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"What Gets Judges in Trouble"

By Richard H. Underwood*

I. INTRODUCTION

I wrote this article to collect some cautionary material about "what gets judges in trouble." I wanted something I could offer to our state judges, practitioners, and my legal ethics students. While I have never been a judge, and while I have never worked for a judicial conduct organization, I have been a law professor for almost twenty-five years and the chairman of a state bar association ethics committee for fourteen. I am not the kind of person who would refrain from holding forth just because I may not know what I am talking about.2

* Spears-Gilbert Professor of Law, College of Law, University of Kentucky; B.S (1969), J.D. (1976) The Ohio State University; Coauthor of TRIAL ETHICS (Little Brown & Co. 1988), and MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK (2d ed., Aspen 2001); Co-editor, KENTUCKY ETHICS OPINIONS AND PROFESSIONAL RESPONSIBILITY DESKBOOK (UK/CLE). Professor Underwood served as the Chairman of the Kentucky Bar Association's Model Rules Committee. That Committee was charged with the responsibility of reviewing the ABA Model Rules and making recommendations for their modification and adoption. He also served as the Chairman of the Kentucky Bar Association's Ethics and "Hotline" Committees from 1984 to 1998, and the Kentucky Bar Association's Unauthorized Practice Committee from 1984 to 1996. See Richard Underwood, Confessions of an Ethics Chairman, 16 J. LEGAL PROF. 125 (1991).

1. This article is an edited and extended version of a presentation the author made at the National Association of Administrative Law Judges Annual Convention, October 19-23, 2002, in Lexington, Kentucky, entitled "Ethics for Administrative Law Judges - What Gets Judges in Trouble."

When I started out, I naturally assumed that what my audience would want and need was some kind of scholarly and uplifting essay on the Code of Judicial Conduct. Being an academic lawyer who is no longer in the trenches, I naturally assumed that judges get into trouble because they are not familiar with the intricacies of that Byzantine document, and the less than obvious traps and pitfalls contained in it. If that is what you are looking for, I will not disappoint you. I will talk about the Code of Judicial Conduct. Indeed, I will give you a short list of what I believe may be the most frequently violated provisions. However, I must discuss a great deal more than the Code of Judicial Conduct; because when I really looked into the question of "what gets judges in trouble," I discovered that other troubling forces are at work out there in the "Real World." Here is what I discovered, and I hope that some of it amazes you, or we are in worse trouble than even I thought.

I will begin by acknowledging the several existing collections of what have come to be known as "Stupid Judge Tricks." These collections are extremely entertaining; and reading about the way

3. It should be obvious to the reader that this article was written to be entertaining. On the other hand, while it may lack something in terms of gravitas, not to mention substance and originality, it does provide the reader with a survey of current literature on the subject of judicial misconduct. For more complete treatments of the Code of Judicial Conduct I recommend the following: Jeffrey Shaman, et al., Judicial Conduct and Ethics (2000); R. Flamm, Judicial Disqualification of Judges: Recusal and Disqualification of Judges (1997); M. Comisky & P. Patterson, The Judiciary - Selection, Compensation, Ethics and Discipline (1987). In my original presentation of these materials, I passed out a copy of Administrative Adjudication in Kentucky: Ethics and Unauthorized Practice Considerations, 29 N. Ky. L. Rev. 359 (2002) which includes, as an appendix, a Proposed Code of Conduct for Administrative Hearing Officers. For other recent offerings on the subject of judicial ethics see Alex Brauer & Tyng Loh, Judicial Misconduct, 14 Geo. J. Legal Ethics 963 (2001); David Cleveland & Jason Masimore, The Ermine and Woolsack: Disciplinary Proceedings Involving Judges, Attorney-Magistrates, And Other Judicial Figures, 14 Geo. J. Legal Ethics 1037 (2001); Peter A. Joy, A Professionalism Creed for Judges: Leading By Example, 52 S.C. L. Rev. 667 (2001); William G. Ross, Civility Among Judges: Charting The Bounds of Proper Criticism By Judges of Other Judges, 51 Fla. L. Rev. 957 (1999); Sambhav N. Sankar, Disciplining the Professional Judge, 88 Cal. L. Rev. 1233 (2000); and Hon. Edward J. Schoenbaum, Improving Public Trust and Confidence In Administrative Adjudication: What Administrative Law Practitioners, Judges, and Academicians Can Do, 53 Admin. L. Rev. 575 (2001).
some judges have humiliated and disgraced themselves by engaging in truly bizarre activities allows us to feel better about ourselves, at least momentarily. On the other hand, it is hard to get much practical guidance from these collections. So I am providing the reader with a somewhat more structured approach, presenting these and other examples of misconduct in the context of a review of the Code, and the presentation of my own Ten Commandments for Judges.

II. "STUPID JUDGE TRICKS" REVISITED

We are all in debt to National Law Journal staff writer Gail Diane Cox, and Professor Steven Lubet, for their collections of "Stupid Judge Tricks." I am certainly indebted to the former, since I will be alluding to a number of specimens from her rogue's gallery, although for didactic purposes I will be rearranging her cases under various provisions of the Code of Judicial Conduct.

Ms. Cox does not offer any scientific definition of a "Stupid Judge Trick." The more formal Professor Lubet defines a "Stupid Judge Trick" as "an action by a person who, though seemingly aware that he or she is being perceived as a judge, nonetheless ignores or flouts all of the conventions inherent in the office." Personally, I am not sure why Professor Lubet feels that it is necessary to fool around with definitions and classifications; but I went to Ohio State and I am content to say "Let the games begin."

There are a number of theories as to the etiology of "Stupid Judge Tricks." Professor Lubet suggests that some of this stuff is simply the "manifestation of the law of large numbers - put enough judges in enough courtrooms and eventually someone will go off every

4. I certainly enjoyed Bill Clinton's pain, and I was hoping that he would be thoroughly steamed, reamed, and dry-cleaned. You can imagine how irritated I was when Alan Dershowitz came to his defense, citing one of my own articles. There is no justice. See Testimony of Alan M. Dershowitz, House of Representatives Judiciary Committee, December 1, 1998, 1998 WL 827454.

5. Steven Lubet's article, Stupid Judge Tricks, 41 S. TEX. L. REV. 1301 (2000), follows in a scholarly way, the trail blazed by Cox in her short articles that appear annually in the National Law Journal. He follows up on many of the incidents reported by Cox, and provides us with official citations to opinions arising out of these incidents.

