office of necessity is conduct prejudicial to the administration of justice that brings the judicial office into disrepute. However, a judge may also, through negligence or ignorance not amounting to bad faith, behave in a manner prejudicial to the administration of justice so as to bring the judicial office into disrepute

Id. at 234.

10. See BROCKTON LOCKWOOD, OPERATION GREYLORD: BROCKTON LOCKWOOD'S STORY (So. Ill. U. Press 1990) (discussing Illinois state judges from Cook County who took bribes to fix cases); *Gonzalez v. Commission on Judicial Performance*, 657 P.2d 372 (Cal. 1983) (describing a judge apparently intoxicated with power); *In re Boles*, 555 N.E.2d 1284, 1291 (Ind. 1990) (describing the respondent judge as being "both blessed and cursed with an advanced case of self-righteousness," after the respondent wrote a letter of apology recognizing his egregious misconduct).

11. See *In re Haddad*, 627 P.2d 221 (Ariz. 1981); *In re Sauce*, 561 N.E.2d 751 (Ind. 1990). See also Darlene Ricker, *A Car Crash Leads to Ethics Clash: Santa Barbara Firms Shun Lawyer Who Filed Suit Against Son of Protesting Judge*, A.B.A. J., Jan. 1994, at 30, in which a judge wrote to a firm on a judicial letterhead expressing "concern" that he might have to pay damages to the firm's associate's wife in excess of insurance coverage in a personal injury action brought by the wife against the judge's son.

12. *In re Haddad*, 627 P.2d at 232; *In re Lewis*, 535 N.E.2d 127, 129 (Ind. 1989) (describing the respondent judge as "totally unaware of his professional obligation"); *In re Bailey*, 541 So. 2d 1036, 1040 (Miss. 1989).

a most important aspect of the art of judging.

III. JUSTIFICATION—THE JUDGE¹³

Continuing education in judicial ethics for all judges is justified by the nature of the subject and its importance to each judge. Ethics cannot be separated from the art of judging. It is its very soul. No one respects the unethical, and respect is the lifeblood of the judge qua judge. Abject servility to the person of the judge is an anathema, but respect for the judicial office and for the judge as judge is critical to the operation of our legal system.

Public confidence in the judiciary is the source of a judge's power. Public confidence in turn rests on respect. But respect does not come with the territory, or with the titles "Judge" or "Your Honor," or with the robe, or with the bench. Those are but symbols—important symbols—but symbols only. They are loaned to the judge while he or she holds the office they symbolize. They are not substitutes. Respect cannot be merely donned, or ordered, or bought, or assumed. Nor can respect for long be simply granted. Respect must be, and can only be, earned, and only the ethical can earn respect.

One could point to many examples to show that we are living in an era of confused values, what some have called an ethical crisis. New situations arise in all areas of society that require constant reexamination of ethical constraints. The judiciary is not immune to this process. Judges need to continually discuss and evaluate their role and conduct. Many aspects of the old "Justice of the Peace" system that flourished not so long ago in the United States, when justices of the peace were paid by a percentage of the fines they imposed, are now looked upon as manifestly unethical. Self-examination is a never-ending process.

Ethics viewed as a matter of conscience, or as Albert Schweitzer's concern for others, can be taught.¹⁴ Judges can be taught to recognize the ethical

13. I repeat in the following paragraphs my thoughts and words from previous articles and speeches. See, e.g., Markey, *supra* note 1, which represented my thoughts in the 1980s. I believe those thoughts are at least as valid today as they were then.

14. See, e.g., ALBERT SCHWEITZER, REVERENCE FOR LIFE (Reginald H. Fuller trans., Harper & Row 1969) (originally published in German in 1966). Schweitzer has written:

Morality requires that people we don't know should not be considered as strangers. That applies equally to those who are worse than strangers to us, because we feel an aversion toward them or because they have shown hostility to us. Even such people we must treat as our friends. . . . [N]o one is a stranger to you; *every man's welfare is your concern*. We so often take for granted that some people are our immediate concern while others are a matter of indifference to us. Clearly this natural feeling is not permitted by ethical standards. . . . [T]he most elementary ethical principle . . . means

content of contemplated conduct and subtle, obscured conflicts of interest. Judges must continuously examine the ethics-intensive situations that confront them and the competing considerations involved in meeting and handling those situations. This examination will help judges more easily evaluate their role and conduct, whether or not objections are raised by litigants or members of the press or general public.

There are ways to earn respect. There are also ways, most often inadvertent, to lose or diminish respect. Judges who constantly reexamine their ethical alarm system will be ahead of the game. Continuing education in judicial ethics will benefit all judges, whether local, state or federal,¹⁵ and in the end will benefit the public and the legal system itself.

