The Real Costs of Judicial Misconduct: Florida Taking a Step Ahead in the Regulation of Judicial Speech and Conduct to Ensure Independence, Integrity, and Impartiality

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THE REAL COSTS OF JUDICIAL MISCONDUCT: FLORIDA TAKING A STEP AHEAD IN THE REGULATION OF JUDICIAL SPEECH AND CONDUCT TO ENSURE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY

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I. INTRODUCTION

"The public’s confidence in the judiciary hinges on the public’s perception of it, and that perception necessarily hinges on the media’s portrayal of the legal system.” —Justice Felix Frankfurter

An African proverb admonishes that: “Corn can’t expect justice from a court composed of chickens.” If the public’s perception of justice is formed by an opinion that judges are “insensitive, arbitrary, and aloof,” then it is understandable that the public would have no expectation of receiving justice. Like the corn, the public is consumed unceremoniously as a means to continuously feed a system that operates only to benefit itself. The speech and conduct of judges contribute to creating a public perception that judges are “incompetent, self-indulgent, abusive, or corrupt,” and, across the country, these judges are the subject of numerous complaints.

The challenge to this perception of justice is the reality that judges have an affirmative duty to “uphold the integrity and independence of the judiciary” through speech and conduct. Judges also have a duty to “avoid impropriety and the appearance of impropriety in all of the judge’s activities.” Additionally, a judge should execute judicial duties impartially and diligently, ensuring that extra-judicial duties are undertaken to minimize the risk

4. See id. at 35.
7. Id. Canon 2.
of conflict.\textsuperscript{8} Currently, the country grapples with maintaining an independent, honest, and impartial judiciary.\textsuperscript{9} However, Florida has taken the lead by amending its code to ensure that the independence, integrity, and impartiality of the judiciary are maintained.\textsuperscript{10} Like many other states, including the District of Columbia,\textsuperscript{11} Florida adopted the 1990 version of the \textit{Model Code of Judicial Conduct} to regulate the speech and conduct of judges.\textsuperscript{12} In January of 2006, Florida adopted amendments to its code in response to the recent attacks on the independence of the judiciary.\textsuperscript{13} These changes are indicative of the importance in ensuring the independence, integrity, and impartiality of the judiciary.\textsuperscript{14}

II. THE CASE FOR INDEPENDENCE, INTEGRITY, AND IMPARTIALITY

Public confidence in the fairness of judicial decisions is a foundation of the judicial decision-making process and a byproduct of judicial independence.\textsuperscript{15} A judge must be free to act without fear of reprisal and without favor

\begin{itemize}
\item \textsuperscript{8} \textit{Id.} Canon 3, Canon 4A(3).
\item \textsuperscript{9} \textit{See} Greene, \textit{supra} note 3, at 37.
\item \textsuperscript{12} Forty-nine of fifty states adopted the 1972 ABA Model Code, the 1990 version, or both. Brief of ABA as Amicus Curiae Supporting Respondents at 8, Spargo v. N.Y. State Comm’n on Jud. Conduct, 351 F.3d 65 (2d Cir. 2003) (No. 03-7250).
\item \textsuperscript{13} The Supreme Court of Florida requested that its Judicial Ethic Advisory Committee (JEAC) study the proposed revisions to the \textit{ABA Model of Judicial Conduct} and recommend any appropriate amendments of its code. \textit{Amends. to Code of Jud. Conduct—ABA’s Model Code, 918 So. 2d at 949}. The JEAC filed a report on January 31, 2005, recommending several amendments. \textit{Id}. The amendments were published for comments and were adopted on January 5, 2006. \textit{Id}.
\item \textsuperscript{14} FLA. CODE JUD. CONDUCT pmbl. (2006).
\item \textsuperscript{15} \textit{See} \textit{Model Code of Jud. Conduct} pmbl. (1990).
toward an issue or individual. When a judge can speak and act without fear or favor, both integrity and independence are maintained. Further, when a judge adheres to the restraints placed on his or her speech and conduct, impartiality is maintained.

A. Perception of the Public

"'Perception is reality.' Each person has individualistic perceptions, different ways of looking at things, yet each person is able to change his or her perception, and, thus, change reality." The partition between the perception of justice and the reality of justice in our judicial system continues to grow. This is due to the disparity between the public's concept of what justice is and what justice should be. The discrepancy operates as a concept discrete and insular from what judges or lawyers believe about the judicial system. While repeated studies indicate that lawyers feel that they are being judged unfairly by society, the basis for these perceptions must be understood before they can change. Judges must be insulated from the external controls that operate to challenge their independence. However, judges cannot escape the overarching negative perception of the legal system that appears to engulf the judiciary.

B. Portrayal by the Media

The coverage of courtroom dramas in the media perpetuates perceptions that threaten to become a reality for the public. Historically, the proliferation of television legal dramas generated perceptions created by media cov-
average of real court cases that may contain relatively little or no truth at all. 26 In 2007 Florida was the venue of a poignant example of the impact on the media coverage on the perception of judges. 27 Circuit Court Judge Larry Seidlin made news across the country for his antics from the bench for his “witty” one-liners and emotional and tearful delivery of his edicts. 28 Judge Seidlin was a presiding judge in some of the custody and legal proceedings that ensued after the death of Anna Nicole Smith. 29 His dramatic behavior led to perception that his speech and conduct were intended to attract offers for a courtroom television show. 30

Additionally, the new genre of television crime dramas use the latest scientific equipment that can detect, discover, diagnose, and dissect any piece of evidence with absolute certainty. 31 As a result, these dramas threaten to generate a standard of proof beyond all doubt with the use of such scientific equipment. 32 The Maricopa County Attorney conducted a study entitled The CSI Effect and Its Real-Life Impact on Justice. 33 The study concluded that television forensic crime dramas are having a significant impact on juries and their perception about the availability and necessity of evidence. 34 Consequently, the impact of the media is evident in television and real life court coverage.

26. See Greene, supra note 3, at 37. Leslie Abramson, a criminal defense attorney who represented the Menendez brothers, remarked that some media coverage has little regard for the truth. Leigh Buchanan Blenen, The Appearance of Justice: Juries, Judges and the Media Transcript, 86 J. CRIM. L. & CRIMINOLOGY 1096, 1098 (1996). She related a story about an individual who claimed on a television show that he goes to go the Los Angeles jail every three weeks to service Lyle Menendez’s hairpiece and that Menendez’s cell is right next door to O.J. Simpson’s cell. Id. The reality according to Abramson is that the hairpiece is not serviced at all and that Simpson was housed in an area secluded from all other prisoners. Id. at 1098–99.

27. This judge has since announced his retirement from the bench, effective July 31, 2007, to pursue a television career. Catherine Donaldson-Evans, Famed Judge to Step Down, SO. FLA. SUN-SENTINEL, June 20, 2007, at B1.

28. Id.

29. Id.


32. During a recent jury selection in a drug possession case, I noted with interest as prospective jurors questioned the prosecution and defense about scientific analysis. The prospective jurors inquired about the need and expectation of fingerprint and other forensic analysis that would allow definitive determination of the weight and sufficiency of the evidence.


34. Id. at 5–7.
Media coverage about the judicial system focuses on outrageous cases.\textsuperscript{35} The coverage of high-profile cases has also contributed to negative perceptions of the legal system and of judges.\textsuperscript{36} As a result, the public's perception of what really happens in the courtroom is obscured by a lens that has little semblance of reality.\textsuperscript{37} These perceptions threaten to erode the integrity of the legal system.\textsuperscript{38} Unfortunately, the media's focus on sensational trials and verdicts may play a role in some of the negative perceptions of justice.\textsuperscript{39} However, perceptions about the integrity of lawyers may play an even larger role.\textsuperscript{40}

C. Experiences of the Participants

The public's perception about the impartiality of the judge may be shaped by the role of the individual in the legal system. For example, in the same trial, a victim, a juror, a plaintiff, a defendant, and a witness may each have different perceptions about partiality and the judicial system.\textsuperscript{41} Accordingly, each may have a different perception about the speech and conduct of the judge.\textsuperscript{42} This dichotomy becomes even more pronounced when the law-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{35} Levine, \textit{supra} note 19, \textsection 6:25.14. \textit{Court TV} brings the day to day reality of the courtroom to the general public. Every trial is not, however, carried out with the pomp and circumstance of the Scott Peterson, Robert Blake, or Michael Jackson trials. The snapshot of the media's coverage of these trials may unfairly focus on judicial speech and conduct that creates a perception that may or may not be reality. For information on each of these trials, please refer to the \textit{Court TV} website. Information about the Scott Peterson trial can be accessed from http://www.courttv.com/trials/peterson/ (last visited May 26, 2007). Information about the Robert Blake trial can be accessed from http://www.courttv.com/trials/blake/ (last visited May 26, 2007). Information about Michael Jackson's various trials can be accessed from http://www.courttv.com/trials/jackson/ (last visited May 26, 2007).
\item Greene, \textit{supra} note 3, at 35, 37. The O.J. Simpson trial reportedly supports the public belief that money can buy justice. \textit{Id.}
\item \textit{Id.} at 37.
\item \textit{Id.}
\item \textit{Id.}
\item Greene, \textit{supra} note 3, at 36. A National Law Journal/West Publishing Company poll suggests that respect for the legal profession is declining. Randall Samborn, \textit{Anti-Lawyer Attitude Up}, NAT'L L.J., Aug. 9, 1993, at 20. In a poll among a list of ten professions—including lawyers—only 2\% of those polled said they had “the most respect for lawyers.” \textit{Id.} This number was down from 5\% in 1986. \textit{Id.}
\item A victim who has been subjected to numerous interviews that require regurgitation of a disturbing and painful event may feel re-victimized. Therefore, the individual may perceive that justice is not served when a system seeks to ensure that a defendant's constitutional rights are not compromised. If a juror is required to appear and to wait for a jury selection and trial that is riddled with delay and interruption, the juror may perceive that grave injustices exist within the judicial system.
\item Greene, \textit{supra} note 3, at 35.
\end{enumerate}
\end{footnotesize}
yters are added to the equation. The prosecutor and the defense attorney may have a different perception of justice that is dictated by the role they play. Each may view the speech and conduct of the judge differently in light of their roles as advocates and their beliefs about the independence, integrity, and impartiality of the judge. Likewise, in a civil action, the plaintiff’s lawyer and the defendant’s lawyer may each have different perceptions of justice. Each may view the speech and conduct of the judge differently, in light of their roles.

The negative perception of the public regarding the judicial system and some lawyers is supported by empirical evidence. By its very nature, the adversarial roles of lawyers can further distort the perception of justice. Admittedly, these diametrically opposed roles create the basic foundation for the fundamental challenge for the judge trying to positively affect public perception. Ultimately, one must concede that the perception and reality of integrity are cornerstones of an independent and impartial judiciary. Therefore, if left unrestrained, the speech and conduct of judges may erode the public’s confidence in the judicial system.