6. Id. at 1302.
imaginable deep end." As an alternative theory, he suggests that some judges develop an "over-active sense of entitlement, verging on self-attributed invulnerability." Lawyer Elisa Ugarte, who appeared on a seminar panel with Professor Lubet, and who, therefore, had to find grounds for disagreement with him, suggests that it is not judicial hubris, but simply human hubris, that accounts for all of this. After all, Presidents have been known to develop an "over-active sense of entitlement, verging on self-attributed invulnerability" too. Actually, they are probably both right (am I an academic, or what?). As a judge I once worked for told me (these were not his exact words, but I am pretty close), "If you take a person who is a good person, and make that person a judge, that person will grow to become an even better person. If you take an a--hole and make that a--hole a judge, that a--hole will become a supreme a--hole." The same is probably true of Presidents too.

Always the stickler, Professor Lubet excludes from the category of "Stupid Judge Tricks" non-judicial activities that get the rest of us get into trouble. For example, he excludes cases of judicial discipline that arose out of drug-dealing, indecent exposure, and violent assault. If I may add a suggestion, the judge of a Chicago "drug court" should probably try not to get caught with even a small stash of marijuana, even while vacationing in Belize. This is one way, but not the right way, to get to a "higher" court. I suppose then,

7. Id. at 1302. I guess that this is the negative version of the theorem that a large enough collection of monkeys will eventually produce a draft of Hamlet.
8. Id. at 1310.
14. When Kentucky Supreme Court Justice Dan Jack Combs, who retired in 1993 for health reasons, admitted that he smoked pot to help him sleep, questions were asked about whether he smoked pot during the period when he was still on the Court. He told reporters that a memory disorder prevented him from being sure about that, but that it would not have affected his legal judgments anyway. See Jamie Lucke, Combs Says Drug Searchers Were Like "Gestapo", LEXINGTON
that under his narrow definition, "Stupid Judge Tricks" are like the incidents I allude to in the next section, under specific provisions of the Code. But that leaves out a lot of good stuff. I do not want to exclude anything, so let me begin with a rather obvious caveat.

A. Judges Get Into Trouble for Doing the Bad Non-Judicial Stuff That the Rest of Us Do [or at Least That You Do, and You Know Who You Are].

If we need a nexus with the Code of Judicial Conduct, we can reach for Canon 2, which states that: "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities" and that “[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.”

The points I am trying to make are that many non-judicial acts will constitute judicial misconduct; and that one’s judicial status will not make things go easier. Bizarre conduct on the part of a professor may go unnoticed—may even be expected. But if you are a judge, you had better stay, well, “sober as a judge.”

The Judicial Winona Ryder award goes to Delaware Family Court Commissioner Gary Grubb, who got caught taking $7.10 price tags off of "high-quality" cigars and replacing them with tags from cheaper stogies. What this judicial cheapskate obviously needs is a good 5 cent cigar.

Then there are the love triangles. I suppose that that kind of thing can happen to any of us, whether we want to admit it or not. But we can keep all that separate from our judicial activities—"compartmentalize," as they say in Washington, D.C.—can’t we? That is what a Michigan judge said when the judicial conduct commission came calling. It seems that this judge (married at the time, but soon divorced) got involved with her married law clerk. Ultimately, the married law clerk’s pregnant wife turned up dead of a gunshot, and the clerk, by that time a lawyer, was convicted and


16. Of course, I am just kidding.
sentenced to life for her murder. But that is not the judicial ethics point. It seems that while things were rolling downhill to this terrible conclusion, the judge was charged with a conflict of interest for appointing her "secret lover" to represent a great deal more than his fair share of indigent defendants—netting him fees that aroused jealousy among the other lawyers. Moreover, the judge presided over her lover's cases, and neither she nor he disclosed their relationship to opposing counsel. So if the triangle does not get you the conflicts will. More on these pesky technicalities in part C, below.

By the way, if you were a judge with an office near a busy intersection, and if you saw a confused turkey trying to cross the road at the intersection right at the height of the rush hour, and if the turkey were being chased by a cop and some telephone workers, you would probably pull a hand gun out of your desk, run outside, and start firing into the air to scare the turkey out of the road, wouldn't you? In any event, that is just what a part-time judge in New York did. He was admonished for conduct tending to bring the bench into disrepute.

B. Judges Sometimes Get Into Trouble For Making Breathtakingly Bad Judicial Rulings.

Canon 3, and 3.B(7)-(8) provides as follows:

A. Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.

B. Adjudicative Responsibilities

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law


A judge shall dispose of all judicial matters promptly, efficiently and fairly.20

Lubet also sets aside, as something other than “Stupid Judge Tricks,” those cases which arise from asinine judicial rulings.21 For example, Lubet collects cases in which a guilty plea was entered for a defendant who pleaded not guilty,22 and a judgment was entered without benefit of any trial or proceeding.23 Again, I see no real point in excluding this sort of thing from the definition. Of course, judges will not be disciplined or even disqualified just because someone does not like his or her rulings—even if the rulings are rather consistently one-sided. Still, it is possible for a judge to make his or her mark in the specialty field of “adjudicata bizzara.” The following are but a few choice examples, we need not waste too much time on this, because none of you would make these mistakes, although they are innocent enough, and hey, everybody makes mistakes.

Most observers would give first place to Ms. Cox’s nominee, the aptly named Judge A. Eugene Hammermaster, also known as “The Hammerin’ Man,” in Pierce County, Washington. He was reinstated after a six-month suspension after agreeing not to hold anymore trials in absentia, and agreeing to stop imposing life sentences for unpaid fines.24 An honorable second place should probably go to San Bernardino Judge Fred Heene who jailed the complainant in a rape case for changing her story, even though the prosecutor objected, pointing out that she had not been charged with anything.25 Oh yeah—charges.

I note in passing the following “rule-ette” having to do with the

25. Cox, supra note 17.
niceties of making rulings: Do not get physical; just rule and move on. Consider the case of Judge Joseph Troisi, over in wild and wonderful West Virginia. When he denied bail to a Mr. Witten, Mr. Witten was not happy and cursed the judge. The judge got down from his judicial aerie, took off his robes, had a verbal exchange with the defendant, and then bit his nose. (Didn’t I see this in *The Godfather*)? The judge resigned and received counseling for “impulse control.”

C. The Conventional Wisdom - Judges Sometimes Violate the Code of Judicial Conduct

I simply must discuss some of the more worrying provisions of the Code of Judicial Conduct (CJC). The following references are to the latest ABA version of the CJC.