IV. JUSTIFICATION—THE JUDICIARY

The second justification for continuing ethical education is its effect on the judiciary as an institution. The concern is institutional and not just individual. It is not enough, in the public eye, that there be a high standard of ethics exhibited by most judges in the judiciary—there must be an excellence of ethics exhibited by all judges.

No institution, judicial or otherwise, has ethics—only people have ethics. People who are judges cannot take refuge in the knowledge that they do nothing wrong. They are part of an institution. When one judge does wrong, this reflects on the institution and ultimately on the public's perception of the integrity of each individual judge.

The public does not see, or see very much of, what a judge qua judge does every day. Even the work of trial judges, who are on the front lines, is seen by fewer than all the people, and they see only the in-court work of the judge. Even then, busy judges may tend to forget that the judicial process is mysterious, secretive, confusing, and illogical to the litigants it exists to serve. Judges today are just too pressed to enjoy the gift described by Burns—"to see ourselves as others see us."¹⁶ On the other hand, the people do see judges' every apparent or real ethical infraction, and if they do not, the media will show it to them.

that . . . we must never consider ourselves strangers toward any human being.
Id. at 113 (emphasis added).

15. To the litigant seeking justice and to the public, who either give or withhold respect, the source of the judge's compensation is and whether the judge is elected or appointed are irrelevant.

16. ROBERT BURNS, *To a Louse*, in POEMS AND SONGS OF ROBERT BURNS 137 (James Barke ed., 1960) (1786).

Compliance with a high standard of judicial ethics is the primary element in the pursuit of a judiciary seen by the public as worthy of its confidence. To meet that standard, every judge must always remember that ethics and the appearance of ethics, like justice and the appearance of justice, are inseparable. The requirement is for a constant, pervading realization that each judge must not only be ethical, but must appear to be ethical, not only on the bench, but off, not only as a judge, but as a person. For it is not the judges' perception that counts, nor the judges' confidence in their own ethical rectitude, nor even the judges' own sense of logic. In building and maintaining the image of the judiciary, it is the reasonable perception of the people that counts—and that is all that counts.

Judges "must expect to be the subject of constant public scrutiny."¹⁷ Constant reexamination of judicial ethics will help ensure over time the ability of the judiciary not only to survive but to welcome happily that public scrutiny. Indeed, a judiciary armored with a strong reputation for ethical conduct can withstand attacks from any quarter.

It would be nice if the media were to tell the public frequently of the high level of ethics maintained daily by the vast majority of judges. That is not going to happen. Nonetheless, by maintaining a high level of judicial ethics and by constantly working to raise it even higher, the judiciary as an institution and judges individually will benefit.

V. JUSTIFICATION—RESEARCH AND DEVELOPMENT

A third justification lies in the need for further development of the subject matter.

There is much room for research and development in the field of judicial ethics. Judicial ethics cannot be viewed as a mechanical or mathematical set of plain and easily applied rules. Judicial ethics is too "human" a subject to permit reliance on a supposedly all-encompassing set of "rules" learnable by rote. In the vast array of actions a judge might take, there are too many nuances, too many variables, and too many factual combinations to warrant the view that the Code of Conduct for Judges supplies a complete "handle" on all that is encompassed by the phrase "judicial ethics."

Ethical principles, like all true principles, may themselves be immutable

17. MODEL CODE OF JUDICIAL CONDUCT Canon 2, cmt 1 (1990). The ancient root of the commentary is reflected in the 18th century lectures of Justice James Wilson, "a judge is the blessing or he is the curse of society. His powers are important: his character and conduct can never be objects of indifference." 2 THE WORKS OF JAMES WILSON 158 (J.D. Andrews ed., 1896).

and unchallengeable. It is in their application to specific conduct that discomfoting issues are presented and training is needed. The need for value trade-offs, many unforeseen when codes and rules are adopted, arises when the judge must match an ethical principle with contemplated conduct. The need to reexamine these situations is on-going and a structured continuing education program on judicial ethics would be helpful.

The practical questions raised by experienced judges in a continuing education program will be helpful in refining the nuances implicit in any system of judicial ethics. The subject is not purely academic. The practical problems that judges encounter change over time. It is crucial that new judges be exposed to the ethical problems that they will, in all likelihood, encounter on and off the bench. It is also crucial that there be a forum where experienced judges can get together on a regular basis to discuss new ethical developments and problems. Their shared experiences will provide a solid basis for refining and embellishing present standards and for setting an agenda on ethics in the future.