Studies have found that the public is more willing to accept an unpopular decision that is perceived as being fairly made. Therefore, the opportunity to be fully and fairly heard carries great weight. Moreover, a strong correlation exists between the public’s “[p]erception[] of fairness in the judicial system, . . . [and] its perception[] of . . . fairness in procedure[].” Ad judges terrorize courtrooms, impair the functioning of the legal system, and undermine public confidence in the law.” Judges, whose speech and conduct blatantly and repeatedly confront procedural fairness and create patterns of misconduct, run the risk of decreasing the public’s confidence to the detriment of the independence, integrity, and impartiality of the judicial system.
The public will not and cannot be expected to adhere to the decisions of a court that lacks integrity and is not independent or impartial. Independence, integrity, and impartiality cannot be assumed or presumed from a court that does not adhere to high principles in its conduct and speech on and off the bench. Because the possibility exists for judicial speech and conduct to foster apprehension regarding the independence, integrity, and impartiality of the judiciary, a judge must accept some regulation. In reviewing judicial misconduct in this state, the Supreme Court of Florida has been critical of the penalties imposed in some cases and has rejected some of the recommendations of the Judicial Qualification Commission (JQC) as too lenient. The application of judicial discipline in Florida, a state which has adopted the America Bar Association (ABA) Model Code of 1990 and most recently adopted changes in its code in January 2006, will be used as a barometer for general application.

III. THE CODE OF JUDICIAL CONDUCT

A. The History of Judicial Discipline

The Code of Judicial Conduct is a standard of precepts by which judicial speech and conduct are measured and by which disciplinary proceedings are instituted against judges. Each state has developed a standard for regulating the speech and conduct of its judges which was generally, if not specifically, derived from ABA standards. Therefore, they provide an essential element to understanding the application of discipline against judges for speech and conduct that affects the independence, integrity, and impartiality of the judiciary.

Standards of ethical guidelines were first created by the ABA for the practicing bar in 1908. At the time that these guidelines were promulgated,

55. See Jeffrey M. Shaman, Judicial Ethics, 2 Geo. J. Legal Ethics 1, 3–4 (1988)
58. See In re Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d 417, 419 (Fla. 2006).
59. Wolf, supra note 57, at 351.
60. Shaman, supra note 55, at 3; see, e.g., In re Amends. to the Rules Regulating the Fla. Bar, 933 So. 2d at 419.
judges were not included in their application. Therefore, a tool for regulating judicial speech and conduct did not exist. This exclusion of ethical guidelines for judges was by no means an indication that the speech and conduct of judges did not warrant such regulation. Moreover, this lack of guidelines for judges did not prevent the conduct of judges from becoming a subject of concern about the independence, integrity, and impartiality of a judge.

Also, in 1922 a commission on judicial ethics was established by the ABA "to draft a code of judicial conduct." The appointment of then Chief Justice William Howard Taft to chair this commission accentuated the importance of the charge of the commission.

Finally, in 1924, the Canons of Judicial Ethics were promulgated and approved by the ABA. There were thirty-six canons instituted which operated as a guideline for states to adopt and were intended as a guide for ideal behavior. The intentional use of these canons only as a guide attracted critics who asserted that their oratory admonitions provided little guidance in determining a standard of proscribed conduct. This lack of a standard for proscribed conduct resulted in the discipline of judges being neither uni-
formly nor universally undertaken. Consequently, the Canons remained virtually unchanged for almost fifty years.

B. The Creation of the Model Code of Judicial Conduct

In 1969, the ABA commenced a comprehensive review process to evaluate and update the Canons of Judicial Ethics. However, it was not until 1972 that these canons were modified to become the Model Code of Judicial Conduct. This Model Code reduced the number of canons from thirty-six to seven and incorporated language which eliminated the hortatory language of the previous Canons of Judicial Ethics. Hence, the 1972 Code indicated what a judge should do in an attempt to establish mandatory standards. This Model Code had no legal effect on the judges to whom it was intended to apply, and it would be necessary for each state to enact statutes or court rules that would make it mandatory and capable of enforcement. By 1990, "forty-seven states, the District of Columbia, and the Federal Judicial Conference" had adopted some form of the 1972 Model Code for regulation of judicial speech and conduct.

Also in 1990, a new version of the Model Code, adopted with five, not seven, canons emerged with significant changes from the 1972 Code. First, gender neutral language replaced the language in the 1972 Code, which had utilized masculine references only. Second, a terminology section was added to explain terms utilized in an attempt to ensure uniformity in understanding and application. Third, the language of the code was revised again to address the enforcement power of the Model Code. Therefore,

72. Id. at 6.
74. CODE OF JUD. CONDUCT Preface (1972).
75. ANN. MODEL CODE OF JUD. CONDUCT pmbl.
76. See CODE OF JUD. CONDUCT (1972); ABA BACKGROUND PAPER, supra note 62, at 1; JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS (3d ed. 2000).
77. See generally CODE OF JUD. CONDUCT (1972).
78. SHAMAN ET AL., supra note 76, at 3.
79. Id.
80. ABA BACKGROUND PAPER, supra note 62, at 1; see MODEL CODE OF JUD. CONDUCT (1990). Canons 4, 5, and 6 of the 1972 Code were combined into one canon dealing with conduct. ABA BACKGROUND PAPER, supra note 62, at 1.
83. ABA BACKGROUND PAPER, supra note 62, at 1; see also MODEL CODE OF JUD. CONDUCT (1990).
"should" was eliminated in favor of "shall" to emphasize the mandatory nature of the standards being established. A note was added in the commentary to indicate clearly and unequivocally that mandatory enforcement and application was intended by the use of "shall" instead of "should." Most notably, a preamble section was added, which explained: 1) how to apply the code; 2) when to apply the code; and 3) why to apply the code. This explanation of the underlying principles of the code was an integral part of the code's effectiveness as a tool for regulation.

By 1990, forty-seven states had adopted the 1972 Code in some form. With the adoption of the 1990 Code, twenty of these forty-seven states, plus the District of Columbia, adopted the new Model Code of Judicial Conduct as their state's code. Two of the three states that previously had no code of judicial conduct adopted the 1990 Code, bringing the total number of jurisdictions to twenty-three. While some states have adopted a combination of the 1972 and 1990 Code, only Montana—with its own code—remains as the state that has adopted neither the 1972 nor 1990 Code. Consequently, the Model Code operates as an excellent tool for application and analysis of judicial conduct.

C. The "New" Model Code of Judicial Conduct

In September of 2003, the ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct was formed to review the Code of Judicial Conduct and recommend changes. In announcing the commission, then ABA President Dennis W. Archer, Jr. noted that it had been twelve years since the ABA had taken a close examination of the Code, and that in light of recent legal and political challenges and attacks on judges, some revisions may be warranted. Public meetings were held across the country in conjunction with the ABA Annual Meeting. The final draft report has been

85. Id.
86. See id.
87. MILFORD, supra note 73, at 9.
88. SHAMAN ET AL., supra note 76, at 3 n.19.
89. Id. at 4. Rhode Island and Wisconsin adopted codes based on the 1990 Model Code of Judicial Conduct. Id.
90. See MONT. CONST. art V, § 11.
91. ABA Joint Comm'n to Evaluate the Model Code of Judicial Conduct, About the Comm'n, http://www.abanet.org/judicialethics/about.html (last visited May 26, 2007) [hereinafter About the ABA Joint Comm'n].
93. About the ABA Joint Comm'n, supra note 91.
released and is awaiting comment from the judiciary, the bar, and the public.\textsuperscript{94}

1. Format Changes

Both format and substantive changes to the Code are being proposed by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct.\textsuperscript{95} The format changes entail the reorganization of the information covered within the Canons and the numbering system.\textsuperscript{96} While Canons 4 and 5 address the same information they covered in the 1990 Code, most of the information previously provided in Canons 1, 2, and 3 has been placed in Canon 1.\textsuperscript{97} The judge's professional duties are addressed solely in Canon 2.\textsuperscript{98} The personal conduct of the judge will now appear in Canon 3 instead of Canon 2.\textsuperscript{99} Second, the 1990 Code generally presents an overarching principle that is followed by subsections, which discursively provides the parameters for speech and conduct.\textsuperscript{100} Instead, the new code would more directly address permitted and prohibited speech and conduct.\textsuperscript{101} The numbering system will also be changed from lettered canons with subsections A,

\textsuperscript{94} Id. Mark I. Harrison, the chair of the Commission, reported that as of April 2006: The Commissioners agree that a short extension of our work will allow us to present the best possible product to the ABA House of Delegates, both to provide clear and appropriate guidance to the judiciary in the years ahead, and to assure the public that its trust in the judiciary is well-founded . . . . We are committed to finishing our work this fall, to allow full consideration of all the proposed changes in the Code before the House convenes for the ABA Midyear Meeting in Miami in February 2007.

\textsuperscript{95} MARK I. HARRISON ET AL., INTRODUCTORY REPORT: PRELIMINARY REPORT OF THE ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT 1 (June 30, 2005). The Joint Commission operates under the auspices of the ABA's Standing Committee on Ethics and Professional Responsibility, and on Judicial Independence, with a grant from the Joyce Foundation. Id.

\textsuperscript{96} Id. at 3.

\textsuperscript{97} Id. The revised Canon 1 will address "both the obligation of judges to uphold the integrity, impartiality, and independence of the judiciary and to avoid impropriety and its appearance." Id.

\textsuperscript{98} HARRISON ET AL., supra note 95, at 3. In the 1990 Code, this information is partly covered in Canon 3. Id.

\textsuperscript{99} Id.

\textsuperscript{100} Id.

\textsuperscript{101} Id. This change is modeled after the ABA Model Rules of Professional Conduct, which is said to be "more straightforward and user-friendly." HARRISON ET AL., supra note 95, at 3.
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B, or C to numbered canons with rules. A comment section will replace commentary throughout the code.

2. Substantive Changes

a. Canon 1—Conduct in General

"A judge shall . . . avoid impropriety and the appearance of impropriety in all of the judge's activities," so as to uphold "the independence, integrity, and impartiality of the judiciary." The addition of the language after the comma is intended to emphasize the importance of avoiding impropriety and its appearance. It sets the tenor for judicial speech and conduct on and off the bench by stressing the importance of independence, integrity, and impartiality. Throughout the comment to this canon, the word independence is placed before both integrity and impartiality. Citing to over three decades of regulation of judicial conduct, the proposed changes place "the admonishment that judges avoid not only impropriety, but also its appearance in two places." This language, regarding impropriety and its appearance, appears in the text of Canon 1 and in Rule 1.03 in the language "substantially as [it] appear[s] in the present Code."