1. Conflict Schmawnflict

Canon 3E(1) and 3E(1)(c) provide as follows:

E. Disqualification

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

    . . . .

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge’s family residing in the judge’s household, has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than *de minimis* interest that could

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be substantially affected by the proceeding.\textsuperscript{27}

Sometimes judges simply do not see the conflicts, and refuse to entertain the possibility of a conflict even when it is pointed out. One of my favorite cases is \textit{Pierce v. Delamater}, in which New York’s Justice Bronson refused to disqualify himself from sitting in review of one of his own judgments rendered while he was riding circuit.\textsuperscript{28} He was shocked and outraged that anyone would question his propriety in doing so, rationalizing that any judge reviewing his own judgment “will have the benefit of a double discussion. If right at the first, he will be confirmed in his opinion; and if wrong, he will be quite as likely to find it out as anyone else.”\textsuperscript{29}

Sometimes even the financial conflicts are overlooked.\textsuperscript{30} Should the fact that a judge and his wife own $700,000 in Wal-Mart stock prevent the judge from giving Wal-Mart an ex parte Temporary Restraining Order (TRO) in a labor dispute?\textsuperscript{31} An Arkansas judge did not think so, and issued the order.\textsuperscript{32} “I’m the kind of guy who likes to get things done, and I don’t necessarily stand on ceremony”, said the learned judge.\textsuperscript{33} “Sometimes you get burned.”\textsuperscript{34} Well, yes—quite. The judge was “admonished,” although there was a dissent.\textsuperscript{35} On the question of how Arkansas judges go about spotting and resolving conflicts, Arkansas lawyer Richard Parker suggested “they divide the world into two types of people. First, there are the people that are rich, smart, prudent, go to church and bought Wal-Mart and Tyson stock. Then there’s the people who are too damn stupid and

\begin{footnotes}
\footnote{27. \textsc{Model Code of Judicial Conduct} Canon 3(E)(1), 3(E)(1)(c) (1990) (emphasis added).}
\footnote{28. \textit{Piece v. Delamater}, 1 N.Y. 1 (1847). This is an easy citation to remember.}
\footnote{29. \textit{Id.}}
\footnote{30. Leslie W. Abramson, \textit{Appearance Of Impropriety: Deciding When a Judge's Impartiality 'Might Reasonably be Questioned'}, 14 \textsc{GEO J. Legal Ethics} 55 (2000).}
\footnote{31. \textit{See Bob V. Voris, Wal-Mart's Home Court, Arkansas Judges Own Retailer's Stock, but Still Rule on its Suits}, \textsc{Nat'l L. J.}, Oct. 16, 2000, at A1.}
\footnote{33. \textit{Id.} at 391.}
\footnote{34. \textit{Id.}}
\footnote{35. \textit{Id.}}
\end{footnotes}
didn’t, and don’t deserve any breaks in life.” 36 Hey - tell us what you really think Richard! In another Arkansas case, a verdict against Wal-Mart for $2.75 million was thrown out by the Arkansas Supreme Court. 37 It was later discovered that the law partners of a “replacement justice” who voted in the matter represented Wal-Mart in at least two other cases. 38 Oops!

2. All in the Family

Canon 3E(1)(d) provides in pertinent part:

(d) the judge or the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding. 39

Judges should disqualify themselves rather than presiding in cases in which their spouse or son or daughter, or any other family member within a third degree of relationship is a party or a material witness or a lawyer. 40 Unfortunately, Kentucky judges have overlooked this provision, and in some instances have twisted arms

36. See Voris, supra note 31.
37. See Bob V. Voris, “Justice for a Day” Ruling Attacked: Did Ark. Supreme Court Temp Taint a Wal-Mart Win?, NAT'L L. J., Oct. 30, 2000, at A4. I should alert the reader to an odd Kentucky procedure. When a Kentucky Supreme Court Justice has a conflict, that Justice (the conflicted Justice) selects a member of the bar to serve as a Special Justice. I also note a rather consistent pattern: the Special Justice ends up writing the opinion of the court. I find all of this to be a bit strange; is it just me?
38. Id.
40. Id.
to secure purported waivers.  

In a recent Kentucky Court of Appeals decision, a malpractice plaintiff recovered a 1.7 million dollar judgment, only to see the Court of Appeals set it aside on grounds of a "judicial conflict." After the verdict came in, the losing defense lawyers argued that the trial judge acted improperly in failing to disqualify herself because her husband was "affiliated" with the plaintiff's firm. This seems like an odd decision, because it does not appear that the lawyer-spouse was a partner of the firm, nor does it appear that he had any substantial financial interest in the outcome of the case. While the judge and the plaintiff's lawyers might be faulted for not making more timely disclosures in the first instance, one might well question the propriety of setting a jury verdict aside after the fact. The commentary to Canon 3E(d) indicates that the fact that a lawyer spouse is affiliated with a firm that is appearing before the judge does not in itself ordinarily disqualify the judge.  

How about family members as plaintiffs? "Ridiculous!" you say. Tell that to a Passiac Municipal Judge whose son got into a dispute with his gym teacher. The Judge entered the fray, first demanding that the teacher be fired, and then having the teacher arrested on a charge of terroristic threatening. He attempted to preside over the

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41. Such conduct flies in the face of Kentucky Judicial Ethics Opinions JE 1 revised (1979), JE-8 (1980), JE-34 (1982), JE-84 (1993), and JE-88 (1997). Furthermore, waivers by agreement are not to be secured by the judge—the judge is not to "participate" in the waiver process. See MODEL CODE OF JUDICIAL CONDUCT Canon 3(F) (1990). For the collected Kentucky Judicial Ethics Opinions see KENTUCKY LEGAL ETHICS OPINIONS AND PROFESSIONAL RESPONSIBILITY DESKBOOK (Todd Eberle & Richard Underwood eds., 2d ed. 1999).


43. Id.

44. Id.

45. Id.

46. See Lasik Verdict Thrown Out - Court: Judge's Ties To Law Firm Questioned, LEXINGTON HERALD-LEADER, March 30, 2003, at B1. On the waiver issue see Shaman, et al., supra note 3 at § 4.12 (citing First Nat'l Bank v. Hoyt, 297 N.W.2d 329 (Iowa 1980)). Such conflicts should be treated as waived if the parties do not raise the issue in a timely manner.

