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Commentary on Judicial Ethics

Cover Page Footnote

Circuit Judge, United States Court of Appeals for the Sixth Circuit.

COMMENTARY ON JUDICIAL ETHICS

GEORGE EDWARDS*

JUDICIAL ethics is a topic which covers a host of subjects, ranging from corrupt practices and conflict of interests through avoidance of appearance of evil to such matters as personal dignity and taste. For most states and the federal jurisdiction¹ the recorded standards of judicial ethics are the Canons of Judicial Ethics of the American Bar Association. These 36 observations on judicial conduct are interesting; but they are also vague and cloudy in wording. The Canons raise about as many questions as they answer.

Some of this imprecision comes from the nature of the topic. Many positive statements can be made about corruption and conflict of interest. But the private life and personal conduct of judges is in many respects as much a matter of taste for judges as for the average citizen. And, of course, judges too value privacy. Probably part of the reason that few judges choose to talk or write about judicial ethics² is that to do so may be taken as an invitation for criticism of the judge's own conduct, views or taste. No such invitation is intended here, but the importance of the topic warrants risk.

THE FORTAS MATTER

No episode in history has done more damage to public confidence in the federal judiciary than the Fortas matter. Fortas was a Supreme Court Justice and within a hairsbreadth of being its Chief Justice. Then came the revelation that he had signed a contract for services (for his and his wife's lifetimes) for \$20,000 a year with the Wolfson Family Foundation controlled and financed by a man who was (but obviously then hoped he wouldn't be) on his way to the federal penitentiary. The stipulated quid for the \$20,000 per year quo was to be service to laudable public purposes. And when the indictment of Wolfson became certain, Fortas voided the contract and returned the first \$20,000. He said he did so because the Supreme Court workload made the foundation work impossible.

On the known facts, no one found a law that Fortas had violated.

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1. Many states have adopted the Canons by rule. The Federal jurisdiction appears to recognize them in judicial decisions and with occasional variations by resolutions of the U.S. Judicial Conference.

2. For a notable exception, see Sobeloff, *Striving for Impartiality in the Federal Courts*, 24 Fed. B.J. 286 (1964), to which I acknowledge indebtedness.

And aside from a stricture against "impropriety," one can search the Canons of Judicial Ethics in vain to find a clear prohibition which fitted the matter. Fortas never sat on any Wolfson case, and if Wolfson was seeking influence, it was probably administrative rather than judicial influence. Nonetheless, the public shock and dismay over this financial arrangement between a convict-to-be and a Supreme Court Justice compelled a sudden resignation.³

Against this background, the United States Judicial Conference hastily adopted a resolution proscribing all paid outside activities of federal judges without prior approval of their Judicial Councils and calling for somewhat limited disclosure of federal judges' assets and incomes.⁴ Now the American Bar Association has called for revision of its Canons. There is no doubt that stricter standards are in the making, as has been vividly illustrated in the Senate battle over Fortas' successor. In this context discussion of some of the more important concepts of judicial ethics seems appropriate.

It should be noted that the first three of the standards are phrased as clear prohibitions, while the last three are phrased affirmatively to recognize the wide range of judgment which may be involved. Of course, no six sentence summary of this topic can be complete, but it will serve to supply topic headings.

SIX BASIC CONCEPTS

- 1) A judge's decision is a public trust and must never be for sale.
- 2) A judge must not decide cases which involve financial gain or loss to him.
- 3) A judge must not use his position for private gain for himself or for his family.
- 4) A judge should avoid the appearance of evil—even when evil is not present.
- 5) In his private life and activities a judge should never demean or exploit his office.
- 6) A judge's decision should reflect the law as his knowledge and conscience hold it to be, and not the pressures of the moment, whether from press or politics or public passion.

3. Ludvigsen, *Impeachment*, *The Detroit News*, May 13, 1969, at 5B, col. 3; Graham, *The Fortas Puzzle: What Was the Flaw?*, *The N.Y. Times*, May 18, 1969, at 1E, col. 5.

4. *Administrative Office of the United States Courts, Guide to the Administrative Organization of the United States Courts XVIII-7* (Oct. 1969). (At the October 31, 1969, session of the Judicial Conference, the control on outside activity in this resolution was "suspended" pending the ABA revision of *The Canons of Judicial Ethics*.)

*A Judicial Decision Is a Public Trust Which Must
Never Be For Sale*

“The place of justice is a hallowed place; and therefore not only the bench, but the foot—pace and precincts and purprise thereof ought to be preserved without scandal and corruption.”⁵

Canon 4. *Avoidance of Impropriety*

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach.

In 35 years of more or less gainful employment, I have known a wide range of occupational groups, both public and private. Comparatively speaking, the judges with whom I have worked during nearly 18 of these years on four different courts have been a sober, frugal, industrious and conscientious group. I do not mean to suggest that the judiciary has a corner on all virtues. For example, although there are exceptions, I would not rate the judiciary quite so highly on a comparative scale as to such qualities as humor, imagination or social vision. But the indicia of the rogue—big spending, hard drinking, fast driving and high living—are notably absent. And the virtue of dollar honesty tends to be taken for granted. I believe that corruption is rare among judges—much more rare than it is among legislative and administrative officials in the public sector, or among corporate or labor executives in the private sector. But, of course, it should be.

Indeed, the principle that a judge must not sell his judgments is now regarded as so obvious that the Canons of Judicial Ethics does not contain a line which deals directly with corruption. No doubt judicial sale of a decision would be an “impropriety” under Canon 4 above. And, of course, there are federal and state criminal statutes squarely prohibiting such conduct so that the stricture against violations of the law would likewise apply.

Historically, it is interesting to note that Sir Francis Bacon, who wrote the first major treatise in English law on judicial ethics, “Of Judicature,” and who is quoted in the ABA's Canons of Judicial Ethics, admitted receiving substantial gifts from litigants in cases before him.⁶ Although this practice was widely condoned in Elizabethan England, it resulted in Bacon's conviction for bribery and his imprisonment in the Tower of London.

5. F. Bacon, *Of Judicature*, in *Bacon's Essays* 140 (F. G. Selby ed. 1962).

6. Bond, *The Growth of Judicial Ethics*, 10 *Mass. L.Q.* 1, 8-9 (1925).

At least one historian suggests that the first United States Supreme Court decided cases in which one or more of its members had substantial interests.⁷

In the history of the federal judiciary there have been a total of four judges found guilty as a result of impeachment procedures. One was convicted for drunkenness, one for supporting secession, and two on charges which involved corrupt practices.⁸ But it should be added that in a number of other instances impeachment was avoided or terminated by resignations.⁹

In the most notorious case of these, Senior Circuit Judge Martin Manton, of the Second Circuit Court of Appeals, was convicted of conspiracy to violate federal antibribery statutes. Most of the cases concerned were patent cases involving large sums of money. The principal conduit was an intimate friend of Manton's—William J. Fallon. Manton's astonishing record of infidelity was summarized thus by the Second Circuit Court of Appeals' panel which affirmed his conviction, with two Supreme Court Justices, Sutherland and Stone, sitting as Circuit Justices:

It is enough to say that, if believed by the jury, as we may properly assume it was, it [the evidence] discloses a state of affairs so plainly at variance with the claim of Manton's innocence as to make the verdict of the jury unassailable. The circumstances taken altogether amply sustain that conclusion. Among these circumstances the following are especially significant: (a) The long and friendly relations between Fallon and Manton. (b) The employment of Fallon in obtaining loans for the Manton corporations. (c) The apparently gratuitous introduction by Fallon to Manton of persons interested in cases while they were under consideration or pending. (d) Lotsch's testimony that after being introduced by Fallon he paid to Manton \$10,000 ostensibly for the corruption of Judge Thomas, received from Manton a trial brief of the government in that case, consulted with him about the language of an opinion before it was handed down, was advised to leave New York because of an investigation then in progress or threatened, was admonished to keep secret the Thomas matter, and that Manton, after being told, upon inquiry by him, the date when a particular transaction had occurred, said it was barred by the statute of limitations. (e) Manton's relations with Reilly, their telephone conversations, in which Manton expressed anxiety about Fallon's being carried on the payroll because of a pending investigation, Manton's suggestion that the circumstance would be embarrassing to him and that the record pages relating to the matter should be pulled out, that certain records be destroyed because of the Art Metal investigation, and that the statute of limitations would protect them in that investigation. (f) The

7. G. Myers, *History of the Supreme Court of the United States* 273 (1925).

8. 12 *Encyclopedia Britannica* 2J (1969).