102. See JOINT COMM. TO EVALUATE THE CODE OF JUDICIAL CONDUCT, ABA, ATTACHMENT B: FINAL DRAFT REPORT REDLINED TO CURRENT ABA MODEL CODE OF JUDICIAL CONDUCT (2005), available at http://www.abanet.org/judicaletics/redlinetocurrentcode.pdf [hereinafter REDLINE TO CURRENT CODE]. For example, rules under Canon 1 would be designated: 1.01, 1.02, and 1.03. Id.

103. See id.

104. Id. Canon 1.

105. See id.


107. REDLINE TO CURRENT CODE, supra note 102, Canon 1 cmts. 1–3.

108. HARRISON ET AL., supra note 95, at 4. "The Commission . . . received numerous written communications on the question . . . of whether the 'appearance of impropriety' concept contained in the present Code should be retained." Id. Some "urged that the concept be retained, [while] [o]thers, notably lawyers who represent judges and judicial candidates in disciplinary proceedings, voiced concerns that the concept is not clearly definable and does not provide judges and judicial candidates with adequate notice about what conduct might constitute a disciplinable offense." Id.

109. Id.
b. Canon 2—Judicial Conduct

"A judge shall perform the duties of judicial office impartially . . . and diligently." 110 The redline copy of Canon 2 exemplifies the extensive revisions this Canon, which previously included only three subsections, has undergone. 111 As the title to this Canon suggests, the admonition that "a judge shall perform the duties of judicial office impartially and diligently" is the subject and principal focus of Canon 2. 112 The proposed changes would add seventeen additional provisions so that Canon 2 would contain twenty rules. 113

Each rule addresses speech and conduct that may occur while the judge is on the bench. 114 Most of the speech and conduct addressed in this Canon was previously addressed in Canon 3 of the 1990 Model Code, using substantially the same language. 115 The additional language of "[g]iving precedence to the duties of judicial office" further emphasizes the intent of this Canon. 116 Impartiality and fairness are specifically addressed in a new Rule 2.06 that provides: "A judge shall uphold and apply the law, and decide all cases with impartiality and fairness." 117

"Rule 2.08, 'Demeanor and Decorum,' contains a new Comment to accommodate" post-trial jury debriefing by delineating what must not be discussed. 118 The Comment to Rule 2.09, "Ensuring the Right to be Heard," adds a caution to judges to avoid coercion when "encouraging parties and their lawyers to settle disputes where possible." 119 In the proposal of Rule 2.10(B), judges are prohibited from "independently investigat[ing] facts in a case" 120 and the importance of an independent judiciary is once again em-
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Emphasized. Rule 2.20 adds the duty of a judge to cooperate with judicial and lawyer disciplinary authorities.

c. Canon 3—Personal Conduct

"A judge shall conduct the judge's personal affairs to preserve the independence, integrity, and impartiality of the judiciary." The revision language for Canon 3 emphasizes the applicability of the code to speech and conduct that may occur during the personal life of a judge, including disclosure of information that may be deemed private. Many new commentaries have been added to this canon to provide clarity and clear guidance to the judiciary regarding personal conduct. For example, the revision comment provides that judges should write letters of recommendation based on "only knowledge obtained . . . in his or her official capacity." While the commentary is not new, it "addresses [a] long-standing debate about the appropriate use of judicial letterhead for references." Second, "ethnicity' and 'sexual orientation' [were added] to the list of factors that must not be the basis for discrimination in the policies of clubs and other membership entities to which judges seek to belong." While the in communications with individuals and entities" and may violate ex parte provisions. 

121. See id. at 4-5. The addition to "[t]he Comment to Rule 2.12, 'Disqualification,' states that a judge 'should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification,'" which raised the question of "whether such an application of the disqualification rule is necessary or desirable, and specifically whether such an interpretation may work a hardship on one or both of the lawyers in a proceeding." Id. at 5.

122. REDLINE TO CURRENT CODE, supra note 102, Canon 2, R. 2.20.

123. The present language of Canon 3 provides: "A judge shall perform the duties of judicial office impartially and diligently." MODEL CODE OF JUD. CONDUCT Canon 3 (2004). It contains subsections A-F and addresses speech and conduct that may occur on the bench or during the performance of judicial duties. Id. Incorporating this language and the subject matter of Canon 3 into Canon 2 will make the focus of Canon 3 off the bench speech and conduct. See HARRISON ET AL., supra note 95, at 3.

124. REDLINE TO CURRENT CODE, supra note 102, Canon 3.

125. See id.

126. See HARRISON ET AL., supra note 95, at 5-6; REDLINE TO CURRENT CODE, supra note 102, Canon 3.

127. HARRISON ET AL., supra note 95, at 5.


129. HARRISON ET AL., supra note 95, at 5. The issue of membership in the Boy Scouts of America was specifically addressed as a result of the United States Supreme Court's decision in Boy Scouts of America v. Dale, 530 U.S. 640 (2000). A Massachusetts Committee on Judicial Ethics found that the prohibition against discrimination based on sex did not refer to dis-
1990 Code presently contains a “prohibition against the manifestation of bias in the court.” The prohibition does “not appear with respect to organizational memberships held by a judge.”

Third, the caveat remains “that a judge may belong to ‘any organization dedicated to the preservation of religious, ethnic, or legitimate cultural values of common interest to its members’” without fear of violation of this canon.

Fourth, the comments note that attendance by the judge in violation of this canon is well established as a per se violation. Although, mere attendance of a judge at an event in a facility of a group that he or she could not join as a member does not violate the rule if attendance is an isolated event and could not be perceived as an endorsement of the organization.

Fifth, “a judge [must] immediately resign from an organization to which he or she belongs upon discovering that it engages in invidious discrimination . . . [but has] one year to withdraw from membership, unless he or she was successful in influencing the organization to abandon its discriminatory policies.”

d. Canon 4—Extrajudicial Conduct

“A judge shall conduct the judge’s extra-judicial activities . . . to minimize the risk of conflict with [judicial obligations].” "[T]he text of this Rule remains largely unchanged," but the structure has changed, revising the description of gifts to exclude “several items that are not, in common parlance, thought of as gifts, including but not limited to: ordinary social hospitality; trivial tokens of appreciation; and loans, discounts, prizes, and scholarships that judges receive for reasons generally unrelated to their being judges.”

130. HARRISON ET AL., supra note 95, at 5.
131. Id.
132. Id. at 6.
133. See id. at 5–6.
134. Id. at 6.
135. REDLINE TO CURRENT CODE, supra note 102, Canon 4.
136. HARRISON ET AL., supra note 95, at 6.
"Rule 4.13(A)(7) remains substantially similar to the present Code, but includes several important changes."¹³⁷ It provides that each jurisdiction should set a specific amount for the reporting of gifts instead of simply requiring that all gifts be reported.¹³⁸ No gifts would be allowed for five years from persons who previously appeared before the court or who are likely to appear before the court in the foreseeable future.¹³⁹

First, Rule 4.14(A) would apply to waiver of charges as well as reimbursement of expenses. Second, permissible reimbursement is specifically limited to necessary travel and lodging. Third, [and the most important change is that] the condition precedent to accepting reimbursement or waiver of charges—that it not create an appearance of impropriety—has been amended to identify specifically the potential that the acceptance of gifts has for creating the perception that judicial integrity, impartiality, or independence may be compromised.

The Comment explicating this Rule is designed to provide judges with greater guidance when analyzing whether their reimbursement for attendance at a given event may be perceived as casting doubt on their integrity, impartiality, or independence. The sources of funding for an event, the reasonableness of the expenses paid, and the identity of the sponsor are all among factors that judges are urged to consider when deciding whether to attend expense-paid seminars.¹⁴⁰

e. Canon 5—Inappropriate Political Activity

"A judge or candidate for judicial office shall not engage in political . . . activity that is inconsistent with the independence, integrity, and impartiality of the judiciary."¹⁴¹ The redline copy of Canon 5 includes both substantial rule changes and significant comments to the canon.¹⁴² These changes appear to be a manifestation of the need to ensure the independence, integrity, and impartiality of the judiciary while recognizing "the political realities of judicial selection."¹⁴³

¹³⁷. Id.
¹³⁸. Id.
¹³⁹. Id.
¹⁴⁰. Id. at 7.
¹⁴¹. REDLINE TO CURRENT CODE, supra note 102, Canon 5. The former language is "[a] judge or judicial candidate shall refrain from inappropriate political activity." MODEL CODE OF JUD. CONDUCT Canon 5 (2004).
¹⁴². See REDLINE TO CURRENT CODE, supra note 102, Canon 5.
¹⁴³. HARRISON ET AL., supra note 95, at 7.
The redline version adds the language: "activity that is not inconsistent with the independence, integrity, and impartiality of the judiciary." The language embodies these overriding principles while addressing the issues that may arise in the different methods of judicial selection. Rule 5.01 addresses the issue of speech and conduct that: 1) is false and made "with reckless disregard for the truth;" 2) might "reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending;" or 3) "make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of office." Rules 5.02, 5.03, 5.04, and 5.05 each address a different method of judicial selection.

Rule 5.02, "Permitted Political and Campaign Activities of Candidates for Judicial Office in Partisan Public Elections," contains specific language to indicate the speech and conduct permitted. This rule was contained in the previous code and generally adds language that clarifies the speech and conduct allowed. This rule specifically allows speech and conduct that would be prohibited by other rules.


Finally, Rule 5.05, "Permitted Political Activities of Candidates for Appointive Judicial Office," provides guidance for speech and conduct for those seeking appointment.