47. Cox, supra note 18.
case, but was forced to recuse himself.\textsuperscript{48} He was removed from office for using his position in “personal vendettas.”\textsuperscript{49}

How about family members as defendants? “Absurd!” you say. Tell the former defense lawyer turned Blytheville Municipal Court Judge, who presided over the “attempted prosecution” (he continued the case seven times over two years) of his sister on a charge of “drunk and disorderly conduct.” Then he took over his nephew’s case, wiping out previously imposed fines and warrants for non-appearance, and postponing the proceedings repeatedly.\textsuperscript{50} He was forced to resign.\textsuperscript{51}

3. Use or Abuse of Office

Canon 2B provides in pertinent part:

B. A judge shall not allow family, social, political or other relationships to influence the judge’s judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.\textsuperscript{52}

“When you serve me, you serve the community.” That was apparently a Missouri Circuit Judge’s definition of community service.\textsuperscript{53} He was punished for using probationers and teenagers from a “youth facility” to do chores at his parties and around his

\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} See also Order of Judicial Retirement and Removal Commission – In the Matter of Wayne W. Fitzgerald, District Judge, 50(3) KY. BENCH & BAR 17 (1986). (Disciplining a judge who had vacated two Driving Under the Influence (DUI) convictions without the knowledge of the prosecutor, and failed to disqualify himself in certain cases that involved his close and personal friends).
\textsuperscript{52} Model Code of Judicial Conduct Canon 2(B) (1990).
\textsuperscript{53} Gail D. Cox, Judges Behaving Badly (Again), Another Collection of What-Were-They-Thinking Stories, NAT’L L. J., May 3, 1999, at A1. See also Office of Disciplinary Counsel v. Evans, 733 N.E.2d 609 (Ohio 2000) (determining that the “free labor” used to produce judicial candidate’s campaign signs turned out to be jail inmates and welfare recipients).
rental properties. A more sinister notion of "servicing" was the specialty of a Louisiana judge who demanded and received sex in return for dropping cases and modifying sentences. This business of soliciting sexual favors has even found its way into my home state of Kentucky.

For an example of abuse of "the help," see In re Mears. In this interesting case, the judge used members of her staff to perform personal chores on county time, including telephoning stores to check on the availability of sales items, ordering items from catalogs, filling her car with gas, picking up her laundry and groceries, supervising her movers, preparing an insurance claim, and preparing birthday and baptism invitations for her son. I wonder what she would do if I asked her to get me some coffee? Hmmm.

As an aside, let me also point out that Canon 3.C.(4) now provides that "[a] judge shall avoid nepotism . . . ." The Kentucky high court recently issued a ridiculous opinion that reversed an opinion of the Judicial Ethics Committee. The Committee quite properly ruled that a judge should not hire his or her spouse as a secretary. Under the Kentucky version of the CJC in effect at that time, (it has since been amended to conform to the 1990 ABA version) the Code said that judges "should . . . avoid nepotism." The Court decided that since the rule only said "should" and not

54. Id.

55. Cox, supra note 17. See also In re Boylan, 744 A.2d 158 (N.J. 2000) (disciplining a judge who solicited sexual favors from female traffic defendants, and in the process cost Jersey City over $10,000 in fines—that's a lot of, well, fines).


58. Id. at 874.


60. Caudill v. Judicial Ethics Committee, 986 S.W.2d 435 (Ky. 1999).

61. Id. at 436

62. Id.
“shall,” then the judge could pretty much do as he pleased. None of the Justices of the high court seemed to be aware of the fact that the Commentary to the ABA Code that the Kentucky Code was based on said that although “should” is used, the language is still intended to be language of discipline. The Justices also did not seem to grasp the fact that they had pretty much abolished judicial discipline in Kentucky, since “should” was used throughout the Code. Fortunately, adoption of the 1990 version with “shall”s” throughout has solved the problem.

4. What A Character [Witness]!

   Canon 2. B continues: “A judge shall not testify voluntarily as a character witness.”

   There were some rather notorious incidents that preceded the adoption of this provision. Alger Hiss managed to get Justices Reed and Frankfurter to testify as character witnesses in Hiss’s first trial, which ended in a hung jury (a majority of the jurors were for conviction). They did not come back for the second trial. In a 1990 Kentucky judicial disciplinary case, a judge was disciplined for testifying as a character witness for one of his former employees, who was being sentenced in Georgia for raping an elderly woman. As you would expect, the judge got some unfavorable press. Perhaps he thought that this did not count because it was out of state, or perhaps he just was not thinking.

   It seems to me that judicial letter writing violates the spirit, and maybe the letter, of this rule. A senior United States District Judge was recently criticized for writing a letter urging another judge to be lenient in sentencing a retired FBI Special Agent, who had been convicted of racketeering. In the letter, the judge opined on the

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63. Id.
67. Shelly Murphy, US Judge Asks for Connolly Leniency: Sentencing Appeal
defendant's good character and service as an FBI Agent.68

5. Ex Parte Animal

Canon 3.B.(7) and 3.B.(7)(b) provide:

B. Adjudicative Responsibilities

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.69

The question of ex parte communications comes up a lot. Apparently some have been so bold as to suggest that "ex parte contacts in Kentucky are, or should be, the 'bread and butter' of administrative proceedings to be tolerated with a knowing wink." [Editor's note: This is shocking ... shocking!!!] However, this cynical proposition was rejected with considerable judicial indignation in Louisville Gas & Electric Company v. Commonwealth.70

The Ex Parte Envelope Pushing Award goes to Nevada judge Frances-Ann Fine, who had a habit of holding hearings without notice to one side or the other; sometimes neither side was present.69

68. Id.
She just called in the experts and talked to them! Why screw around?

The more traditional form of ex parte favors only one side, as occurred in a case discussed by Lubet. The judge was admonished for sending the following e-mail:

I am considering summarily rejecting [opposing counsel's] requests. Do you want me to let [opposing counsel] have a hearing on this, or do we cut [opposing counsel] off summarily and run the risk [of] the [Third District Court of Appeals] reversing? . . . I say screw [the other party] and let's cut [opposing counsel] off without a hearing. O.K.? By the way, this message will self-destruct in five seconds.

The recipient of the e-mail objected to participating in this ex parte play. The judges’ e-mail response was “Chicken.”

One assumes that the judge may have been kidding around - just trying to be funny. But even if that is true, the judge violated Undie’s Fifth Commandment.