9. "55 judges have been the subject of Congressional inquiry; 8 were impeached [as noted above, 4 of these were found guilty], 17 resigned during the investigation, 8 were censured by a Congressional committee (Congress has no official power of censure), and the rest were absolved." Footlick, *Reformers Seek to Cleanse Courts of Unfit Judges*, *The National Observer*, Feb. 28, 1966, at 14, col. 2.

manipulation of the schedule of assignments of judges to enable Manton to sit in the Schick case. (g) The loans made at Manton's request by or through the intervention of persons interested in some of the cases during their pendency, one of the most significant of these being the loan of \$25,000 made in the name of Sullivan by Lotsch to Manton at the latter's solicitation on the very day of the argument in the General Motors case, the proceeds of which were immediately handed by Sullivan to Manton, a method adopted to conceal Manton's connection with the transaction. Similar technique appears in respect of the loans made by Andrews to or for corporations in which Manton was interested through Spector as a conduit"¹⁰

For some, all of this will seem useless repetition of ancient history. But in this decade three justices of the Supreme Court of Oklahoma were removed from the Bench for corrupt sale of decisions.¹¹ And this very year the Chief Justice and an Associate Justice of the Supreme Court of Illinois resigned after a special investigating commission had charged them with judicial "improprieties" in the acceptance of bank stock while a criminal case concerning a man who was deemed to be the source of the stock was pending before the Supreme Court of Illinois.¹²

Of course, these dramatic examples must be balanced against a federal judiciary which has numbered over 2,000¹³ and an estimated total of over 50,000¹⁴ state court judges since this country was founded. But, so long as judgeships must be manned by human beings, the possibility of corruption exists.

It may be useful to define the areas of greatest concern. I believe them to be the criminal prosecutions involving organized crime (including labor racketeering) and corporate litigation where exceedingly large sums of money depend upon the outcome.

Organized crime makes corruption a potential problem in all big city criminal courts. If organized crime can find vulnerable officials in or outside the courts, on or off the bench, there is every reason to believe that it will take advantage of the opportunity. And, unfortu-

10. *United States v. Manton*, 107 F.2d 834, 843-44 (2d Cir. 1938), cert. denied, 309 U.S. 664 (1940).

11. Note, *Courts: Scandal in the Oklahoma Supreme Court*, 20 Okla. L. Rev. 417 (1967).

12. *The Detroit News*, Aug. 1, 1969, at 9D, col. 3-4.

13. This estimate was made by the Deputy Director of the Administrative Office of the United States Courts after an analysis of Surrency, *Federal District Court Judges and the History of Their Courts*, 40 F.R.D. 139 (1967). Letter from William E. Foley to Judge George Edwards, Oct. 24, 1969.

14. Judicial statistics in the 50 states are generally in a somewhat chaotic state. This estimate is based on the assumption that there are now over 15,000 state judges (Footlick, *Reformers Seek to Cleanse Courts of Unfit Judges*, *The National Observer*, Feb. 28, 1966 at 1, col. 6) and employs the ratio (1 to 3-1/3) produced by relating the present federal judiciary to the total number of federal judges since the founding of the country.

nately, some businessmen are likewise convinced that money can buy anything.

The other two identifiable areas of concern are bankruptcy receivership proceedings and probate proceedings involving the administration of the estates of deceased persons. In these matters there frequently are cases where substantial sums of money are at issue and there is no one who has a claim which warrants his serving as a jealous guardian of it. In addition, these cases can, and occasionally do, involve judicial patronage which may adversely affect judicial impartiality.

A JUDGE MUST NOT DECIDE CASES WHICH INVOLVE
FINANCIAL GAIN OR LOSS TO HIM

Canon 26. *Personal Investments and Relations*

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

Canon 29. *Self-Interest*

A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

Obviously a judge should not hear and decide a case where the outcome would either enrich him or cause him financial loss. Such a situation would provide the classic "conflict of interest" case. Whatever standards may have been in past history, no one now suggests that where the possibility of gain or loss is substantial, the judge has any choice other than to disqualify himself. But as Canon 26 above infers, many (probably most) judges do have some personal investments, and the possibility that those investments might at some time be involved in litigation before the judge's court is a real one.

Most judges come to the bench relatively late in life. Like most American citizens of similar age in this affluent society they are likely to have accumulated savings—and possibly some inheritance. Such funds represent a major aspect of their families' security. They may also represent an important factor in the judge's own judicial independence. As of now, it seems clear to me that judges are free to keep such funds and to invest them. If public policy were to decree otherwise, present salary and pension plans in most states (and the inadequate widows' pension

scheme in the federal system!) would have to be revised drastically upward to prevent a sharp decrease of qualified candidates for judicial office.

Assuming continuation of present policy, I think that a judge should seek to avoid investments which offer a likelihood of involvement in litigation in his own court. And I think a judge should disqualify himself in any case where he (or his wife or minor children) possesses a substantial interest in a litigant party.

A standard for the federal bench is provided by statute: "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest"¹⁵ It might, however, be supposed from the language of Canon 29 quoted above, "A judge should [not sit where] his personal interests are involved," that any stock interest in a company involved in litigation, no matter how miniscule the holding might be, should automatically disqualify the judge. Thus far neither the American Bar Association Committee which interprets the Canons of Ethics nor the courts have accepted that interpretation. In a much quoted case, a United States District Judge said:

After the motion papers and briefs were filed, I discovered for the first time that the Radio Corporation of America is one of the defendants. For some years I have owned twenty shares of the common stock of that corporation, which posed the question of my possible duty to impose disqualification to deal with this motion, in view of Title 28 U.S.C.A. § 455

I have ascertained that the Radio Corporation of America has issued 13,881,016 shares of no par common stock. My interest, therefore, would be represented by the fraction of 20/13,881,016. I do not see how, by any process of reasoning, that could be regarded as a 'substantial interest' in the controversy, which would justify me in avoiding responsibility by disqualifying myself under the statute.

To guard against error in holding this view, I notified both attorneys in writing, of the stockholding in question, and have been assured by a letter from the plaintiff's attorney that he and his adversary have agreed to request that I decide the motion, and this has been construed as a waiver of any possible statutory objection.¹⁶

I think that Judge Byers handled his problem with great care and that any other decision on his part might have been an imposition on some other judge who probably had heavy trial responsibilities of his own.

In discussing this same problem, Judge Sobeloff said: "A judge with a direct pecuniary interest in the outcome of a case or owning property that will be affected by a suit over which he presides should disqualify himself. If, however, the interest is slight and remote, he is not disqualified."¹⁷

15. 28 U.S.C. § 455 (1964).