144. REDLINE TO CURRENT CODE, supra note 102, Canon 5.
145. See id.
146. Id. R. 5.01(A)(11).
147. Id. R. 5.01(A)(12).
148. Id. R. 5.01(A)(13).
149. REDLINE TO CURRENT CODE, supra note 102, Canon 5.
150. Id. R. 5.01.
152. REDLINE TO CURRENT CODE, supra note 102, Canon 5. For example, a judge or judicial candidate in a non-partisan election would be prohibited from identifying the party to which he or she belongs, but would be allowed pursuant to this rule. See id.
153. Id. R. 5.03, 5.04.
154. Id. R. 5.05.
THE REAL COSTS OF JUDICIAL MISCONDUCT

IV. THE SPEECH AND CONDUCT THAT THREATEN INDEPENDENCE, INTEGRITY, AND IMPARTIALITY

A. Categories of Judicial Speech and Conduct: The Florida Model

A recent article by Judge James R. Wolf explores the cost of judicial misconduct in Florida by conducting a comprehensive survey of judicial discipline.155 Judge Wolf identifies twenty categories of misconduct in his analysis of judicial discipline.156 The twenty categories are:

1) lacking judicial temperament; 2) failing to be impartial; 3) engaging in ex parte communications; 4) violating recusal and disclosure requirements; 5) improperly communicating with the press; 6) failing to follow the law while conducting judicial duties; 7) inappropriately using contempt power; 8) misusing office for personal gain; 9) misusing office for the [benefit] of others; 10) abusing substances; 11) improper[ ] receiving [of] gifts; 12) . . . improper sexual conduct; 13) . . . improper behavior while practicing law; 14) violating criminal laws; 15) . . . delay[ ] in ruling; 16) exhibiting a lack of candor during official proceedings; 17) failing to file required . . . disclosure . . . ; 18) criticizing jur[ors] and . . . officials; 19) use[] [of] intimidation . . . ; and 20) . . . election misconduct.157

Wolf’s article does not analyze the misconduct in the context of the most recent changes to the Florida Code of Judicial Conduct or the proposed changes in the Model Code of Judicial Conduct.158 The categories that he identifies are a comprehensive list of speech and conduct that frequently are the subject of judicial discipline.159 Narrowing the categories of misconduct identified by Judge Wolf provides a more useful mechanism for a broader

155. Wolf, supra note 57, at 350.
156. Id. at 352-53.
157. Id.
158. See id. at 351. According to Wolf:
While a study of the seven canons of the Florida Code of Judicial Conduct will certainly reveal what behavior constitutes judicial misconduct warranting the imposition of discipline, such a study cannot provide an adequate framework for determining the fairness or equality of the penalties actually received by judges for their misconduct.

Id.
159. See Wolf, supra note 57, at 352-53. In his analysis of judicial discipline while referring to categories one through ten of judicial misconduct, Wolf states: “While these behaviors are given many names, they essentially involve a judge being discourteous and not treating people the way he or she would want to be treated.” Id. at 367.
analysis of the speech and conduct. The twenty categories of misconduct can be reduced to three areas of misconduct: 1) on the bench speech and conduct; 2) off the bench speech; and 3) political speech and conduct. These three categories provide a consolidated framework for comparison and evaluation of the judicial misconduct, and should serve as an effective and necessary tool for evaluating the regulation of judges in order to maintain public confidence and ensure the independence, integrity, and impartiality of the judiciary. The examinations will necessarily include speech and conduct of judges during political activity to expose how the independence, integrity, and impartiality of the judiciary are affected.

B. Precepts for Regulation of Judicial Speech and Conduct

What a judge says can become as much the subject of discipline as what a judge does. The same speech may violate more than one provision, and each must be examined through those rules, commentaries, and cases that discuss the prohibited behavior. An adequate examination of judicial speech and conduct will necessarily overlap in depth and breadth of the analysis of the canons that govern such speech and behavior. While all of the canons may provide a constructive framework for analysis when looking at judicial speech or conduct, this examination of on the bench conduct will focus on, and begin with, an analysis of Canon 3, and then establish the implications of Canon 1 and Canon 2. The emphasis on Canon 3 reflects its overriding precepts of independence, integrity, and impartiality, and its emphasis on specific speech and conduct. The utility of Canon 4 as a tool for analysis is limited because of its framework, but it will be examined

160. Id. at 352. With fewer categories, the opportunity for comparison and analysis is greater. See id. ("It is beneficial for analytical purposes to identify narrow categories of conduct and to create a large number of categories to ensure that the comparison of penalties is truly for like conduct.").

161. See generally id at 352–53.

162. See Wolf, supra note 57, at 351 (raising many issues concerning discipline for judicial misconduct and implying why such issues are grounds for public concern).

163. See id. at 352.


165. See Wolf, supra note 57, at 352.

166. See id.


168. See id. Canon 1 ("A judge shall uphold the integrity and independence of the judiciary.").

169. See id. Canon 2 ("A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.").

170. See id. Canon 3.
for compliance. Finally, Canon 5 will be used to examine political speech and conduct.

"A judge shall uphold the integrity and independence of the judiciary." This canon invites desirable, not actual application, to judicial speech and conduct, but has been successfully applied to judicial speech and conduct, including political activity. The principal indictment against sole use of this canon as a disciplinary tool is that the "hortative and goal oriented" language fails to "set forth . . . the precise nature of the speech and conduct that may be subject to discipline." 

"A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities." The overriding principle of this canon is the recognition of the need to prohibit irresponsible and improper speech and conduct through regulation. This regulation includes definitions of impropriety and the appearance of impropriety. It is impossible to list all speech and conduct that is prohibited by this canon, but the commentary provides that "improprieties under this standard include violations of law, court rules, or other specific provisions of this Code." The test for the appearance of impropriety of speech and conduct is objectively outlined as determining if "the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." This standard allows objective application of this canon to a variety of speech and conduct ranging from an ex-

171. See id. Canon 4.
172. MODEL CODE OF JUD. CONDUCT Canon 5.
173. Id. Canon 1.
174. E.g., In re Larsen, 616 A.2d 529, 612 (Pa. 1992). Numerous states have consistently noted the difficulty in applying this canon via case law. Id. Such cases involve examples of on the bench speech and conduct. See, e.g., In re Jacobi, 715 N.E.2d 873, 874–75 (Ind. 1999) (finding a violation of Canon 1 for extensive ex parte contact with a town's attorney and board president when granting its temporary restraining order); In re Waterman, 625 N.W.2d 748, 748–50 (Mich. 1999) (hearing cases of attorneys to whom he leased offices). For examples of off the bench speech and conduct see Miss. Comm'n on Jud. Performance v. Blakeney, 848 So. 2d 824, 826 (Miss. 2003) (initiating ex parte contact with deputy in attempt to obtain dismissal for defendant), and In re Esquiroz, 654 So. 2d 558, 558–59 (Fla. 1995) (charging a judge with a DUI in violation of Canon 1 and Canon 2). For examples of political speech and conduct see In re Koon, 580 S.E.2d 147, 148 (S.C. 2003) (illustrating an example of a case of inappropriate political activity), and In re Rodriguez, 829 So. 2d 857, 858–60 (Fla. 2002) (hearing a case on a campaign finance reporting irregularity).
177. Id
178. Id.
179. Id. Canon 2 cmt.
180. Id.
tramarital affair to failing to pay for income tax preparation, while awarding an income tax accountant fiduciary appointments.

“A judge [should] perform the duties of [a judge] impartially and diligently.” The all-encompassing nature of this canon provides the most comprehensive umbrella for analysis of judicial speech and conduct. This general applicability continues with the admonition that “judicial duties of a judge take precedence over all the judge’s other activities.” “The judge’s judicial duties include all the duties of the judge’s office prescribed by law.”

In pronouncing the standards that would apply to this canon, the subsections identify the parameters as: 1) adjudicative duties; 2) administrative duties; 3) disciplinary duties; and 5) those duties relating to disqualification. Ultimately, an allegation of improper speech or conduct must generally include a violation of this canon, because it covers most aspects of how a judge should conduct judicial and extra-judicial activities.


184. See generally id.


186. Id.

187. Id. Canon 3B; see Wolf, supra note 57, at 359. Judge Wolf identifies these duties in terms of the need for the judge to “maintain[,] competence, . . . order, and decorum” on the bench and judicially perform duties with dignity and courtesy free of bias and prejudice. Wolf, supra note 57, at 359. The administrative duties also require the judge to ensure “a party’s right to be heard” without improper ex parte communication or public comments. FLA. CODE JUD. CONDUCT Canon 3B.

188. FLA. CODE JUD. CONDUCT Canon 3C; see Wolf, supra note 57, at 359. Generally, these responsibilities include the adjudicative duties and the need to avoid favoritism and nepotism when making appointments. FLA. CODE JUD. CONDUCT Canon 3C.

189. FLA. CODE JUD. CONDUCT Canon 3D; see Wolf, supra note 57, at 359. This duty specifies the responsibility of a judge to report judicial and attorney misconduct. FLA. CODE JUD. CONDUCT Canon 3D.

190. FLA. CODE JUD. CONDUCT Canon 3E; see Wolf, supra note 57, at 359. This duty specifies the requirements of a judge for disclosure and recusal. FLA. CODE JUD. CONDUCT Canon 3E.

191. See MODEL CODE OF JUD. CONDUCT Canon 3 (2004) (“The judicial duties of a judge take precedence over all the judge’s other activities. The judge’s judicial duties include all the duties of the judge’s office prescribed by law. In the performance of these duties, the [standards of Canon 3] apply.”).
A judge should conduct "the judge's extra-judicial activities [as] to minimize the risk of conflict with judicial obligations." This canon specifically applies to off the bench speech and conduct, and generally provides guidance to the judge when participating in these activities. Complete withdrawal by the judge from all extra-judicial activities is neither advisable nor required lest the judge becomes isolated from the community. However, this canon makes clear that the judge must accept speech and conduct limitations and expect to be the subject of scrutiny.

"A judge or judicial candidate shall refrain from inappropriate political activity." In recent years, the legislative branch has become involved in attempts to encroach upon and politicize the issue of judicial independence. In 2002, the United States Supreme Court became the venue of vociferous attacks on judicial speech and conduct, especially during elections. In Republican Party of Minnesota v. White, the Court found unconstitutional a provision of the Minnesota Code of Judicial Conduct that prevented judicial candidates from announcing their views regarding disputed legal and political questions. In emphasizing the positive value of announcements on views regarding disputed legal and political questions, the

192. Id. Canon 4.
193. Id.
194. Id. Canon 4 cmt.
195. Id.
196. Id. Canon 5.
199. Id. at 765.
200. Id. at 788.
Court stated that candidate platforms and positions are "what the elections are about."201

C. *Parameters of Judicial Speech and Conduct*

The use of the canons for the examination of on the bench and off the bench speech and conduct must be preceded by determining what is meant by judicial duties.202 This canon provides guidance stating that judicial duties are "all [of] the duties of the judge’s office prescribed by law."203 Since by law a judge is capable of being called into service twenty-four hours a day, do judicial duties encompass all speech and conduct by a judge? For the purpose of analysis under this canon, judicial duties will be used in reference to speech and conduct which occur while on the bench or while carrying out a judicial function.204 Consequently, anything that a judge says or does in direct connection with judicial duties can and will be subject to examination under this rubric.205

1. On the Bench Speech and Conduct

On the bench speech may encompass the following: 1) "lacking judicial temperament;" 2) "failing to be impartial;" 3) "engaging in ex parte communications;" 4) "exhibiting a lack of candor during official proceedings;" 5) "criticizing juries and . . . officials;" and 6) "us[e] [of] intimidation."206 The use of intimidation must be examined on a case-by-case basis since the speech or conduct may be indicated by a single event.207 Arguably, both failing to be impartial and the use of intimidation could also occur off the bench for personal advantage or some other reason.208 However, those instances, for the purpose of this analysis, will be characterized as "misus[e]
of office [either] for personal gain" or for the benefit of others. All of
these categories, which were identified by Judge Wolf, provide an opportu-
nity for useful analysis, especially when examined in the context of improper
dependent speech.