One form of ex parte has always intrigued me, because some judges actually consider me to be some kind of an “expert.” Under the 1990 ABA Code of Judicial Conduct Canon 3(B)(7)(b), and under Canon 3(A)(4) of the 1972 Code of Judicial Conduct, a judge may obtain advice in a pending case from a disinterested expert in the

71. Cox, supra note 47.
72. Lubet, supra note 5, at 1307-8. For cases from my neck of the woods see Commonwealth of Kentucky Judicial Retirement and Removal Commission In Re The Matter Of: Calvin N. Manis District Judge 33rd Judicial District, 57 KY. BENCH & BAR 28 (Spring 1993); Commonwealth of Kentucky Judicial Retirement and Removal Commission In the Matter Of: Wayne W. Fitzgerald, Former District Judge, 18th Judicial District, 2nd Division, 54 KY. BENCH & BAR 46 (Summer 1990) (district judge vacated DUI conviction that had been entered by another judge, and signed the order “outside the courtroom and without the knowledge of the attorney for the Commonwealth”).
73. Id. at 1307 (alterations in original).
74. Id. at 1307-8.
75. See Undie’s Commandments, infra.
76. As an aside, an expert is someone like the late Major General John “Uncle John” Sedgwick, who, at the battle of Spotsylvania, reportedly opined “[Those Rebs] couldn't hit an elephant at this dist - . . . [urk!?] . . . . . . . ”
law if the judge informs the parties of the person and the substance of the advice, and gives them an opportunity to respond. Strangely enough (?), the Kentucky version of the CJC has a similar position, but one which does not provide for notice to the parties! This is troubling. I used to get calls from judges, but I insisted on the notice. Now I do not get any more calls, which is just as well.\textsuperscript{77}

Another interesting application of the rule against ex parte contacts came in Kentucky Bar Opinion E-419 (2002).\textsuperscript{78} The question presented was whether prosecutors could “arrange and conduct meetings with judges for the purpose of establishing informal policies or shared understandings on issues likely to influence outcomes in pending or future criminal cases.”\textsuperscript{79} The Ethics Committee answered “No.”\textsuperscript{80} I think they reached the right conclusion. The scenario reminds me of the time when my mentor at the law firm found out that the local lawyer and his buddy the local judge decided to have a pretrial without inviting my mentor, who was the out-of-town opposing counsel. Having been tipped off, he showed up, much to the embarrassment of the court.

Here is one that I think is a little odd. Did the judge get a fair shake here? During an election in 1993, the judge published a campaign ad in which he made the pitch that he was “a man you can talk to.” The Kentucky Judicial Retirement and Removal Commission issued a private reprimand opining that the ad “gave the voters the impression that the judge would engage in ex parte communications!”\textsuperscript{81}

6. Practicing Law and Otherwise “Takin’ Care of Bidness”

Canon 4A., D.(1)-(3), E., G. provides:

A. Extra-Judicial Activities in General

\textsuperscript{77} For a good discussion see Leslie Abramson, \textit{The Judicial Ethics of Ex Parte and Other Communications}, 37 \textit{House L. Rev.} 1343 (2000).
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{81} \textit{Commonwealth of Kentucky Judicial Retirement and Removal Commission Order of Private Reprimand (Pursuant to SCR 4.020(1)(B))}, 58 Ky. Bench & Bar 38 (Summer 1994).
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.

D. Financial Activities

(1) A judge shall not engage in financial and business dealings that:
(a) may reasonably be perceived to exploit the judge's judicial position, or
(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:
(a) a business closely held by the judge or members of the judge's family, or
(b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

E. Fiduciary Activities

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's
family, and then only if such service will not interfere with the proper performance of his duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under his appellate jurisdiction.

....

G. Practice of Law

A judge shall not practice law . . . .

In 1997, a judge of the Pima County Superior Court got burned when it was discovered that he was practicing law on the side—negotiating a shoe contract with Nike on behalf of Andre Agassi. He said he was just advising a friend, but he had been paid $50,000 in 1994, $278,000 in 1995, and $152,000 in 1996 for his efforts. But what the hey—he only received $96,314 as his judicial salary.

You may recall that the Arkansas Democrat-Gazette worried that Bill Clinton’s disbarment case might be assigned to the wrong judge—specifically Judge Morris Thompson. Thompson has the same way with words as our former “Pres.” When he got busted for practicing law on the side, he falsely claimed that he had a special dispensation from a senior judge to do so. That did not work.

When he was also charged with failure to report his legal fees as is required by law, he argued that he did not think he had to report his outside income from legal fees because he thought that the law requiring him to report “extra-judicial” income meant that he had to report only income he received for making some kind of judicial decision. Get it? Extra-judicial income. You see, it all depends on

84. Cox, supra note 17.
85. Id.
86. Id.
what extra-judicial means—or something.

A Muncie, Indiana judge who was described as “hard-working” kept his law practice in one county while he carried on “full-time” employment as a judge in another county. 87 Meanwhile, he was trading sex for legal services in his law practice. 88 Busy guy.

For an interesting look at the problem of “judges practicing law,” you might like to read the (locally) famous case of Prichard v. United States. 89 You will recall that Kentucky luminary Ed Prichard had just (foolishly and needlessly) stuffed some ballot boxes. Having heard that his family friend, Judge Ardery, had convened a grand jury to look into such matters, Prichard attempted to get legal advice from the judge as to the appropriate course of action (or was he just trying to compromise the judge and the process?). It was later held that Prichard could not shield the content of these discussions by claiming the attorney-client privilege. 90 The court more or less held that no lawyer could possibly believe that he could seek legal advice from the sitting circuit judge, nor could any judge purport to give such legal advice, especially in these circumstances. 91 Some particularly harsh criticism has been leveled by Judge John Noonan, Jr. (Ninth Circuit) in his review of the case. 92

This scenario is perhaps difficult to believe: a target of grand jury proceedings shows up on the judge’s doorstep at eleven o’clock on a Sunday evening with the judge’s son, an attorney, to talk about the case. Even more shocking is Prichard’s claim that his communications to Judge Ardery were within the attorney-client privilege.

It could be said that this fact pattern is “too easy” to study in a professional responsibility course - how could a lawyer stuff ballot boxes and then claim that an ex-parte communication with the judge assigned to

88. Id.
89. Prichard v. United States, 181 F.2d 326 (6th Cir. 1950).
90. Id. at 229.
91. Id. at 330.
his case was an attorney-client communication? It is obvious that Prichard was wrong; however, his complete lack of respect for, or understanding of, professional ethics is more difficult to explain. So is the fact that other lawyers in Bourbon County, including Judge Ardery’s son, showed similar insensitivity to ethical concerns. In this respect, the most outrageous cases are sometimes the most puzzling.93

Tell us what you think, Judge Noonan! Ouch! Pretty strong stuff! In any event, I think that we would all probably agree with Judge Noonan’s final observation. Indeed, most of the cases that I will allude to today seem to be proof of his point.