16. *Lampert v. Hollis Music, Inc.*, 105 F. Supp. 3, 5-6 (E.D.N.Y. 1952).

17. Sobeloff, *supra* note 2, at 291.

Justices of State Supreme Courts have about the worst of the disqualification problem. Not only do they have final authority pertaining to a wide range of questions affecting litigants in their states, but in addition, they generally sit en banc. In most states there is no replacement for a judge. Every disqualification becomes public. And any disqualification may itself affect (or determine) the outcome of the case. During my term on the Supreme Court of Michigan, we had occasion to grapple with some of these problems, as have other justices in other states.

In a Conference on Judicial Ethics at the University of Chicago,¹⁸ Justice Fairchild, then of the Supreme Court of Wisconsin, quoted a series of questions.¹⁹ These questions had been inspired by the announcement of the program and had been sent to Fairchild in advance by a Justice from a Supreme Court of another state. The conference did not answer the questions, but seemed to treat them as illustrative of the principle that disqualification ultimately has to depend upon the good conscience of the judge.

The questions from the anonymous justice follow, with my answers in italics.

Q. "Are we limited to investments in Government bonds, real estate, other bonds?"

A. *No.*

Q. "Is even the latter if by private corporation permissible?"

A. *If this question means are judges prohibited generally from investing in private corporation bonds, I think the answer is "No."*

Q. "Getting down to specific items, may a Supreme Court Judge own the following: stock in AT&T; stock in General Motors; stock in a public utility operating in the state; bonds of a county or school district of the state?"

A. *A Justice of the Supreme Court should not own stock in any corporation in his state where he has reasonable grounds to believe the corporation will be repeatedly in litigation before his court on matters of wide general interest. This would seem to me to rule out ownership of stock in AT&T or a public utility operating in his state where appeals from the rate-making body were taken to the Supreme Court. Unless there was some forewarning of a problem in relation to a county or school district bond issue, I would see no reason for a judge to feel he could not invest in such bonds. I think ownership of General Motors stock should be judged somewhat on the same basis as outlined above. There are probably many states, although none with which I am intimately familiar, where litigation in relation to this corporation is relatively rare.*

Q. "Should I sit in a case owning AT&T stock when the local Bell Telephone Company is up before us on a rate increase? [I think I know the answer to that one!]"

A. *I think you do too.*

18. The University of Chicago Law School, Conf. on Judicial Ethics (1964) [hereinafter cited as Conf. on Judicial Ethics].

19. Judge Fairchild is now Circuit Judge for the United States Court of Appeals for the Seventh Circuit.

Q. "May I, owning GM stock, sit in an action against a subsidiary of General Motors, such as when Buick Motor Company is the defendant?"

A. *Buick Motor is, of course, a wholly-owned division of General Motors. If the judge's stockholding in GM was a substantial investment to him, I think he should not sit.*

Q. "Should I sit where a bond issue is being challenged by a city or school district if I own bonds issued by another district? . . ."

A. *I see no reason not to, unless the question presented also affects the validity of the bonds which the Justice owns.*²⁰

It must be obvious by now that it is frequently difficult in discussing illustrations under this topic to know whether we are discussing avoiding evil or avoiding the appearance of evil. This last difficult concept we shall return to as the fourth topic under discussion.

This may be an appropriate point to warn that disqualification is no simple solution to the problems of judicial ethics. The work load of the courts at every level is very great—and is rapidly increasing. A disqualification frequently delays the trial or hearing of a case. It always constitutes a burden upon another busy judge. In most cases of moment and of public controversy, an assigned judge can think of some reason why he would rather not sit. In routine cases the factor which might be argued for disqualification may be concealed in a voluminous record and have no decision-making weight at all. The judge who disqualifies himself too often is likely to get the reputation of ducking his basic responsibility for decision-making. And while many problems concerning disqualification seem to me to have definite answers, there will be some (and some of the most important) where only the judge himself will ever really know whether he should or should not disqualify himself. Usually this will be true when no litigant can point a finger—or perhaps even make a guess.

Sometimes full disclosure in advance can avoid any need for disqualification. When an apparent judicial interest in a case assigned to a judge is not a real one, full disclosure to and prior decision by a disinterested judge, plus disclosure to the parties, may prove a means of avoidance of needless disqualifications. The judges of my court (The Sixth Circuit) usually consult the Chief Judge on problems which they think might offer difficulties. If the Chief Judge thinks the problem should be treated under the *de minimis* rule, the judge may then disclose the fact or relationship to the parties in court and offer to disqualify himself if either party requests it. Waivers are generally (not always) forthcoming. Senator Tydings has now proposed a bill which would formalize this practice by requiring disclosure to the Chief Judge

20. Fairchild, Comment, Conf. on Judicial Ethics 9, 14.

(or Chief Justice) and requiring him to make a decision in writing on the issue of substantiality of interest.²¹ I believe that such a decision by the Chief Judge and its disclosure to the parties, without requiring comment from them, might prove preferable to the waiver practice outlined above which can prove embarrassing to lawyers.

Similarly, it seems to me that a judge should welcome reporting his assets and income (and those of his immediate family) to an appropriate body designated by the judiciary as provided in the United States Judicial Conference resolution. If the reviewing panel saw potential problems in a particular investment held by a judge, the problem could and should be dealt with beforehand rather than after some dispute arose. And if the reviewing panel saw no problem, the judge would have that added independent weight behind his own judgment.

In relation to these matters (as in relation to regulation of "outside activity") I would prefer action by the appropriate agency of the judiciary to statutory enactments. If a rule produces an unforeseen problem, it can more easily be amended than can a law.

And, of course, I share with most judges the hope that similar ethical standards and controls will be adopted by the legislative and executive branches of our government where we are inclined to believe the problems are more critical.

A JUDGE MUST NOT USE HIS POSITION FOR PRIVATE
GAIN FOR HIMSELF OR FOR HIS FAMILY

Canon 26. *Personal Investment and Relations*

He should not utilize information coming to him in a judicial capacity for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of a margin. . . .

Canon 32. *Gifts and Favors*

A judge should not accept any presents or favors from litigants, or from lawyers practicing before him or from others whose interests are likely to be submitted to him for judgment. . . .

Canon 13. *Kinship or Influence*

A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

The first two Canons quoted above (unlike some) are clear and need no comment other than endorsement. The Canon on Kinship or Influence

21. S. 1506, 91st Cong., 1st Sess. (1969).

may warrant some discussion, since it frequently is pertinent in judicial problem cases.

Joseph Borkin in *The Corrupt Judge*²² has performed a service to the judiciary if only by spelling out in intimate detail the techniques of corruption. His book discusses three judges, of which Judge Manton is the first. The last is Judge Albert W. Johnson, of the United States District Court for the Middle District of Pennsylvania, about whom Borkin writes:

Complaints about his official conduct started soon after he took the oath of office. By 1931 the criticism had once again erupted into the press. Under attack was his handling of bankruptcies and receiverships over which he had jurisdiction. An item appearing in the *Philadelphia Inquirer* in May of 1931 revealed that since January, of twenty bankruptcy cases in Lycoming County, Judge Johnson's son-in-law, Carl Schug, had been appointed trustee in eleven. Notice was also taken that Judge Johnson's sons Donald and Albert, Jr., had been appointed in bankruptcy cases in other counties. Of the seventy lawyers in Lycoming County, the administration of all the bankruptcies had gone to only five.