Again utilizing the categories identified by Judge Wolf, on the bench
court that will be examined consists of the following: 1) “Violating
Recusal and Disclosure Requirements;” 2) “Failing to Follow the Law While
Conducting Judicial Duties;” 3) “Inappropriately Using Contempt Power;” 4)
“Delay in Ruling;” 5) “Failing to File Required Disclosure” Documents; and
6) “Use of Intimidation.” While there is some overlap in these categories
of judicial discipline, the designation of on the bench conduct provides a
common thread for analyzing the speech and conduct.

2. Off the Bench Speech and Conduct

Determining the parameters of the off the bench judicial speech and
court that may be subject to discipline may be ascertained more easily.
The off the bench designation essentially includes any other speech and con-
duct that does not occur on the bench and in direct connection with judicial
duties. The aspects of speech and conduct that may be examined under
Canon 4 will be judicial activities specifically defined as: 1) “Avocational
Activities;” 2) “Governmental, Civic or Charitable Activities;” 3) “Fi-
nancial Activities;” 4) “Fiduciary Activities;” 5) “Service as Arbitrator
or Mediator;” and 6) “Practice of Law.” These activities govern judicial
conduct relating to participation in non-judicial activities.

3. Political Speech and Conduct

The final analysis of judicial speech and conduct will examine political
activity. Political activity will take into account speech and conduct of
judges and judicial candidates in a judicial election. It will also examine

209. Wolf, supra note 57, at 353.
210. See id. at 352–53.
207. Id. at 349–50.
213. Id. Canon 4C.
214. Id. Canon 4D.
215. Id. Canon 4E.
216. Id. Canon 4F.
217. MODEL CODE OF JUD. CONDUCT Canon 4G.
218. See id. Canon 4.
219. See id. Canon 5.
220. See id.
speech and conduct within the context of the appointment process. Finally, it will examine speech and conduct on behalf of another candidate within the context of an election or political appointment of a judge or any other person. Political activity will include both speech and conduct because the political environment is the principal catalyst in the analysis of misconduct.

V. THE EXAMINATION OF JUDICIAL SPEECH AND CONDUCT

A. On the Bench Speech and Conduct

The concept of limiting judicial speech and conduct on the bench can be easily justified since what a judge says and does can have serious ramifications for those who appear in court. A large percentage of the cases of misconduct occur as a result of incivility. Both speech and conduct are the subjects of these complaints. The consequences of improper speech can extend further than discipline against the judge and lead to the reversal of a conviction. These instances of judicial misconduct become more than legal error because they represent a departure by the judge from the obligation to “[p]erform the [d]uties of [j]udicial [o]ffice [i]mpartially and [d]iligently.” Judicial misconduct resulting in legal error has ramifications far greater than the cost of judicial disciplinary proceedings.

As a rule, judges should “not be disciplined for errors of judgment or errors of law.” To allow discipline for anything less than egregious examples of misconduct may have the “tendency to chill . . . independence.” The disciplinary process should not be a substitute for the appellate process. Conversely, failing to address legal error that is the result of inten-

221. See id.
222. MODEL CODE OF JUD. CONDUCT Canon 5.
223. See id.
224. Wolf, supra note 57, at 367. In Florida, complaints of incivility constitute a large percentage of the referrals to the Judicial Qualifications Committee. Id.
225. See id. at 368.
226. See Shaman, supra note 55, at 8–9. When legal error results in the reversal of a conviction, a question may arise whether such grounds should be the basis for judicial discipline. Id.
228. See Shaman, supra note 55, at 8.
231. See Shaman, supra note 55, at 8.
tional, repeated, or blatant misconduct does not promote confidence in the impartiality and integrity of the court. A judge presides over little, if anything else, that is more solemn, decisive, or significant than a first degree murder case in which the death penalty is being sought. Therefore, the judge whose improper speech or conduct creates legal error that causes a reversal is significant, as evidenced in the speech of Judge Donald McCartin.

In a decision filed on March 6, 2006, the Supreme Court of California reversed the death penalty imposed in a 1992 triple homicide, noting that at several crucial instances, the trial judge made comments in front of the jury that constituted misconduct and required reversal. The judge blatantly and repeatedly crossed the line from legal error to judicial misconduct. First, during the jury selection, the judge falsely told the jury that premeditation was a "gimme." He interrupted two defense expert witnesses (a pharmacologist and a psychologist) to ridicule their testimony. He made objections and comments on behalf of the state, while repeatedly chastising the defense attorney.

In announcing its decision, the court noted that "[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." The Sturm

232. See id. at 8–9.
233. See generally id.
234. See People v. Sturm, 129 P.3d 10, 17 (Cal. 2006).
235. See id.
236. See id.
237. Id. at 18. The court noted that this comment regarding premeditation was of extreme concern because the lack of premeditation was a central theme of the defendant's case in mitigation. Id. The jury specifically found him guilty of felony-murder instead of premeditated murder and deadlocked ten to two in favor of life instead of death during the penalty phase. Sturm, 129 P.3d at 12.
238. See id. at 19. The judge jokingly told the pharmacology expert that his "$4 million [in] federal grants ... [while at] the University of California ... [had] contributed to the federal deficit." Id. (internal quotations omitted). He indicated that the government had "spent too much already" on such research and that testimony about it "would be very depressing and we will need cocaine." Id. (internal quotations omitted). He accused the psychologist of embellishing answers and responding incorrectly to a defense question. Id. at 20.
239. See Sturm, 129 P.3d at 20–21. During the overall presentations by the state in aggravation and defense in mitigation, the judge "sua sponte intervened more than 30 times during the defense case" and the state "less than five times." Id. at 24 (emphasis added). The interruptions were generally negative and/or disparaging. Id. at 24 n.3.
court stated that "[i]t was reasonably probable that the . . . penalty phase jury’s verdict would have been different had the trial judge exhibited the patience, dignity, and courtesy that is expected of all judges." This incidence of discourteous speech is an apposite paradigm of the intemperate and impartial speech that has been the subject of the discipline of judges and the reversal of criminal cases. Maintaining impartiality requires a judge to act in absence of bias or prejudice and keep an open mind. The use of the code to overturn criminal cases provides an additional level of examination, thereby contemplating an additional consequence of judicial misconduct. Retrial, after fifteen years of even the penalty phase of a death penalty case, will be difficult and costly. Because Judge McCartin retired in 1993, the real cost of this judicial misconduct may never be fully realized.

In 2004, Judge Faith Johnson invited the media to a party replete with a cake and balloons for the sentencing of a defendant who absconded during trial. The defendant “previously served time in prison for killing his wife . . . [and] was convicted in absentia of aggravated assault” for choking his girlfriend. Judge Johnson noted that each year in the United States, four million women are physically assaulted and thirty percent of female homicide victims are slain by husbands, boyfriends, or live-in partners Judge Johnson also said that “when these kinds of stats begin to shrink, then we’ll have cause to celebrate . . . Until then, this man’s recapture—particularly in national domestic violence month—sends the message that the law is against domestic violence.”

On April 29, 2005, the Texas Commission on Judicial Conduct found that Judge Johnson violated the judicial code by not maintaining “order and decorum in [her] courtroom.” Further, they found that her actions “were

241. Sturm, 129 P.3d at 27 (citing CAL. CODE OF JUD. ETHICS Canon 3B(4) (2006)).
242. See Wolf, supra note 57, at 366–67. Examples include “lack of decorum . . . [and] dignity . . . disparaging lawyers, . . . litigants, . . . witnesses . . . [and court personnel], . . . and inappropriate humor or sarcasm.” Id. (internal citations and quotations omitted).
244. See Sturm, 129 P.3d at 17.
245. See Donald A. McCartin, A ‘Hanging Judge’s’ Second Thoughts: Fairness and Balance Aren’t Possible, So Death Penalty Should Be Scrapped, ORANGE COUNTY REG., June 24, 2005, at editorial page.
247. Id. (emphasis added). The defendant fled during the trial proceedings. Id.
248. Id.
249. Id. (internal quotations omitted).
willful and cast public discredit upon the judiciary." A public admonition was imposed against the judge, who had earlier apologized before the commission. Similar to the misconduct in this case, many cases of judicial misconduct deal with the judge’s lack of decorum in the courtroom.

B. Off the Bench Speech and Conduct

Is the private expression of a bias or prejudice by a judge analogous to an expression of bias and prejudice on the bench? Do these expressions warrant First Amendment protection that may not be available for on the bench speech and conduct? Although a judge does not abdicate all constitutional rights with assumption of the bench, some restrictions must be imposed. Once bias and prejudice are expressed publicly, even if not from the bench, the independence, integrity, and impartiality of the judiciary may be compromised. The very public nature of the judge’s role may subject any speech and conduct to scrutiny.

Scrutiny of off the bench speech may be subject to scrutiny, with or without discipline, but the cost may be measured in terms of the independence, integrity, and impartiality of the judiciary. The Supreme Court of Mississippi’s five to two refusal to discipline a judge for making obviously prejudicial comments poignantly illustrates the difficulty of addressing speech and conduct that brings the independence, integrity, and impartiality of a judge into question; especially where no manifestation of bias or prejudice has been exhibited by the judge in the execution of his or her judicial duties.

Judge Connie Glen Wilkerson wrote a letter to his local newspaper in response to the enactment of legislation in California that granted same sex partners the same rights granted to spouses and families. Judge Wilkerson

251. Id. at 32.
252. Id. This is the least severe punishment that can be issued. See id.
253. See In re J.O.C. (Hammill), 566 S.E.2d 310, 316 (Ga. 2002); In re Trettis, 577 So. 2d 1312, 1313 (Fla. 1991).
254. See MODEL CODE OF JUD. CONDUCT Canon 1A (2004).
255. See In re Stevens, 645 P.2d 99, 99 (Cal. 1982). The judge was publicly censured by the Supreme Court of California for using racial and ethnic epithets repeatedly and consistently, even though he performed his duties free from any bias and the comments were generally made from his chambers. Id.
256. MODEL CODE OF JUD. CONDUCT Canon 1A cmt.
258. See id. at 1016.
259. Id. at 1008.
said that "[i]n [his] opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them." He followed up the publication of his letter with an interview on a radio show, during which he said that his deeply religious beliefs led him to believe that homosexuality is a mental illness that requires treatment.