So much for judges practicing law. How about judges running other businesses? Well, look at Canon 4D.(3)94 as it is supplemented by the “other requirements of the Code,” and then consider the case of a judge in Twiggs County, Georgia, who ran a mortgage company out of his courtroom. He defended his actions on the time honored ground that it was all a “witch hunt,” but he finally resigned after being charged with theft by a special prosecutor.95 O.k.—so what if we run the court out of our business address? Will that work? Have we found a loophole? Sadly, no, as Judge Ellis “Beaudron” Willard of the Sharkey County, Mississippi, Justice Court discovered. He carried on court proceedings from Beaudron’s Pawn Shop and Tire Center; he was “suspended.”96

All extra-judicial activities are also subject to the provisions of Canon 4A., which provides, among other things, that such activities should not demean the judicial office or interfere with the proper performance of judicial duties.97 In an interesting New Jersey case, a municipal court judge was forced to give up his other job; he was a professional boxing referee.98 Some might disagree with this result. After all, how much different are the roles of municipal court judge

93. Id. (emphasis added).
95. Cox, supra note 24.
96. Cox, supra note 17.
98. Cox, supra note 24.
and boxing referee?

Canon 4E.(1) tells the judge not to serve as an executor, administrator for persons other than family members. In Washington State, part-time judge Grant Anderson controlled an estate and continued to control and “wheel and deal” with the estate’s funds after he became a full-time judge. He was removed from the bench, but the Supreme Court held that some sanctions are just too harsh. Anderson will not have to attend a judicial ethics class, as was ordered in a commission’s recommended sanction. So how does that make you feel as you sit through annual, mandatory judicial ethics CLE?

7. Hospitality Hound

Canon 4D.(5)(c) provides: “(5) A judge shall not accept, and shall urge members of the judge’s family residing in the judge’s household not to accept a gift, bequest, favor or loan from anyone except for:… (c) ordinary social hospitality.”

When I was a law clerk for a federal judge, we interpreted the gift rule strictly, to warn the lawyers not to offer us their nasty fruitcake at Christmas time.

Do not accept free tickets to Florida Marlins’ baseball games from a law firm that appears before you. At least that is the lesson of In re Luzzo. But it is worth comparing the routine doings of Edward Bennett Williams, as reported by author and reporter Evan Thomas. Williams distributed Redskins tickets—the owner’s box—to such regulars as Chief Justice Earl Warren, Justice Tom Clark, and Justice Byron “Whizzer” White. At the same time he specialized in arguing cases before these very judges. Is this ordinary social hospitality?

While a judge may accept “ordinary social hospitality,” one must be careful. There is “controlling authority” in this area, and one invites bad press by pushing the envelope. Recently a Texas federal

100. Cox, supra note 17.
101. Id.
102. In re Luzzo, 756 So. 2d 76 (Fla. 2000).
judge was criticized for socializing too much with plaintiffs' lawyers. The alleged misconduct arose from: the taking of social trips, acceptance of transportation on private aircraft, and (horrors) participation in discussions about possible employment. That brings us to the danger of getting something caught in the revolving door.

8. The Revolving Door

ABA Model Rule of Professional Conduct 1.12(b) (Former Judge or Arbitrator) provides: "A lawyer shall not negotiate for employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or arbitrator . . . ." I recall that a few years back a Lexington, Kentucky, lawyer complained to me that he had been "hometowned" in a case. He thought that the case had gone well, but it was taking forever to get a decision. When it finally came, the judge had simply signed the findings of fact and conclusions of law tendered by the plaintiff's firm. The lawyer was plenty pissed off, and, risking an ex parte himself, called the judge, only to learn that the day after entering the judgment the judge had joined the plaintiff's firm. It could have been a coincidence. Look what is happening to poor old Martha Stewart.

In any event, if we cannot get all that we need from the Code of Judicial Conduct, it would help if we had some supplementary standards. Here is my offering. Some of these Commandments are pretty good. Others are silly, but I needed ten.

III. THE UNDIE COMMANDMENTS

I. Thou Shalt Not Lie, Cheat, Or Steal

His disciples questioned him and said to him, "Do you

105. Id.
106. MODEL RULES OF PROF'L CONDUCT R. 1.12(b) (1983).
107. In heac verba, or something like that.
want us to fast? How shall we pray? Shall we give alms? What diet shall we observe?” Jesus said, “Do not tell lies, and do not do what you hate, for all things are plain in the sight of Heaven. For nothing hidden will not become manifest, and nothing covered will remain without being uncovered.”

My favorite case involving lying was played out in The City of Angels. When Judge Patrick Couwenberg filled out his application for a judgeship, he claimed: he had a degree in physics from Cal Tech (he graduated from a junior college); a Master’s Degree; he changed dates to cover up the fact that he had failed the bar six times; and he claimed he had worked for Gibson, Dunn, & Crutcher, although this was news to that august outfit. At his robing ceremony, our creative writer tricked another judge into referring to his Viet Nam Purple Heart medal (you guessed it—he was never in Viet Nam). While he admitted most of his “mistakes” to investigators, he kept coming up with more stuff—like the time he was recruited by the CIA to work for a Laotian General along with a bunch of Scandinavian (I am not making this up) mercenaries in Southeast Asia. I will bet those Swedes were hot. Finally, he came up with the defense that his fibs were all the result of a treatable mental disability caused by his having been born in a refugee camp in Japanese held Java. For some reason, the authorities did not buy it. Pat is not a judge anymore.

II. Thou Shalt Stay Awake; Neither Shalt Thou Be Hyperactive

“[H]ow far better it is to arrange one’s life so that one has no need of a judge dozing on the bench.” Enough said on that point. But awake can be bad too, if carried to an extreme.

I am sure that some of you practiced criminal cases at one point in your career. I am sure that you subscribe to Undie’s Trial Practice

109. I am a Viet Nam veteran, so I naturally enjoy this disciplinary case. Give him "THE MAX."
110. Cox, supra note 17.
Rule No. 1—"[r]emember that the judge is probably a former prosecutor." I am sure that you have seen judges make objections for the prosecutor and then sustain them. But have you ever seen a judge object and then overrule his own objection without the benefit of any comment from either party? I was told that this happened in a Kentucky court. However, I did not memorialize the details, and the anecdote is lost for all time. Perhaps it is just as well.