The organization in 1931 of the Tea Springs Lodge added to the public dismay. The judge and his sons enjoyed hunting and the outdoor life generally. The Tea Springs Lodge helped them pursue this pleasure. Operated as a club, with a list of seventy-four members, it nevertheless appeared to be the private preserve of the judge and his sons. This does not mean that the rest of the members did not get their money's worth for their \$500 initiation fee plus annual dues. Fifty-one of them were appointed by Judge Johnson in one form or another as appraisers, receivers, trustees, attorneys for trustees, special masters, or referees in bankruptcy in the Middle District of Pennsylvania. Of the remaining twenty-three, eleven were ineligible for such appointment by law. Judge Johnson, his three sons, and Judge J. Warren Davis were among the ineligible. In other words, 82 per cent of the dues-paying members of the Tea Springs Lodge received appointments and fees by virtue of Judge Johnson's position as a Federal judge. According to court records, these payments came to the grand total of \$265,648. No wonder Judge Johnson's appointees permitted the Tea Springs Lodge to be his private fief.²³

The most astonishing of the episodes in Judge Johnson's career was the receivership proceeding concerning the Williamsport Wire Rope Company. Judge Johnson ultimately approved sale of this company to Bethlehem Steel (then represented by Hoyt Moore of the Wall Street law firm, Cravath, deGersdorff, Swaine & Wood) for \$3,300,000, little if any of which was available for payment to stockholders.

Federal investigation into this case disclosed splits of receivers' and legal fees with two of Johnson's sons and an agreement for an unusual \$250,000 "administration expense" of which \$223,000 was to be paid by Bethlehem out of court.

Reviewing the entire record, the Judiciary Committee of the House

22. J. Borkin, *The Corrupt Judge* (1962).

23. *Id.* at 143-44.

of Representatives concluded that the Williamsport stockholders lost their equity as a result of "the corrupt connivance of John Memolo, attorney for the receivers; Hoyt A. Moore, attorney for Bethlehem Steel Co.; Judge Johnson; and his son, Donald Johnson . . ." ²⁴

On suit by the stockholders, the sale was decreed void for fraud. Bethlehem ultimately paid the stockholders of Williamsport \$6 million for a substitute consent decree. Under threat of impeachment, Judge Johnson resigned, surrendering all salary and pension rights.

Active participation in business ventures, speculative investments, favoritism toward relatives or friends have proved to be the downfall of most of the judges who have been threatened with impeachment or impeached.

A JUDGE SHOULD AVOID THE APPEARANCE OF EVIL—
EVEN WHEN EVIL IS NOT PRESENT

Such a generality has an infinitude of illustrations and provokes an infinitude of opinions. No judge can possibly succeed in living by it to everyone's complete satisfaction.

Former Federal Judge Simon Rifkind suggests that a judge should not drink too much or be a too frequent standee at the betting windows at the race track, and that his wife should not be the first to adopt the most daring fashion. Frugality alone would commend all of these suggestions to me and to my brethren. The same applies to Judge Rifkind's added thought that a judge should not be too conspicuous on the polo field.²⁵ (I find some satisfaction in the fact that he did not mention tennis!)

Aside from maintaining a reasonable decorum in his private conduct, there are many instances where the judge should seek to avoid the appearance of evil on the bench. I came to the United States Court of Appeals for the Sixth Circuit from a two-year term as Police Commissioner of the City of Detroit. For six years I have screened the briefs and records of criminal appeals from Michigan to try to ascertain whether or not during 1962 and 1963 any of the 4,500 officers of the Detroit Police Department were involved in investigations which led to the federal prosecutions in the appeals assigned to my panels. If so, routinely I asked the Chief Judge to assign another judge or to assign the case to another panel, even though in most if not all such instances I had no recollection at all of the matter. The number of such instances was embarrassing for several years. But since my court

24. H.R. Rep. No. 1639, 79th Cong., 2d Sess. 31 (1946).

25. Rifkind, *The Public Concern in a Judge's Private Life*, Conf. on Judicial Ethics 25, 27.

sits in panels of three judges, replacement is possible. My brethren were cooperative and I think understood that regardless of my remoteness as Police Commissioner from, say, a particular narcotics arrest, the defendant would never be able to regard the head of the police force which arrested him as impartial in the appeal of his conviction.

Recently I wrote an opinion reiterating this principle in relation to a federal trial judge as to whom an appellant convicted of postal theft alleged disqualification. The judge had formerly been United States District Attorney when a preliminary hearing had been had in appellant's case. He was appointed to the Bench long before appellant's trial. He had never participated in or had any personal knowledge of the charges against appellant. The applicable federal statute, however, reads in part: "Any justice or judge of the United States shall disqualify himself in any case in which he . . . has been of counsel . . ." ²⁶ Of course, the United States District Attorney has responsibility for all criminal prosecutions in his district ²⁷ and hence, is "of counsel."

The opinion said:

There are two plausible reasons for rejecting appellant's disqualification issue. The first is that in actuality appellant had a fair trial before a judge who knew nothing about his case except as the trial record developed before him. We recognize that this jury case was well tried by an able and impartial judge. The trouble with this argument is that the language of the statute is mandatory: "Any . . . judge of the United States *shall* disqualify himself in any case in which he . . . has been of counsel . . ." (Emphasis added.) As to this feature of the statute, prejudice is presumed whether actually present or not. We believe that the language employed by Congress compels the conclusion that Congress was concerned with avoiding the *appearance* of partiality as well as avoiding the fact. ²⁸ (Emphasis in original.)

The next illustration reverts to the problems posed by judges' investments. For this example let us assume the judge had 100 shares of stock in his (or his wife's) name in a large corporation. His investment is worth \$8,000 and it represents 1/100,000 of the value of the corporation. He is assigned to try a personal injury claim against that corporation where \$25,000 damages are asserted. Thus the judge might have a financial interest of twenty-five cents in the outcome of the suit. Disqualification here is clearly not compelled by any "substantial interest" which the judge has in the outcome of the case. But I would be inclined to argue that nonetheless he should seek to avoid deciding that case. An investment of the size described is likely to be substantial to the judge. ²⁹ It may mean some prior judgment on the part of the judge

26. 28 U.S.C. § 455 (1964).

27. 28 U.S.C. § 547 (Supp. IV, 1969).

28. *United States v. Amerine*, 411 F.2d 1130, 1133 (6th Cir. 1969).

29. For examples of what constitutes a "substantial interest" see *Bradford Audio Corp.*

concerning the management of the company, and if the holding has continued for some years, an opinion may have formed in relation to the integrity of its operations. Of much more moment, however, is the fact that the judge has to be concerned about appearance of partiality in situations where he may know that in fact no partiality exists. For the average personal injury litigant, knowledge that the judge is a stockholder of the corporation which he is engaged in suing would be sufficient to make him sure that an adverse judicial verdict would be directly related to the fact of the stock ownership. The loser will never take the trouble to make the mathematical calculation above—nor will he believe it if it is made for him.

The next illustration concerns a criminal case.

Once I stood at the back of a courtroom and heard a judge with whom several of us had a luncheon appointment administer a sentence. It was a long sentence for a serious crime. For all I knew (or know) about the matter, it was wholly appropriate for the offense—and the offender. Completing the sentence, the judge signaled the group of us to join him in chambers. The recently sentenced man was still within the bar of the courtroom, and his guard was engaged in handcuffing him preparatory to the trip back to the county jail. As the judge greeted us at the door of his chambers, he made a quip to one of my companions about a topic of interest only to them and burst out in a deep belly laugh that reverberated through the courtroom. The judge entered his chambers without ever looking back. I did—and saw the look of bitter hatred which the prisoner turned on the judge. The prisoner had obviously concluded that the judge had not only taken fifteen years of his life, but had made a joke about it. What a background for a “correctional” experience which society hopes will return that offender a “better citizen” than he was when he went to the penitentiary.