Can gay and lesbian litigants expect fair and impartial treatment on the bench from a judge who makes such comments off the bench? Should a gay parent seeking custody of a child after divorce expect the judge to be fair and impartial in deciding custody issues? How will bias be proven? Should the judicial discipline be delayed unless and until improper influence from bias or prejudice is manifested in his on the bench conduct? The answer to these questions is a resounding "yes" according to the Mississippi Commission on Judicial Performance. Consider the Supreme Court of Mississippi's application of Canons 2A and 4A in addition to Canons 1, 2, and 4. The commentary of Canon 1 explicitly states that "[a]n independent judiciary is one free of inappropriate outside influences." An opinion, unsupported by expert

260. *Id.* at 1009 (quoting Connie Glen Wilkerson, *Letter to the Editor, George County Times*, Mar. 28, 2002).
261. *Id.* at 1008.
262. See Wilkerson, 876 So. 2d at 1015–16.
263. "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." MODEL CODE OF JUD. CONDUCT Canon 2A. The Mississippi Code of Judicial Conduct is materially similar to this canon of the ABA Model Code of Judicial Conduct. Compare id., with MISS. CODE OF JUD. CONDUCT Canon 2A (2005).
264. "A judge shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties." MODEL CODE OF JUD. CONDUCT Canon 4A(1)-(3). The Mississippi Code of Judicial Conduct is identical to this canon of the ABA Model Code of Judicial Conduct. Compare id., with MISS. CODE OF JUD. CONDUCT Canon 4A(1)-(3).
268. MODEL CODE OF JUD. CONDUCT Canon 1A cmt.
testimony, that homosexuality is a mental illness may be seen as an inappropriate outside influence, especially without a commitment to follow the law. 269 "The test for [determining whether a judge’s activities would constitute the] appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired." 270

"'Impartiality' . . . denotes [the] absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." 271 Consequently, it appears clear that impartiality is impaired by the expression of bias and prejudice off the bench. 272 As an extra-judicial activity, the judge’s speech—i.e., radio broadcast and newspaper editorial—does not "minimize the risk of conflict" as mandated by Canon 4, for a judge sitting in a court in which same-sex litigants may appear. 273

The Supreme Court of Mississippi reasoned that a "[c]ourt clearly may not impose sanctions for violation of a Canon where doing so would infringe on rights guaranteed under the First Amendment, including the freedom of speech." 274 It found that there was no compelling state interest to warrant a requirement that judges not announce their prejudices, provided that the appearance of impartiality is intact. 275 The court noted that "the objects of judicial prejudice are entitled to seek a level playing field through recusal motions, and citizens who disagree with a judge’s views are entitled to voice their disagreement at the ballot box." 276

First, the appearance of impartiality cannot be intact since the conduct would "create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities . . . is impaired." 277 Second, recusal as a result of the "judge’s extra-judicial activities" 279 creates a certain "risk of conflict with judicial obligations" 280 that is in direct conflict with the Canon 3A provision which states "[t]he judicial duties of a judge take precedence

270. MODEL CODE OF JUD. CONDUCT Canon 2A cmt.
271. Id.
272. See generally id.
273. Id. Canon 4.
275. Id. at 1015.
276. Id. at 1016.
277. I.e., the bias expressed.
278. MODEL CODE OF JUD. CONDUCT Canon 2A cmt.
279. Id. Canon 4. I.e., the bias expressed.
280. Id.
over all the judge’s other activities.”

Therefore, the agreement or disagreement by voters about clearly improper conduct should not come into operation if the Code of Judicial Conduct is enforced properly.

Canon 2A provides, *inter alia*, that “[a] judge . . . shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” There is no allowance for off the bench conduct that erodes public confidence in the “integrity and impartiality of the judiciary.”

Neither bias nor prejudice is proper judicial conduct and both are expressly prohibited on the bench. Public confidence is eroded, and not promoted by, manifestations of bias and prejudice.

“A judge shall conduct all of the judge’s extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.”

Undoubtedly, “[e]xpressions of bias or prejudice . . . may cast reasonable doubt on the judge’s capacity to act impartially,” and must be avoided.

The Supreme Court of Louisiana reached a much different result regarding off the bench conduct that was determined to be a manifestation of bias and prejudice. Judge Timothy C. Ellender wore a black afro wig, shackles, an orange prison jumpsuit, and black makeup to a private Halloween party held at a public restaurant owned by his brother-in-law. There was no further allegation of misconduct regarding the costume.

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281. *Id.* Canon 3A. The Mississippi Code of Judicial Conduct is identical to this canon of the *ABA Model Code of Judicial Conduct*. Compare *id.*, with MISS. CODE OF JUD. CONDUCT Canon 3A.

282. See generally MODEL CODE OF JUD. CONDUCT Canon 3A-B.

283. *Id.* Canon 2A (emphasis added).

284. *Id.*

285. *Id.* Canon 3B(5). Canon 3B(5) provides that:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status . . . .

*Id.* The Mississippi Code of Judicial Conduct is identical in this prohibition. Compare MODEL CODE OF JUD. CONDUCT Canon 3B(5), with MISS. CODE OF JUD. CONDUCT Canon 3B(5).

286. See MODEL CODE OF JUD. CONDUCT Canon 1A cmt.

287. *Id.* Canon 4A(1)-(3).

288. *Id.* Canon 4A cmt.


290. *Id.* at 227.

291. See *id.* at 227–28.
charged with violations of Canons 1, 2A, 2B, 3B(5), and 3E. Judge Ellender entered into a stipulation and was found in violation of Canons 1 and 2A. In affirming the recommendation of the Louisiana's Commission on Judicial Conduct, the court found that the judiciary was brought into disrepute by the judge's conduct and sentenced him to a year's suspension without pay. Specifically, the court considered ten factors previously utilized by the court to determine the proper sentence it should impose. These factors provide a useful framework for analysis.300

292. Id. at 228. "A judge shall uphold the integrity and independence of the judiciary." MODEL CODE OF JUD. CONDUCT Canon 1. "An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved." Id. Canon 1A. The Louisiana Code of Judicial Conduct is identical to this canon of the ABA Model Code of Judicial Conduct. Compare id. Canon 1, with LA. CODE OF JUD. CONDUCT Canon 1 (2006).

293. "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." MODEL CODE OF JUD. CONDUCT Canon 2A. The Louisiana Code of Judicial Conduct is identical to this canon of the ABA Model Code of Judicial Conduct. Compare id., with LA. CODE OF JUD. CONDUCT Canon 2A.

294. "A judge shall not lend the prestige of judicial office to advance the private interests of the judge . . . ." MODEL CODE OF JUD. CONDUCT Canon 2B. The Louisiana Code of Judicial Conduct is identical to Canon 2B of the ABA Model Code of Judicial Conduct. Compare id., with LA. CODE OF JUD. CONDUCT Canon 2B.

295. MODEL CODE OF JUD. CONDUCT Canon 3B(5). "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice . . . and shall not permit staff, court officials, and others subject to the judge's direction and control to do so." Id. Canon 3A(4) of the Louisiana Code of Judicial Conduct is materially similar to Canon 3B(5) of the ABA Model Code of Judicial Conduct. Compare id., with LA. CODE OF JUD. CONDUCT Canon 3A(4).

296. MODEL CODE OF JUD. CONDUCT Canon 3E. Recusation. The judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned and shall disqualify himself or herself in a proceeding in which disqualification is required by law or applicable Supreme Court rule. In all other instances, a judge should not recuse himself or herself.

LA. CODE OF JUD. CONDUCT Canon 3C. The Louisiana Code of Judicial Conduct is materially similar to Canon 3E of the ABA Model Code of Judicial Conduct. Compare MODEL CODE OF JUD. CONDUCT Canon 3E, with LA. CODE OF JUD. CONDUCT Canon 3C.


298. Id. at 231, 233, 233 n.2. The judge was also ordered to pay the costs of investigation and prosecution. Id. at 227.

299. See id. at 232. The Supreme Court of Louisiana adopted a non-exhaustive list of ten factors to consider in imposing discipline on a judge:

(a) whether the misconduct is an isolated instance or evidenced a pattern of conduct; (b) the nature, extent, and frequency of occurrence of the acts of misconduct; (c) whether the misconduct occurred in or out of the courtroom; (d) whether the misconduct occurred in the judge's official capacity or in his private life; (e) whether the judge has acknowledged or recognized that the acts occurred; (f) whether the judge has evidenced an effort to change or modify his
The Supreme Court of Louisiana deferred six months of the one year suspension on the condition that the judge receive racial sensitivity training.\textsuperscript{301} In a concurring opinion, the court specifically noted that:

Those who would write off Judge Ellender’s lapse in judgment as a harmless prank requiring only a token sanction do not understand how deeply such an act resonates throughout the African-American community as a harsh reminder of a not too distant past.\textsuperscript{302} . . . Requiring Judge Ellender to undergo racial sensitivity training sends the message not only to Judge Ellender but to the rest of the country that racial slurs and stereotyping, whether intentional or merely thoughtless, will no longer be tolerated in Louisiana . . . . [Such training] could be beneficial in preventing similar infractions of the judicial code of conduct and [in] promoting the impartial administration of justice to all our citizens.\textsuperscript{303}

It is of value to note that this court, unlike the Mississippi court and commission, specifically found it appropriate to punish the judge in spite of the fact that no evidence existed that the judge had been unfair and partial in his treatment of blacks.\textsuperscript{304} The disparity between Mississippi’s finding that there had been no violation and Louisiana’s imposition of a one-year suspension is troubling.\textsuperscript{305} It is important to note that both of these states reached their diametrically opposed results using canons that essentially mirror the \textit{ABA Model Code of Judicial Conduct}.\textsuperscript{306} There is no clearinghouse or national review of a state court’s application and imposition of its code of judicial conduct.

Some speech and conduct is so prejudicial as to warrant the kind of discipline administered in Louisiana.\textsuperscript{307} However, the disparity between the Mississippi and Louisiana courts cannot be reconciled.\textsuperscript{308} The disparity in disciplinary actions from state to state creates great difficulty in establishing

\textit{In re Chaisson}, 549 So. 2d 259, 266 (La. 1989) (citing \textit{In re Deming}, 736 P.2d 639, 659 (Wash. 1987)).

300. See Ellender, 889 So. 2d at 232.
301. \textit{Id.} at 233.
302. \textit{Id.} at 236 (Lombard, J., concurring).
303. \textit{Id.} at 232–33.
305. Compare Wilkerson, 876 So. 2d at 1016, with Ellender, 889 So. 2d at 232.
306. See Ellender, 889 So. 2d at 233–34.
307. Compare Wilkerson, 876 So. 2d at 1016, with Ellender, 889 So. 2d at 233–34.
and enforcing standards for regulating speech and conduct. A salient distinction in the treatment of the cases may be the First Amendment issue of regulating the speech of Judge Wilkerson versus the conduct of Judge Ellender. Undoubtedly, it is this kind of disparity in disciplinary actions that erodes the public’s confidence in the integrity and independence of the bench.