On the subject of hyperactivity, consider the case of the part-time Tennessee judge who also practiced law on the side. He was so caught up with notions of efficiency that he ruled (favorably) on motions he filed in cases in which he was the attorney—a system of self-adjudication, sometimes premature adjudication at that. Apparently, similar cases of multiple legal personality are not all that rare. Indeed, our Tennessee lawyer-judge was something of a piker, compared to an Ohio Judge. This multi-talented chap initiated and presided over a contempt proceeding, descended from the bench to assume the role of prosecutor, and then disrobed and held forth from the witness stand. Later he played the role of defendant at his own disciplinary proceedings. What an amazing talent! What a guy!

III. Thou Shalt Be Wary Of The Fourth Estate

In a bit, I will tell you about my own experiences with the media. But the best lesson is provided by the Microsoft case. Here the trial judge was described as having been “poisoned by the passion of pandering to a press unconcerned with judicial ethics.” The Court of Appeals found that the trial judge had given secret interviews to the press two months before issuing findings of fact, had revealed his planned remedy, and had telegraphed that he would restructure the company. He also crossed the line in his characterizations of Microsoft and its leaders. These actions were “deliberate, repeated,

112. Alan B. Rabkin, Double Trouble, A Tennessee Part-Time Judge Gets Media Attention (and Maybe More) for Acting as Both Judge and Attorney in the Same Case!, NEVADA LAW., Nov. 9, 2001, at 24.
113. Cox, supra note 24.
egregious, and flagrant” violations of the Canons. On the other hand, Law Professor Lubet of Northwestern University quipped that “[t]he likelihood of a formal sanction is about the same as the chance that George W. Bush will appoint Alan Dershowitz to the U.S. Supreme Court.”

My own experience tells me that it is better to resist the urge to speak to the press. Not so many years ago, there was a run of sexual abuse cases in Kentucky in which genitalia were displayed to surprised jurors to rebut “identification” testimony from complaining witnesses. You know the drill. The defendant drops his trousers and the defense lawyer announces breathlessly but triumphantly: “No Mickey Mouse tattoo on that bad boy!” When a reporter asked me to comment, I could think of nothing to say but: “I have never been in that position.”

I think all of us of faint heart can agree that “no comment” may be the greater part of valor. But are the rules on “comment” too strict?

Canon 3B.(9) provides that “[a] judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing . . .”

The commentary to this section explains that this “no comment” rule continues to apply during any appellate process and until final disposition. I have my doubts about whether this rule is constitutional, but academic commentators do not seem to share this view. Professor Lubet went so far as to make a case that Judge Richard Posner’s (Chief Judge, 7th Circuit) award winning book An Affair of State: The Investigation, Impeachment, and Trial of President Clinton violated the rule.

115. Microsoft, 253 F.3d at 107 (referring to Canons 2, 2A(4), and 3A(6) of the Model Code of Judicial Conduct).
117. See Robin Devine, Officials review Caldwell trial nudity, PADUCAH SUN, June 18, 1995, at 16A.
120. Steven Lubet, Ethics Clash of Two Giants, NAT’L L. J., Apr. 3, 2000, at
I note that the United States Supreme Court busted the restrictions on judicial campaign speech wide-open in *Republican Party of Minnesota v. White*. Thanks to the Supreme Court, members of the public now have the right to be subjected to political snake oil and garbage. The “Market Place of Ideas” has become a Wal-Mart of ideas. For example, in Kentucky it is okay for one judicial candidate to call the other a “drug dealer’s dream,” and for the other to suggest that his opponent is a “lazy, deceitful cheater.” I guess that you can say that there is some valuable information here. That is, we can decide which of the candidates is the nastier or the more foolish. Citizens of other states are now enjoying similar benefits. In Georgia, an unsuccessful candidate challenged the restrictions of the CJC. This candidate called the electric chair “silly,” and claimed that the Judicial Qualifications Commission’s decision prevented him from running ads stating that his opponent stood for same sex marriage. The Eleventh Circuit ruled that even if these statements were negligently false and materially misleading, the Commission had overstepped its bounds. Unfortunately, this ruling came too late for the muzzled candidate. He wanted another election or money damages, but the court was not willing to go that far.

Additionally, ABA Model Rule 8.2 provides that:

[A] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or

A22. Did Senior Judge Nathaniel Jones of the Sixth Circuit violate the rule when he gave a speech at an ABA conference in which he likened the Second Circuits reversal of police convictions in the Abner Louima case to a lynching? Does anyone care? See Frank Murray, *Federal Judge Criticizes Reversed Police Convictions*, WASH. TIMES, March 8, 2002.


123. See Weaver v. Bonner, 309 F.3d 1312 (11th Cir. 2002).

124. *Id.* at 1316.

125. *Id.* at 1324.

integrity of a judge, adjudicatory officer or public legal officer, or a candidate for election or appointment to judicial or legal office.

Unfortunately, judges forget about the First Amendment standards when it comes stamping out lawyers' criticism of judges. In *Kentucky Bar Association v. Jernigan*\(^{127}\) a lawyer was disciplined for kicking a judge in the "groin" (a euphemism, one assumes). One Justice wanted to let him off the hook for the physical damage, but discipline him because he had also sent a "scurrilous" letter to a newspaper editor. Scurrility is by no means the equivalent of "knowingly false, or made in reckless disregard as to truth or falsity." Indeed, something could be scurrilous, but true. ABA Model Rule 8.2 does not contain the earlier Code's requirement that the lawyer be "temperate and dignified," or use "appropriate language, and avoid petty criticism."\(^{128}\)

IV. *Thou Shalt Not Set Thyself Above Others*

For of all sad words of tongue or pen the saddest are these: ("Do You Know Who I Am!")\(^{129}\)

Remember Canon 2A. and B.? Some judges seem to have forgotten about them. Illinois Supreme Court Chief Justice James Heiple "became the state's most prominent judicial bad boy" when he received a complaint from the Judicial Inquiry Board alleging that he had engaged in "conduct that brings the judicial office into disrepute."\(^{130}\) Specifically, he had flashed his judicial identification card when detained for suspected traffic violations. In one case, he was said to have tried to browbeat officers into not issuing a ticket by exclaiming "[d]o you know who I am?"\(^{131}\) Bad form, your honor.