Here, again, there was no evil, but the judge’s lack of perception created the appearance of it.

Canon 25 provides still another type of illustration of avoidance of of evil appearance:

A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which,

v. Pious, 392 F.2d 67 (2d Cir. 1968); *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 296 F.2d 215 (5th Cir. 1961).

in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.

Pursuant to this Canon, and appropriately, I think, the United States Judicial Conference (and some State Supreme Courts) have forbidden judges to serve as officers or directors of private corporations.

IN HIS PRIVATE LIFE AND ACTIVITIES A JUDGE SHOULD
NEVER Demean OR EXPLOIT HIS OFFICE

Canon 33. *Social Relations*

It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.

Canon 34. *A Summary of Judicial Obligation*

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to the law and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

The truth of the matter is that, aside from the confines of his home, a judge really has no truly private life. Everything he does is considered by the public—not by its ordinary standard as to human conduct, but by the public's much stricter standard as to what it thinks a judge should or should not do. Those of us who choose the judiciary as a vocation simply have to accept this as a fact of life and seek to avoid excesses in conduct, including some which might be tolerated in other occupations.

But in the wake of the Fortas affair, the most frequently uttered comments (some by people who ought to know better) are ones which infer that the ideal for a judge is to avoid all criticism. Such a standard would certainly eliminate as judicial heroes such giants of our legal history as Brandeis, Holmes, Frankfurter and Warren. I also venture the suggestion that the quality of justice for this country's future would be lowered by a judiciary which decided cases with an eye on the possibility of critical comment by press or some section of the public.

My suggestion that in his private life and activities a judge should

never demean or exploit his office is meant to designate the outer perimeter of what has come to be termed "outside activities." Many things, such as exploitation of a judge's power for financial gain, or political advancement, or disgracing his office by public display of intemperance seem to me to be undebatably beyond that perimeter.

In my first year on the Wayne County Circuit Bench, one of my colleagues achieved considerable notoriety by parking his automobile at the front door of a prominent downtown night spot in the early hours of the morning. The story gained piquancy from the fact that he had ignored the curb and parked on the public sidewalk. Someone remedied the situation before any policeman arrived. But the affair (not his first) resulted in a formal request from the Bench for the judge's retirement—and his agreement.

Exploitation of judicial office for political purposes is forbidden by Canons 28 and 30. Canon 30 specifically prohibits a judge while holding his judicial office from campaigning for a non-judicial post. But the Canon has been violated on occasion, sometimes in spirit and sometimes in the letter. The most notorious of the violators of the letter of the Canon was former Senator Joseph McCarthy, who early in his career indicated his insensitivity to ethical considerations by running for a partisan office (the United States Senate) while holding a judicial position.³⁰

Turning to the subject of activities which do not in themselves even arguably "demean" or "exploit", we find a fairly lively debate.

Judge Irving Kaufman and Delmar Karlen, as officers of the Institute of Judicial Administration, recently authored a warning against judicial monasticism:

In view of the growing concern about outside activities of judges, we think it important to reaffirm the principle that judges should not become monastic, but should continue to work with the organized bar and the law schools of this country in efforts to improve the administration of justice. Judicial reform is no more a sport for the weak-hearted than it is for the short-winded. If judges should falter now in face of the agitation of the moment, much of the motive power behind court reform would be lost.

The Canons of Judicial Ethics deserve careful study and possible revision, but the task should be undertaken calmly and deliberately, with full realization of the great value of judicial participation in the betterment of the law and legal institutions.³¹

Dean Acheson even more recently took the opposite view in testimony before a United States Senate Judicial Subcommittee chaired by Senator Ervin.

30. *State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 24 N.W.2d 504 (1946).

31. Kaufman & Karlen, *Inst. of Jud. Admin. Rep.*, No. 4, at 1 (1969).

(2) *Judicial officers participating in nonjudicial work or organizations.* This practice should be flatly prohibited. The most important extrajudicial assignments distract from judicial tasks, and lesser ones may bring involvement in controversies detracting from judicial impartiality and aloofness.³²

On this score, I side with Kaufman and Karlen. The American judiciary is not and should not become a grey bureaucracy completely remote from the life and the problems of the nation. It is a third and coordinate branch of government—vital to the health and growth of this nation. Most of the “outside activity” of judges is concerned with writing, lecturing, teaching or learning about matters directly related to the law.

From 18 years on the Bench, I recall the Appellate Judges’ Seminar at New York University Law School as the richest single learning experience. The faculty in 1958 when I attended was headed by Mr. Justice William J. Brennan, Jr. This year under the impact of criticism of “outside activities” of judges, he gave up his association with the Seminar. To me this is a source of genuine regret. That Seminar was not “outside activity”; it was the finest kind of direct judicial activity. For it represented judges learning from other judges and imparting to other judges what experience had taught them.

Legal writing, lecturing, teaching and studying are antidotes to judicial atrophy. So long as time spent on them does not interfere with the judge’s proper performance of his direct judicial duties, I think it is in the public interest to encourage them. I have never known a judge who could be rated substandard in judicial output because of “outside” lecturing, writing or teaching. In the history of American law the “great” judges made many such contributions. Some, like Holmes and Cardozo, are remembered and valued in the law as much for their “outside” legal writing as for their opinions. Lawyers in private practice rarely do much writing. Without intending any offense, the notion of leaving legal writing exclusively to law professors leaves me aghast.

I had no objection to the Judicial Conference rule, now suspended,³³ banning compensation for these activities without prior approval by the circuit judicial council. But, as demonstrated above, the judge with larceny in his heart is likely to find a much less clumsy mechanism for his purpose than any of these.

Canon 23 currently contains a mandate to judges to share with appropriate authority what experience has taught about the defects of the judicial process and the remedies for them.

32. Acheson, *Removing the Shadow Cast on the Courts*, 55 A.B.A.J. 919, 920 (1962).

33. See note 4, *supra*.

Canon 23. *Legislation*

A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience.

Canon 31 contains this sanction for the judge's writing, lecturing or teaching:

He may properly act as . . . lecturer upon or instruct in law, or write upon the subject, and accept compensation therefor, if such course does not interfere with the due performance of his judicial duties, and is not forbidden by some positive provision of law.

In my view whatever changes are made in the Canons of Judicial Ethics, neither of these should be substantially altered.

I differ also with Mr. Acheson's blanket condemnation of Presidential appointment of members of the Supreme Court to commissions which are assigned to explore and report on great national problems. While I agree with his comment on the inappropriateness of Justice Jackson's assignment as Chief Prosecutor at the Nuremberg trials, I feel quite differently about legislative prohibition of all such assignments. On this question I told Senator Ervin's committee:

I think that it would be highly undesirable to have legislative provisions which would have had the effect of prohibiting Mr. Justice Roberts' chairmanship of the Pearl Harbor Commission, or Chief Justice Warren's chairmanship of the commission which investigated the assassination of President Kennedy. Both of these events involved national tragedies of historic magnitude which left in their wake many fears and doubts on the part of the American people. There was a great need for the absolute maximum of public confidence in the probity, courage and intelligence of those who would conduct the inquiries. I do not feel that eliminating from consideration the nine men who, at least hopefully, have been chosen from the entire country with these qualities primarily in mind would be a sound approach to this sort of historic problem.³⁴

A JUDGE'S DECISION SHOULD REFLECT THE LAW AS
HIS KNOWLEDGE AND CONSCIENCE HOLD IT TO BE,
AND NOT THE PRESSURES OF THE MOMENT,
WHETHER FROM PRESS OR POLITICS
OR PUBLIC PASSION

Canon 20. *Influence of Decision Upon the Development of the Law*

A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he

34. Letter from Judge George Edwards to Senator Sam Ervin, Jr., June 24, 1969.

violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law.