C. Political Speech and Conduct

The regulation of the political activity of judges invites an even greater opportunity for disparate treatment as speech and conduct are examined. On May 10, 2006, the Texas Commission on Judicial Conduct issued a public admonition to Supreme Court of Texas Justice Nathan L. Hecht regarding comments he made to the press last year in support of the nomination of White House Counsel Harriet Miers to the United States Supreme Court. Court records reveal that Justice Hecht, “by his own admission, participated in approximately 120 media interviews concerning Miers’ nomination.”

Justice Hecht also appeared on several television and radio news and talk shows to discuss Miers’ nomination. The commission found that Hecht’s actions constituted “persistent and willful violations” of two canons of the Texas Code of Judicial Conduct. The first violation was found based on Canon 2B which states that “[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.” The second violation was found based on Canon 5(2) which provides that “[a] judge or judicial candidate shall not authorize the

308. See generally Model Code of Jud. Conduct (2004); Wilkerson, 876 So. 2d at 1016; Ellender, 889 So. 2d at 233–34.
309. Compare Wilkerson, 876 So. 2d at 1016, with Ellender, 889 So. 2d at 233–34.
311. See id. Canon 5.
313. Id. at 2.
314. Id. “At that time, Hecht jokingly said to Texas Lawyer that he had been acting as a ‘PR office for the White House’ and had been filling in gaps about Miers’ background to the press, countering some conservatives’ skepticism about her qualifications.” John Council, Commission on Judicial Conduct Admonishes Justice Hecht, Tex. Law., May 23, 2006.
315. Hecht, Nos. 06-0129-AP & 06-0130-AP, slip op. at 4.
The public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party.\textsuperscript{317}

The commentary to Canon 2B of the \textit{Model Code of Judicial Conduct} provides that "[j]udges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries."\textsuperscript{318} Justice Hecht, in his defense, asserted that "I believe that my statements on matters of national public interest did not offend canons of judicial ethics and were fully protected by the First Amendment as core speech."\textsuperscript{319} Hecht further stated that "[a]s best I can determine, the Commission's action is unprecedented despite many judges, over the years, providing factual information and endorsements to the judiciary committee and the public concerning nominees to the federal bench."\textsuperscript{320}

Judges are often in the position to be able to knowingly comment on the qualifications of a judicial candidate.\textsuperscript{321} While such comments may raise the specter of political involvement, they are allowed nonetheless.\textsuperscript{322} Justice Hecht's statements in his defense accurately depict allowable judicial participation in Texas.\textsuperscript{323} However, the Commission identifies the public use of the judge's name as the nature of the violation.\textsuperscript{324} Specifically, the Commis-

\textsuperscript{317} TEX. CODE OF JUD. CONDUCT Canon 5(2). Texas judges face partisan elections and are allowed to participate in limited partisan activities. \textit{See generally id.} Canon 5. While there is no analogous canon in the Model Code, the \textit{Model Code of Judicial Conduct} does provides that "[a] judge or candidate subject to public election . . ., except as prohibited by law, [may], when a candidate [is up] for election, publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running." \textit{MODEL CODE OF JUD. CONDUCT} Canon 5(C)(1)(b)(iv).

\textsuperscript{318} \textit{id.} Canon 2B cmt.

\textsuperscript{319} Council, \textit{supra} note 314 (internal citations omitted).

\textsuperscript{320} \textit{id.} (internal citations omitted).

\textsuperscript{321} \textit{See generally} \textit{MODEL CODE OF JUD. CONDUCT} Canon 5 cmt.

\textsuperscript{322} \textit{See id.} An Oklahoma advisory opinion, in looking at the appropriateness of judicial participation, developed five factors to be considered when determining the limitations on a judge's participation in the selection of another judge:

1. The judge must have personal knowledge of the person being recommended; 2. The judges' recommendation should: (a) be and appear to be directed only to the factors relevant to performance of the judicial office; (b) be factual, evenhanded, succinct and discreet; 3. A judge should not lend his or her name to any publicity campaign for any candidate; 4. A judge should avoid pleading for a candidate of the judge's choosing in opposition to others under consideration; 5. A judge should not provide a letter of endorsement for a candidate if the judge could reasonably expect that the endorsement will be publicly announced or public distributed in support of the endorsed candidate.


\textsuperscript{323} \textit{In re} Hecht, Nos. 06-0129-AP, 06-0130-AP, slip op. at 4 (Tex. State Comm'n on Jud. Conduct May 10, 2006).

\textsuperscript{324} \textit{id.}
sion concluded that "Justice Hecht allowed his name and title to be used by the press and the White House in support of his close friend, Harriet Miers, a nominee for the office of United States Supreme Court Justice."325

In addition to the cost of the misconduct to the independence, integrity, and impartiality of the judiciary, there are obvious conflicts about what constitutes misconduct affect the judge.326 A judge must expect scrutiny and accept restrictions on speech and conduct with the assumption of judicial office.327 The aftermath of White328 has been assertions that speech or conduct alleged as improper are a valid exercise of First Amendment rights.329

The Texas court, in issuing the public admonition against Justice Hecht, focused on two issues.330 First, "'[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.'"331 The second issue was that "'[a] judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party.'"332 There does not appear to be a connection between the misconduct alleged and the "announce clause" of White.333

An additional, yet unexamined, cost of judicial misconduct is that of criminal prosecution. Even from its inception, the code was intended and designed to provide guidance.334 The preamble of the code specifically provides that "'[i]t is not designed or intended as a basis for civil liability or criminal prosecution.'"335 Therefore, the decision by the Court of Appeals of

325. Id. at 3–4.
326. See generally Hecht, Nos. 06-0129-AP, 06-0130-AP, slip op. at 4.
332. Hecht, Nos. 06-0129-AP, 06-0130-AP, slip op. at 3 (citing TEX. CODE OF JUD. CONDUCT Canon 5(2) (2004)).
333. See White, 536 U.S. at 765.
334. MODEL CODE OF JUD. CONDUCT pmbl.
335. Id. This provision was intended to insure that judges remain independent and not sit in fear. See also Lofton v. State, 944 S.W.2d 131, 134 (Ark. Ct. App. 1997).
New York to reinstate a criminal prosecution against former Supreme Court of New York Justice Gerald P. Garson introduces the prospect of an additional cost of judicial misconduct.  

In 2003, Justice Garson was suspended without pay as a result of his indictment on criminal charges that directly related to his judicial duties. Garson was charged with one count of bribery and six counts of accepting benefits for “violation of his duty as a public servant.” The violation of public duty alleged in the six counts was misconduct in violation of the New York Rules of Judicial Conduct. The nature of the six violations entailed speech and conduct on the bench, off the bench, and during political activity.

The allegations of misconduct were based on two sections of the New York Rules of Judicial Conduct, Part 100.3(B)(6), which provides in pertinent part that “[a] judge shall not initiate, permit, or consider ex parte communications,” and Part 100.2(C), which provides that “[a] judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.” The prohibition against personal solicitations and partisan behavior has been upheld.

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337. In re Garson (Garson I), 793 N.E.2d 408 (N.Y. 2003). He is no longer on the bench. See Garson II, 848 N.E.2d at 1265.
338. Garson II, 848 N.E.2d at 1265.
339. Id.
340. See id. The first of six violations for judicial misconduct was improper ex parte communication during a case in which the judge met with the attorney for one of the parties and instructed him on how to proceed in order to prevail in exchange for a box of expensive cigars. Id. at 1265–66. The second and third allegations of misconduct consisted of the judge requesting and receiving a referral fee on behalf of his wife from a lawyer to whom clients had been referred. Id. at 1266. The fourth, fifth, and sixth counts alleged payments to the judge for referrals by the judge. Garson II, 848 N.E.2d at 1266–67. The sixth allegation of misconduct also included an allegation that the judge instructed the attorney to “make a check out” to the judge’s wife’s judicial campaign committee because she needed $25,000. Id. at 1267.
343. See Garson II, 848 N.E.2d at 1274.
VI. FLORIDA’S APPLICATION OF ITS CODE OF JUDICIAL CONDUCT

The Supreme Court of Florida has been critical of the recommendations of discipline of its Judicial Qualifications Commission, sending a clear message that leniency sends the wrong signal to judges who violate the Code of Judicial Conduct. The conduct identified and the penalties imposed provide some insight into the level of severity that is assigned to certain speech and conduct. There are three basic penalties available to the Supreme Court of Florida for judicial misconduct: 1) reprimand; 2) suspension; and 3) removal. Each of these sanctions may be accompanied by payment of a fine, cost of investigation, and/or cost of prosecution.

The Supreme Court of Florida “requested that the Judicial Ethics Advisory Committee . . . study the 2003 revisions” that had been made to the Model Code and recommend appropriate amendments to be considered by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. The changes passed by the Supreme Court of Florida on January 5, 2006, embraced the desire of the Court to act further to ensure the independence, integrity, and impartiality of the judiciary and to ensure consistency with existing provisions of the Model Code.

344. Wolf, supra note 57, at 350.
345. Id. at 351.
346. Id. at 354. A reprimand can be issued with or without a requirement that the judge appear before the court. Id. A reprimand without a required court appearance is analogous to an admonition. Id.
347. Wolf, supra note 57, at 354. A suspension may be issued with or without pay, generally depending upon the nature of the alleged misconduct. Id. Lawyer misconduct action can also involve disciplinary sanctions. Id.
348. Id. at 353. Prior to 1996, the court was limited to reprimand or removal for judicial misconduct. Id. at 391 (referring to FLA. CONST. art. V, § 12(a)(1)).
349. Wolf, supra note 57, at 388–89.
350. In re Amend. to Code of Jud. Conduct—ABA’s Model Code, 918 So. 2d 949 (Fla. 2006). In 2003, the Commission was formed by ABA President Dennis W. Archer, Jr. Id. at 949 n.1.
A. On the Bench Speech and Conduct

The concept that removal from office should occur only as a result of speech and conduct that is "fundamentally inconsistent with the responsibilities of judicial office" is consistent with the examination of the penalties imposed in Florida and throughout the country. Judge Shea of Florida was removed after an accumulation of minor and ostensibly innocuous incidents which created an antagonistic environment and evidenced conduct unbecoming a member of the judiciary. A standard for removal based on a pattern of misconduct is consistent with national trends for disciplining on the bench bias and prejudice.

In Florida, abuse of judicial power is as likely to lead to removal from the bench as it was ten, twenty, or thirty years ago. An abuse of judicial power on the bench that may lead to removal can include: 1) lacking judicial temperament; 2) failing to be impartial; 3) engaging in ex parte communication; 4) failing to follow the law; 5) improper use of contempt
power; and 6) intimidation. On the bench conduct that consists of violating recusal and disclosure requirements, as well as delays in ruling, has generally resulted in reprimand or even more informal procedures such as a reminder.