VI. MATTERS OF CONCERN

There are concerns that must be continuously addressed in a seminar on judicial ethics. These concerns are reflected in the ABA Code of Judicial Conduct. The ABA resolution involves a never-ending balancing process that affects each judge.

A. Independence vs. Accountability

How does one reconcile the need for judges to be independent in their decision-making with the need for accountability? Judges are not truly independent if they are not ethical. Yet an ethical norm needs to be enforced. How can the public hold a judge accountable for his or her conduct while assuring the judge the essential freedom to render independent decisions?

B. Isolation vs. Involvement

The thrust of much of the Code, advisory opinions, and court opinions dealing with judicial ethics, is toward more and more isolation of the judge and the judge's family from community affairs. Paradoxically, judges are being asked to decide more and more questions that involve the management of society. How does a judge keep a finger on the pulse of society without

becoming such an active participant that his or her integrity is compromised?¹⁸

C. Presumptions—Impartiality vs. Partiality

There is today no public presumption that judges can be impartial.¹⁹ But how far can this be pushed and does it affect the judge's self-image? We may not want to put judges on a pedestal, but we want to ensure that they are accorded the proper measure of respect necessary for them to function effectively.

D. Appearance vs. Reality

Appearances are as important as reality when it comes to judicial ethics. Nonetheless, harried, harassed, and hurried, a judge may see only the real, unaware that appearances may be quite different. Schooling in judicial ethics must ensure that ethical judicial conduct is so clothed as to make it appear in its true ethical colors.

VII. THE NEED FOR CONTINUING EDUCATION

There has been an ever increasing public awareness of judicial ethics in the last thirty or so years. In 1974, the Judicial Conference of the United States adopted the Code of Conduct for Federal Judges and reformed its Advisory Committee on the Code. In 1981, Congress passed the Judicial Councils Reform and Judicial Conduct and Disability Act, creating a mechanism for receipt and investigation of complaints about behavior of federal judges. All fifty states and the District of Columbia have created permanent bodies to receive and investigate complaints about behavior of state judges. The American Inns of Court, a flourishing group, was established in part to provide a vehicle for communication between and among judges and lawyers about professional concerns. The American Judicature Society has created "The Center for Judicial Conduct Organizations," which conducts conferences and workshops and publishes the *Judicial Conduct Reporter*, the *Judicial Discipline and Disability Digest*, and other publications. Numerous articles on the subject have been written.

18. "In the eighteenth century, it was complained that the bench was occupied by 'legal monks, utterly ignorant of human nature and of the affairs of men'." Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 29 A.B.A. REP. 395 (1906) (quoting from 4 LORD CAMPBELL, *LIVES OF THE CHIEF JUSTICES OF ENGLAND* 119 (3d ed. 1874)).

19. Whether there ever was such a presumption is problematic. What may in the past have been perceived as such a presumption of public faith may have been mere apathy, or the absence of television and investigative reporting, or minimal contact with the courts compared with that of today's litigious society.

The reason for this public interest is not clear. News stories about judicial misconduct and the indictment and conviction of some state and federal judges have undoubtedly made the issue real to many persons. Also, judges have taken an expanded role in managing our society, and they therefore touch the lives of many people. A large number of bodies are engaged today in monitoring, investigating, reporting, and acting on complaints of judicial misconduct.

This is all for the good, and it has not resulted in any serious abridgment of judicial independence or otherwise harmed the judiciary. However, judges must be made continually aware of new developments in the area of judicial ethics and of their practical application.

VIII. CONCLUSION

The state and federal judiciaries are under constant and growing public scrutiny. Maintenance of the highest standards of judicial ethics is thus more than ever critical to the judiciary's continued legitimacy and public acceptance. Mandatory courses in judicial ethics should be instituted and regularly attended by each judge. Such a course might well aid a judge to recognize and to sail safely by the shoals of ethical entrapment. The price is small to pay.

As I have said previously, I remember hearing, as a boy, the expression, "As Sober as a Judge."²⁰ Whether pre-schooling in judicial ethics is instituted, or some other means is adopted to facilitate the efforts of judges to earn respect, I look forward to that happy day when the popular expression will be a new and widely recognized truism: "As Ethical as a Judge."

20. "Lewis all the while, either by the Strength of his Brain, or Flinching his Glass, kept himself sober as a Judge." JOHN ARBUTHNOT, *Law is a Bottomless Pit*, in THE HISTORY OF JOHN BULL 5, 58 (Alan W. Bower & Robert A. Erickson eds., Oxford Univ. Press 1976) (1712) (part 3, ch. 6).