If we do not start with recognizing the sometimes ignored fact that judges are men and subject to all the problems of the human condition, we miss the essence of the matter. The central problem of judicial ethics really is how judges can speak for the community conscience—state or national—rather than exclusively for their own. The unspoken presumptions which underlie some comment on this topic are that judges (or the best ones) were somehow created out of nothing, with no ties to the past, and that they live in a vacuum or perhaps in some sort of present-day monastery where the impact of present-day life is completely absent. The notion is that judges thus can approach each case without a background of prior experience, prior knowledge, and prior opinion (whether termed prejudice or wisdom). Such presumptions would seem to be destroyed by the mere statement of them.

Nonetheless, most people would, I believe, be inclined to say that ideally a judge should know nothing whatsoever about any piece of litigation which comes before him for decision. Actually, of course, this is an impossibility for any human being. And our system of justice makes it seem that we really deliberately plan to have decision-making done by people who come closer to knowing the most, rather than the least about all sorts of litigation problems which may come before them. America is probably better satisfied with its judges of general jurisdiction in rural counties than any other group in the judiciary. Yet in most states of the union, these judges are elected. Almost invariably such judges grew up in the rural county where they hold office, and invariably they know not only something, but a great deal about the background of every single piece of litigation within their jurisdiction. My own trial court experience has been entirely in a metropolitan area, the county of 3 million plus where Detroit is located. And yet, I think that in at least 75% of the cases which I tried as a Circuit Court Judge in Wayne County, I either knew one or both of the lawyers, or one or both of the litigants, or a good deal about the nature of the controversy before it reached my court. If I had sought to disqualify myself because of such prior knowledge or acquaintance, I could not possibly have performed my duties as a judicial officer in Wayne County, and neither could any of my brethren.

Not only is it both impossible (and undesirable) for a judge to bring

a void of knowledge about the facts of life of his community to the Bench with him, it is likewise impossible for him to come there without a deep, rich and potent background of association with people and forces in our society.

The family, the home, the neighborhood, the school, job, marriage, military experience, travel, friends, avocations—all inevitably become a part of the judge, just as they do of other men. No judge can ever really disassociate himself from his origin, his history and his present life. Nor should he try. Even a reaction against or specific rejection of some aspect of his background is evidence of the fact that the influence is there—one to be reckoned with.

Does this mean that for me the adage "Ours is a society of laws, not of men" has no validity? Not at all. Like most quotable adages, this is an overstatement—but it certainly has much truth in it. No thoughtful judge can avoid the knowledge that he must live with two consciences. In his private life, in his individual voting, in his personal speech and writing, he expresses his own personal convictions. But in his judicial function, he must also seek to super-impose on his own conscience the conscience of his state or country as it has been expressed in written law. Certainly there are occasions for all of us when the personal conscience and the public conscience are at odds. Eighteen years on trial and appellate benches has convinced me that mandatory sentences are fundamentally wrong. If society is to succeed in "correcting" criminal offenders, the sentence given must be related to the offender and not solely to the offense. The federal criminal law, however, contains many mandatory sentences. I have spoken and written against mandatory sentences. But on the Bench I have no right to substitute my private conviction for the duly adopted law of the land.

In private practice I represented a number of silicosis victims (or their widows) in industrial compensation claims. The statutory scheme in Michigan at the time placed a \$6,000 limitation upon a claim for total disability or death caused by this disease. Acquaintance with the situation of the victims or their widows and children left me appalled by the utter inadequacy of the remedy. Total disability or death benefits for victims of other industrial hazards were compensated at a somewhat better rate.

Subsequently, in the Supreme Court of Michigan, I sat with the court in hearing an appeal where the \$6,000 silicosis limitation was attacked on equal protection grounds. The statutory intent of the limitation provision was clear. The power of the state legislature to attack by remedial legislation one or several evils in a particular field without having to attack all or provide the same remedy for each had been re-

peatedly upheld. A contrary rule would seriously restrict the power of the legislative branch to fashion remedial legislation. I wrote the opinion of the court denying the appeal.³⁵

This, of course, is nothing new. Many men from many different backgrounds constitute the judiciary of this country. Though they see it through different eyes, each in his own way seeks the goal of "equal justice under law."

Occasionally it is suggested that a judge with a particular background should be rejected for appointment or election, or if on the Bench, should not sit on a particular issue.

A decade ago I heard it suggested that a judge who is a devout Catholic should not consider First Amendment cases concerning the establishment of religion. Should such cases then be assigned only to devout Baptists or Episcopalians—or perhaps to atheists?

More recently I heard a lawyer strongly imply that Justice Marshall ought to disqualify himself in civil rights cases and that Justice Goldberg similarly should have disqualified himself in labor cases. It reminded me of the experience of one of my colleagues on the United States Court of Appeals for the Sixth Circuit, Judge Wade H. McCree, Jr.

Judge McCree was assigned some years ago in the Michigan Circuit Court to try a suit for reformation of a land deed. When the case was called the lawyer for the plaintiff directed Judge McCree's attention to the obvious fact that this lawyer's client was white, while the defendant was black and so was the judge. He suggested that Judge McCree would prefer not to sit. Judge McCree replied:

If your premise is correct, any white judge would be disqualified on the same ground. So far as I know all 17 of my colleagues are white. Now if you would care to seek information from them as to whether in fact any of them have a higher percentage of Negroid ancestry than I have Caucasoid ancestry and you find one better qualified on this ground, I would be glad to step aside in his favor.

Perhaps it is not necessary to add that the lawyer withdrew his suggestion.

Part of the strength of this country is its diversity. To suggest that that diversity should not be represented on the Bench is to deny an important aspect of the American heritage. Even in relation to judges, the melting pot works, as Justice Cardozo's eloquence tells us:

The training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions. It will help to broaden the group to which his subconscious

35. *Gauthier v. Campbell, Wyant & Canon Foundry Co.*, 360 Mich. 510, 104 N.W.2d 182 (1960).

loyalties are due. Never will these loyalties be utterly extinguished while human nature is what it is. We may wonder sometimes how from the play of all these forces of individualism, there can come anything coherent, anything but chaos and the void. Those are the moments in which we exaggerate the elements of difference. In the end there emerges something which has a composite shape and truth and order. It has been said that "History, like mathematics, is obliged to assume that eccentricities more or less balance each other, so that something remains constant at last." The like is true of the work of courts. The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.³⁶

Years ago (but after six years in the judicial melting pot and in a state trial court context) I drafted what I termed—

A JUDGE'S PRAYER

I hope I will always be impressed with the enormous power vested in the position I hold over the property and, more importantly, the lives of people.

I hope I will never let myself become arbitrary or calloused in the exercise of it.

I hope that I will always remember that that power is placed there by the people; can, thank God, be withdrawn by them, and that our law is not above the people but for them and of them.

I hope that I will always remember how I felt as a young lawyer the first time I walked into a courtroom and looked up at the Bench.

I hope that I will always try to give the younger members of the Bar the sympathy, courtesy, understanding and help that their profession merits.

I hope that I will always remember that at least one great trial judge has said that any impatient judge should be impeached, and (whether we accept that drastic measure or not) it should serve to remind me that patience is a virtue more needed on the Bench than in any other occupation.