B. Off the Bench Speech and Conduct

The Supreme Court of Mississippi found that manifestations of bias and prejudice made through off the bench speech did not warrant judicial discipline and were protected by the First Amendment in the absence of bias and prejudice on the bench. However, Florida and other states have not been so predisposed. In In re Santora (Santora I), a newspaper article included remarks by the judge regarding interracial dating, integration, racial inferiority, blacks on welfare and in the criminal justice system, using racial slurs, and telling racial jokes. The Supreme Court of Florida was petitioned for the removal of the judge as Chief Judge of a circuit court. The petition alleged that “Judge Santora’s public statements have eroded public confidence in the judiciary and cast doubt on his impartiality. They also have caused growing social and racial turmoil in this community. These tensions seriously threaten the effective functioning of the judiciary.”

361. Crowell, 379 So. 2d at 110.
362. See Shea, 759 So. 2d at 632; Damron, 486 So. 2d at 4, 6 (finding threatening behavior by the judge while on the bench).
365. See In re Santora (Santora I), 592 So. 2d 671, 671–72 (Fla. 1992); In re Cerbone, 460 N.E.2d 217, 218 (N.Y. 1984) (stating that judge was removed for announcing he was a judge and threatening retaliation with racist remarks and profanity during bar room fight); Kuehnel v. State Comm’n on Jud. Conduct, 403 N.E.2d 167, 167–68 (N.Y. 1980) (stating that judge was removed for using ethnic remarks during altercations and “gross lack of candor”); In re Rabren (Ala. Ct of Judiciary Aug. 1, 1986) (unpublished opinion); see SHAMAN ET AL., supra note 76, § 3.07 (stating that judge was removed for making racist remarks while waiting for court to begin).
366. Santora I, 592 So. 2d at 671–72.
367. Id. at 673–76 app. Although the Court removed Judge Santora as chief judge, it also issued a reprimand in the disciplinary proceeding. In re Santora (Santora II), 602 So. 2d 1269, 1270 (Fla. 1992); see also In re Bourisseau, 480 N.W.2d 270 (Mich. 1992) (stating judge made racist remarks to press); but see In re Nakoski, 742 A.2d 260, 261 (Pa. Ct. Jud. Discipline 1999) (refusing to discipline for judge’s affirmative response to instructor’s question whether it was against the law to be a black man).
368. Santora I, 592 So. 2d at 672.
369. Id.

The petitioners include[d] three past presidents of The Florida Bar, the current president of the Jacksonville Bar Association, the president-elect of the Jacksonville Bar Association, six past
While the judge was immediately removed as Chief Judge, he was permitted to remain as a circuit judge after being reprimanded for his comments.370

The removal of judges for manifestations of bias and prejudice appears to be utilized if accompanied by additional egregious behavior, such as lack of candor during the proceeding,371 or threatening to retaliate on the bench based on the bias expressed.372 It is difficult to justify a position that bias and prejudice manifested from the bench cannot be "assumed... to have an effect on the judge's treatment of litigants and not to reflect racial bias on the part of the judge merely because the judge does not repeat the remarks in the presence of the litigants or in the courtroom."373 However, willingness to manifest bias and prejudice on the bench can be viewed as more noxious and problematic, indicating a lack of fitness and a fundamental inconsistency for service as a judge.374 Moreover, additional incidences warranting removal of judges for off the bench speech and conduct include criminal offenses.375

C. Political Speech and Conduct

The Supreme Court of Florida has been diligent in its desire to ensure that judicial campaigns are legal and ethical.376 An extensive guide was pro-

presidents of the Jacksonville Bar Association, the current president of the Clay County Bar Association, two members of The Board of Governors of The Florida Bar, and two members of the Board of Governors of the Jacksonville Bar Association, among others.

Id. at 672 n.2.
370. Santora II, 602 So. 2d at 1270.
371. See Kuehnel, 403 N.E.2d at 168.
373. SHAMAN ET AL., supra note 76, §3.07.
374. See Wolf, supra note 57, at 369.
375. See In re Berkowitz, 522 So. 2d 843, 843–44 (Fla. 1988) (stating judge continued to practice law after assuming office, and committed trust account violations that encompassed hundreds of checking transactions, judge failed to file accurate tax returns, and judge's testimony on campaign irregularities was deceptive); In re Garrett, 613 So. 2d 463, 463–65 (Fla. 1993) (stating judge was removed for shoplifting despite exemplary record of public service). In In re Ford-Kaus, the judge was removed and disciplined by the Bar for conduct that occurred prior to her election to the bench. 730 So. 2d 269, 272–77 (Fla. 1999). Specifically, she mishandled and over-billed for a case immediately before taking the bench. Id. Based on that, the Supreme Court of Florida found her conduct inconsistent with the responsibilities of a judicial officer and that she is presently unfit to hold judicial office, stating that her conduct demonstrates "a pattern of deceit and deception." Id. at 277.
376. JUDICIAL ETHICS ADVISORY COMM., AN AID TO UNDERSTANDING CANON 7 (2006), available at http://www.flcourts.org/gen_public/courted/bin/canon7update.pdf. Since 1976, the Supreme Court of Florida has authorized the Judicial Ethics Advisory Commission to write "advisory opinions to inquiring judges [and judicial candidates] concerning the propriety of... judicial and non-judicial [speech and] conduct." Id. at 1. (quoting Petition of the Committee on Standards of Conduct for Judges, 327 So. 2d 5 (Fla. 1976)).
duced, titled *An Aid to Understanding Canon 7*, which details acceptable political behavior.\(^{377}\) Prior to each election cycle, the bench and bar join in encouraging the participation of all judicial members and judicial candidates in a forum in each circuit where there is a contested judicial election.\(^{378}\) While the use of removal from office has been limited, “the [C]ourt has stated that a candidate should not profit by their misdeeds.”\(^{379}\) The wide variety in each state’s method of judicial election makes regulation difficult.\(^{380}\) The challenge is to construct a canon that adequately addresses the issues that are unique to the various methods of judicial selection.\(^{381}\)

The difficulty of regulation is evident at the state level as well as the national level.\(^{382}\) The various types of violations have included: 1) misrepresentation regarding candidate or opponent;\(^{383}\) 2) inappropriate promises;\(^{384}\) 3) campaign financial irregularities;\(^{385}\) 4) partisan politics;\(^{386}\) and 5) endorsing or supporting other candidates.\(^{387}\)

\(^{377}\). See id.


\(^{379}\). Wolf, *supra* note 57, at 391.

\(^{379}\). See ANN. MODEL CODE OF JUD. CONDUCT Canon 5 (2004).

\(^{381}\). See id.

\(^{382}\). See Wolf, *supra* note 57, at 351 (quoting CYNTHIA GRAY, A STUDY OF JUDICIAL DISCIPLINE SANCTIONS 1 (2002)).

\(^{383}\). In re Alley, 699 So. 2d 1369, 1369 (Fla. 1997) (reprimanding a judge for “misrepresent[ing] her qualifications and those of her opponent” in judicial election campaign and injecting party politics into nonpartisan election).

\(^{384}\). In re McMillan, 797 So. 2d 560, 562 (Fla. 2001). Removal warranted for:

1. making explicit campaign promises to favor the State and the police in court proceedings;
2. making explicit promises that he would side against the defense; (3) making unfounded attacks on incumbent county judge; (4) making unfounded attacks on the local court system and local officials; and (5) improperly presiding over a court case [despite personal] direct conflict of interest.

\(^{385}\). See In re Pando, 903 So. 2d 902 (Fla. 2005) (finding that during the course of the judge’s unsuccessful 1998 election campaign and her successful 2000 election campaign, the Judge: “(1) accepted loans from family members and friends in excess of the $500 statutory limit; [and] (2) misrepresented the source of these loans in submitting and certifying her campaign finance reports during the course of the campaigns”); In re Rodriguez, 829 So. 2d 857, 859 (Fla. 2002) (reprimanding a judge for campaign finance activities and reporting practices, such as knowingly accepting campaign contribution loan of $200,000 from a non family member and filing misleading campaign); *McMillan*, 797 So. 2d at 562–64.

\(^{386}\). In re Angel, 867 So. 2d 379, 383 (Fla. 2004) (holding that the partisan political activity during campaign for judicial office warranted a public reprimand).

\(^{387}\). In re Glickstein, 620 So. 2d 1000, 1002–03 (Fla. 1993) (writing letter endorsing retention in office of fellow member of judiciary, where letter is written on office stationery and identified author as member of judiciary and is published in newspapers, warrants public reprimand).
VII. CONCLUSION

"[P]ublic sentiment is everything. With public sentiment nothing can fail; without it nothing can succeed." 388 —Abraham Lincoln

The real costs of judicial misconduct are measured in the way in which the speech and conduct of judges threaten to erode the independence, integrity, and impartiality of the judiciary. 389 Each act of misconduct by a judge contributes to the public’s perception about judges and their role. 390 Three justifications arise repeatedly for limiting judicial speech and conduct. First, limitations on judicial speech and conduct are necessary “to avoid the appearance of partiality, favoritism, or other misuse.” 391 Second, regulation of judicial speech and conduct promotes confidence in judiciary. 392 Finally, limiting judicial speech and conduct prevents judges from being distracted while performing their duties. 393 Therefore, the case for preserving the independence and impartiality of the judiciary creates a foundation for the need of rules regulating judicial speech and conduct. 394

The model rules provide a substantive and procedural framework creating a standard for judging speech and conduct. 395 These standards provide guidance to judges regarding improper and proper speech and conduct. 396 They are “intended to establish standards for ethical conduct of judges” in both their judicial and personal roles. 397 Canons 1 and 2 of the Model Code are clearly aspirational, but provide a standard that has been utilized for judicial discipline. 398 Canons 3, 4, and 5 address specific conduct both on and off the bench and provide commentaries to provide further directions and examples for their application. 399

Ensuring the independence, integrity, and impartiality of the judiciary must continue to be an important societal aim. The continued regulation of judges operates to encourage judges to adhere to high ethical standards. The

388. 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 27, LINCOLN-DOUGLAS DEBATE AT OTTAWAY (Roy P. Basler et al. eds., 1953).
389. In re Leon, 440 So. 2d 1267, 1269 (Fla. 1983).
390. See id.
391. SHAMAN ET AL., supra note 76, §10.02.
392. Id.
393. Id.
395. See id.
396. See id.
397. Id.
399. See MODEL CODE OF JUD. CONDUCT Canons 3-5.
proposals for revisions to the Model Code recognize the need for regulation to ensure the independence, integrity, and impartiality of the judiciary. The additions and amendments being proposed provide clear, concise, and consistent guidance to judges. The independence, integrity, and impartiality of the judiciary rest with continued regulation and discipline.