I hope that I shall always remember that the greatest job of the courts is to deal with people in trouble and that I shall always endeavor to handle criminal cases, divorce cases and matters involving children with *at least* the time and interest and concern with which the court traditionally deals with property disputes.

I hope I can always remember that the three most important words to anyone interested in learning are "I don't know" and that I will never be too afraid or embarrassed to use them.

I hope I shall always remember that the people look to the courts to defend their fundamental freedoms and that I have no right ever to sacrifice one iota of those rights for the least significant person because of the ranting of demagogues or the pressures of press or politics.

I hope I shall always remember to respect the office I hold and require others to do likewise in my courtroom.

I hope in the midst of tragedy and pathos with which the courts deal I will be able to maintain some sense of humor.

I hope I will never take myself too seriously, and that I will be able to laugh

36. B. Cardozo, *The Nature of the Judicial Process* 176-77 (1921) (footnote omitted).

with the parties who subsequently point out to me how often I have failed in these ambitions.

Perhaps Micah long ago provided the complete formula for judicial ethics, "What doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God?"³⁷

APPENDIX A

Canons of Judicial Ethics^a

ANCIENT PRECEDENTS.

"And I charged your judges at that time, saying Hear the causes between your brethren, and judge righteously between every man and his brother, and the stranger that is with him.

"Ye shall not respect persons in judgment; but ye shall hear the small as well as the great; ye shall not be afraid of the face of man; for the judgment is God's; and the cause that is too hard for you, bring it unto me, and I will hear it."—*Deuteronomy*, I, 16-17.

"Thou shalt not wrest judgment; thou shalt not respect persons, neither take a gift; for a gift doth blind the eyes of the wise, and pervert the words of the righteous."—*Deuteronomy*, XVI, 19.

"We will not make any justiciaries, constables, sheriffs or bailiffs, but from those who understand the law of the realm and are well disposed to observe it."—*Magna Charta*, XLV.

"Judges ought to remember that their office is *jus dicere* not *jus dare*; to interpret law, and not to make law, or give law." . . .

"Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue." . . .

"Patience and gravity of hearing is an essential part of justice; and an over speaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar, or to show quickness of conceit in

37. Micah 6:8.

^a These Canons, to and including Canon 34, were adopted by the American Bar Association at its Forty-Seventh Annual Meeting, at Philadelphia, Pennsylvania, on July 9, 1924. The Committee of the Association which prepared the Canons was appointed in 1922, and composed of the following: William H. Taft, District of Columbia, Chairman; Leslie C. Cornish, Maine; Robert von Moschzisker, Pennsylvania; Charles A. Boston, New York; and Garret W. McEnerney, California. George Sutherland, of Utah, originally a member of the Committee, retired and was succeeded by Mr. McEnerney. In 1923, Frank M. Angellotti, of California, took the place of Mr. McEnerney.

Canons 28 and 30 were amended at the Fifty-Sixth Annual Meeting, Grand Rapids, Michigan, August 30-September 1, 1933. Canon 28 was further amended at the Seventy-Third Annual Meeting, Washington, D. C., September 20, 1950. Canons 35 and 36 were adopted at the Sixtieth Annual Meeting, at Kansas City, Missouri, September 30, 1937. Canon 35 was amended at San Francisco, Calif., Sept. 1952.

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cutting off evidence or counsel too short; or to prevent information by questions though pertinent."

"The place of justice is a hallowed place; and therefore not only the Bench, but the foot pace and precincts and purprise thereof ought to be preserved without scandal and corruption." . . .—*Bacon's Essay "Of Judicature."*

PREAMBLE.

In addition to the Canons for Professional Conduct of Lawyers which it has formulated and adopted, the American Bar Association, mindful that the character and conduct of a judge should never be objects of indifference, and that declared ethical standards tend to become habits of life, deems it desirable to set forth its views respecting those principles which should govern the personal practice of members of the judiciary in the administration of their office. The Association accordingly adopts the following Canons, the spirit of which it suggests as a proper guide and reminder for judges, and as indicating what the people have a right to expect from them.

1. RELATIONS OF THE JUDICIARY.

The assumption of the office of judge casts upon the incumbent duties in respect to his personal conduct which concern his relation to the state and its inhabitants, the litigants before him, the principles of law, the practitioners of law in his court, and the witnesses, jurors and attendants who aid him in the administration of its functions.

2. THE PUBLIC INTEREST.

Courts exist to promote justice, and thus to serve the public interest. Their administration should be speedy and careful. Every judge should at all times be alert in his rulings and in the conduct of the business of the court, so far as he can, to make it useful to litigants and to the community. He should avoid unconsciously falling into the attitude of mind that the litigants are made for the courts instead of the courts for the litigants.

3. CONSTITUTIONAL OBLIGATIONS.

It is the duty of all judges in the United States to support the federal Constitution and that of the state whose laws they administer; in so doing, they should fearlessly observe and apply fundamental limitations and guarantees.

4. AVOIDANCE OF IMPROPRIETY.

A judge's official conduct should be free from impropriety and the appearance of impropriety; he should avoid infractions of law; and his personal behavior, not only upon the Bench and in the performance of judicial duties, but also in his everyday life, should be beyond reproach.

5. ESSENTIAL CONDUCT.

A judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of the law and diligent in endeavoring to ascertain the facts.

6. INDUSTRY.

A judge should exhibit an industry and application commensurate with the duties imposed upon him.

7. PROMPTNESS.

A judge should be prompt in the performance of his judicial duties, recognizing that the time of litigants, jurors and attorneys is of value and that habitual lack of punctuality on his part justifies dissatisfaction with the administration of the business of the court.

8. COURT ORGANIZATION.

A judge should organize the court with a view to the prompt and convenient dispatch of its business and he should not tolerate abuses and neglect by clerks, and other assistants who are sometimes prone to presume too much upon his good natured acquiescence by reason of friendly association with him.

It is desirable too, where the judicial system permits, that he should cooperate with other judges of the same court, and in other courts, as members of a single judicial system, to promote the more satisfactory administration of justice.

9. CONSIDERATION FOR JURORS AND OTHERS.

A judge should be considerate of jurors, witnesses and others in attendance upon the court.

10. COURTESY AND CIVILITY.

A judge should be courteous to counsel, especially to those who are young and inexperienced, and also to all others appearing or concerned in the administration of justice in the court.

He should also require, and, so far as his power extends, enforce on the part of clerks, court officers and counsel civility and courtesy to the court and to jurors, witnesses, litigants and others having business in the court.

11. UNPROFESSIONAL CONDUCT OF ATTORNEYS AND COUNSEL.

A judge should utilize his opportunities to criticize and correct unprofessional conduct of attorneys and counsellors, brought to his attention; and, if adverse comment is not a sufficient corrective, should send the matter at once to the proper investigating and disciplinary authorities.

12. APPOINTEES OF THE JUDICIARY AND THEIR COMPENSATION.

Trustees, receivers, masters, referees, guardians and other persons appointed by a judge to aid in the administration of justice should have the strictest probity and impartiality and should be selected with a view solely to their character and fitness. The power of making such appointments should not be exercised by him for personal or partisan advantage. He should not permit his appointments to be controlled by others than himself. He should also avoid nepotism and undue favoritism in his appointments.

While not hesitating to fix or approve just amounts, he should be most scrupulous in granting or approving compensation for the services or charges of such appointees to avoid excessive allowances, whether or not excepted to or complained of. He cannot rid himself of this responsibility by the consent of counsel.

13. KINSHIP OR INFLUENCE.

A judge should not act in a controversy where a near relative is a party; he should not suffer his conduct to justify the impression that any person can improperly influ-

ence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position or influence of any party or other person.

14. INDEPENDENCE.

A judge should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor by apprehensive of unjust criticism.

15. INTERFERENCE IN CONDUCT OF TRIAL.

A judge may properly intervene in a trial of a case to promote expedition, and prevent unnecessary waste of time, or to clear up some obscurity, but he should bear in mind that his undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on his part toward witnesses, especially those who are excited or terrified by the unusual circumstances of a trial, may tend to prevent the proper presentation of the cause, or the ascertainment of the truth in respect thereto.

Conversation between the judge and counsel in court is often necessary, but the judge should be studious to avoid controversies which are apt to obscure the merits of the dispute between litigants and lead to its unjust disposition. In addressing counsel, litigants, or witnesses, he should avoid a controversial manner or tone.

He should avoid interruptions of counsel in their arguments except to clarify his mind as to their positions, and he should not be tempted to the unnecessary display of learning or a premature judgment.

16. EX PARTE APPLICATIONS.

A judge should discourage *ex parte* hearings of applications for injunctions and receiverships where the order may work detriment to absent parties; he should act upon such *ex parte* applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to counteract the effect of the absence of opposing counsel by a scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.

17. EX PARTE COMMUNICATIONS.

A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.

While the conditions under which briefs of arguments are to be received are largely matters of local rule or practice, he should not permit the contents of such brief presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

18. CONTINUANCES.

Delay in the administration of justice is a common cause of complaint; counsel are frequently responsible for this delay. A judge, without being arbitrary or forcing cases unreasonably or unjustly to trial when unprepared, to the detriment of parties, may well endeavor to hold counsel to a proper appreciation of their duties to the

public interest, to their own clients, and to the adverse party and his counsel, so as to enforce due diligence in the dispatch of business before the court.

19. JUDICIAL OPINIONS.

In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law.

It is desirable that Courts of Appeals in reversing cases and granting new trials should so indicate their views on questions of law argued before them and necessarily arising in the controversy that upon the new trial counsel may be aided to avoid the repetition of erroneous positions of law and shall not be left in doubt by the failure of the court to decide such questions.

But the volume of reported decisions is such and is so rapidly increasing that in writing opinions which are to be published judges may well take this fact into consideration, and curtail them accordingly, without substantially departing from the principles stated above.

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.

20. INFLUENCE OF DECISIONS UPON THE DEVELOPMENT OF THE LAW.

A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law.

21. IDIOSYNCRACIES AND INCONSISTENCIES.

Justice should not be moulded by the individual idiosyncracies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court. Though vested with discretion in the imposition of mild or severe sentences he should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.

In imposing sentence he should endeavor to conform to a reasonable standard of punishment and should not seek popularity or publicity either by exceptional severity or undue leniency.

22. REVIEW.

In order that a litigant may secure the full benefit of the right of review accorded to him by law, a trial judge should scrupulously grant to the defeated party opportunity to present the questions arising upon the trial exactly as they arose, were presented, and decided, by full and fair bill of exceptions or otherwise; any failure

in this regard on the part of the judge is peculiarly worthy of condemnation because the wrong done may be irremediable.

23. LEGISLATION.

A judge has exceptional opportunity to observe the operation of statutes, especially those relating to practice, and to ascertain whether they tend to impede the just disposition of controversies; and he may well contribute to the public interest by advising those having authority to remedy defects of procedure, of the result of his observation and experience.

24. INCONSISTENT OBLIGATIONS.

A judge should not accept inconsistent duties; nor incur obligations, pecuniary or otherwise, which will in any way interfere or appear to interfere with his devotion to the expeditious and proper administration of his official functions.

25. BUSINESS PROMOTIONS AND SOLICITATIONS FOR CHARITY.

A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.

26. PERSONAL INVESTMENTS AND RELATIONS.

A judge should abstain from making personal investments in enterprises which are apt to be involved in litigation in the court; and, after his accession to the Bench, he should not retain such investments previously made, longer than a period sufficient to enable him to dispose of them without serious loss. It is desirable that he should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties.

He should not utilize information coming to him in a judicial capacity for purposes of speculation; and it detracts from the public confidence in his integrity and the soundness of his judicial judgment for him at any time to become a speculative investor upon the hazard of a margin.

27. EXECUTORSHIPS AND TRUSTEESHIPS.

While a judge is not disqualified from holding executorships or trusteeships, he should not accept or continue to hold any fiduciary or other position if the holding of it would interfere or seem to interfere with the proper performance of his judicial duties, or if the business interests of those represented require investments in enterprises that are apt to come before him judicially, or to be involved in questions of law to be determined by him.

28. PARTISAN POLITICS.^b

While entitled to entertain his personal views of political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid

^b As amended August 31, 1933 and September 20, 1950.

making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for political office and participation in party conventions.

He should neither accept nor retain a place on any party committee nor act as party leader, nor engage generally in partisan activities.

Where, however, it is necessary for judges to be nominated and elected as candidates of a political party, nothing herein contained shall prevent the judge from attending or speaking at political gatherings, or from making contributions to the campaign funds of the party that has nominated him and seeks his election or reelection.

29. SELF-INTEREST.

A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved. If he has personal litigation in the court of which he is judge, he need not resign his judgeship on that account, but he should, of course, refrain from any judicial act in such a controversy.

30. CANDIDACY FOR OFFICE.^c

A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination.

While holding a judicial position he should not become an active candidate either at a party primary or at a general election for any office other than a judicial office. If a judge should decide to become a candidate for any office not judicial, he should resign in order that it cannot be said that he is using the power or prestige of his judicial position to promote his own candidacy or the success of his party.

If a judge becomes a candidate for any judicial office, he should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy or the success of his party.

He should not permit others to do anything in behalf of his candidacy which would reasonably lead to such suspicion.

31. PRIVATE LAW PRACTICE.

In many states the practice of law by one holding judicial position is forbidden. In superior courts of general jurisdiction, it should never be permitted. In inferior courts in some states, it is permitted because the county or municipality is not able to pay adequate living compensation for a competent judge. In such cases one who practices law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

He should not practise in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy.

If forbidden to practise law, he should refrain from accepting any professional employment while in office.

He may properly act as arbitrator or lecture upon or instruct in law, or write upon the subject, and accept compensation therefor, if such course does not interfere

^c As amended August 31, 1933.

with the due performance of his judicial duties, and is not forbidden by some positive provision of law.

32. GIFTS AND FAVORS.

A judge should not accept any presents or favors from litigants, or from lawyers practising before him or from others whose interests are likely to be submitted to him for judgment.

33. SOCIAL RELATIONS.

It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relations or friendships constitute an element in influencing his judicial conduct.

34. A SUMMARY OF JUDICIAL OBLIGATION.

In every particular his conduct should be above reproach. He should be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of public clamor, regardless of public praise, and indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.

35. IMPROPER PUBLICIZING OF COURT PROCEEDINGS.^d

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.

36. CONDUCT OF COURT PROCEEDINGS.^e

Proceedings in court should be so conducted as to reflect the importance and seriousness of the inquiry to ascertain the truth.

The oath should be administered to witnesses in a manner calculated to impress them with the importance and solemnity of their promise to adhere to the truth. Each witness should be sworn separately and impressively at the bar or the court, and the clerk should be required to make a formal record of the administration of the oath, including the name of the witness.

^d Adopted September 30, 1937; amended September 15, 1952 and February 5, 1963.

^e Adopted September 30, 1937.