\(^{127}\) *Kentucky Bar Ass'n v. Jenigan*, 737 S.W.2d 693 (1987).

\(^{128}\) See *ABA Model Rules of Professional Conduct* 540 (3rd ed. 1996) (alluding to former EC 8-6).


\(^{130}\) *Id.*

Why don't you plaster your car windows with the Fraternal Order of Police stickers, like the rest of us?132

V. Thou Shalt Not Try To Be Funny

Canon 3B.(4) tells us 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 . . . ."133 So leave the stupid jokes and wisecracks to the law professors. No one expects anything better from them anyway.

[Judicial Humor] . . . proverbially occupies a very low place in the classification of wit. Its scintillations gain immensely by their settings and surroundings. They are emanations from a superior sphere, and are accepted and enjoyed and condoned by those who are compelled to listen to them. They are very seldom enjoyed by both parties to a cause. The wit is generally exercised at the expense of the party, or the witness of the party who is supposed at the time not to have the favorable consideration of the court.134

For a couple of cases involving puerile judicial humor, consider In re Baldwin135 and In re Roberts136. In Baldwin, the judge left the courthouse while the jurors were deliberating in a drunk-driving case, and returned with a twelve-pack of beer, which he shared with the jurors. "I know this is uncommon, and kind of funny following a DUI case. I'll deny it if any of you repeat it," he told them.137 Yes -

132. See also In re Richardson, 760 So.2d 932 (Fla. 2000) (recounting a judge who was arrested for solicitation of prostitution and identified himself as a judge who was "pro police" when he arrived at the station house).
137. Lubet, supra note 5, at 1304.
yes - very funny. Judge Baldwin accepted censure and resigned.138 In Roberts, a judge who was presiding over a domestic battery case quipped to his clerk that “every woman needs a good pounding now and then.”139 HA! HA! That was one good judge. Almost as good as a recent performance by New York Judge Ralph Romano, who during the arraignment of a man who had assaulted his wife with a telephone, quipped “What’s wrong with that? You’ve got to keep them in line once in a while.”140 Clever, original, and good timing, too, eh?141

Then there was that “wild and crazy guy” out there in Nebraska, Judge Richard Jones. He would sign court forms and orders with names like Adolf Hitler, Snow White, and Mickey Mouse.142 Judge Jones also got a kick out of making up silly orders setting bail, for example, a “Gazilion pengos.”143 Then there was the anonymous threat he sent to a colleague followed up by a firecracker assault on the colleague’s judicial office.144 You are a million laughs, Dick!

I might have added another Commandment about bullying, but we need to keep it at ten for literary effect only - I Am Not Trying To Make A Religious Statement Or Post Anything! So here is an example of a judge getting in trouble for bullying when he thought he was being funny. This from Bradshaw v. Unity Marien Corp.,145 which was brought to our attention by Professor Lubet.146 By the way, the lawyers on the receiving end of this “humor” did not use crayons to write their briefs.

138. Id.
139. Id. at 1305.
140. Cox, supra note 52.
142. Cox, supra note 26. For another attempt at humor, which drew a complaint, consider the Broward County, Florida circuit judge who used a device in court that made a “toilet-flushing sound” to tell a defense lawyer what he thought of his case. Interviewed by Hozaifa Cassubhai, Florida Judge’s Bizarre Actions Draw Scrutiny (Court T.V. television broadcast, January 11, 1998).
143. Id.
144. Id.
Before proceeding further, the Court notes that this case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact - complete with hats, handshakes, and cryptic words - to draft their pleadings entirely in crayon on the backs of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black pencil in hand, and a devil-may-care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins.147

147. Bradshaw, 147 F. Supp 2d at 670-71; see also, In re Michelson, 591 N.W.2d 843 (Wis. 1999) (defendant's mother wanted more time to pay her daughter's fine because she was responsible for the care of her ill daughter's two small children). In In re Michelson, the Judge told defendant's mother "'I suppose it was too much to ask that your daughter keep her pants on and not behave like a slut.'" In re Michelson, 591 N.W.2d at 845. He also stated that the daughter should not have brought children into the world if she was not in a position to support them. Id. In a letter to the daughter, who had demanded an apology, the Judge wrote:

    With the planet already overcrowded, my personal belief is that a young woman who finds herself unmarried and pregnant should get an abortion. However, whatever my personal beliefs, it is not always appropriate for a judge to express them from the bench because the judge is in a position of power at that moment and the person spoken to cannot talk back. For that, having used my position to strongly express my personal views, I apologize.

    Id. That is big of you, judge. We are so relieved that you have seen the light.
After beating up defense counsel, the judge turns on the Plaintiff's lawyer.

[T]he Court commends Plaintiff for his vastly improved choice of crayon - Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotched about Plaintiff's briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig.¹⁴⁸

Where is lawyer Jernigan of cancan fame, when we need him?

VI. Thou Shalt Not Tie Up The Staff And Make Them Watch Bondage Movies

Okay, this is a silly Commandment. But it happened. I am not making this up. This is the case of Master (Judge) Robert Hollman, way down in Ector County, Texas, which comes from one of the Cox collections. Hollman’s lawyer argued unsuccessfully that these were just “little games” he played, which did not interfere with his official duties. “Rather, they were consensual efforts to act out ‘vignettes from old cowboy movies and damsel-in-distress videos.’”¹⁴⁹ But the damsel he picked took the matter to the EEOC. Judge Hollman “resigned and rode off into the sunset.” Do not come back, Shane.

VII. Thou Shalt Avert Thine Eyes From Naked Pictures; Neither Shalt Thou Talk Dirty

Once again, the tie into the Code is in the vicinity of Canon 2.¹⁵⁰ Judge George Preston, presiding judge in the City Court of Scottsdale, Arizona, had just attended a city-sponsored seminar of sexual misconduct in the workplace.¹⁵¹ He must not have paid attention. Five days later he was busted for using his courthouse

₁⁴₈. *Id.*
computer to e-mail a video clip of nude skydivers (yes - I said nude skydivers - and you stop thinking about them right now!) to unappreciative court personnel. The act that finally sank the judge’s ship occurred when he handed his female bailiff a greeting card (presumably not a “Hallmark”) that “featured the exposed genitals of three women.” The bailiff went to the EEOC, and the city (the taxpayer) paid. Disgusting. Sad. The judge resigned.

Incidentally, if you are ever surfing the web for recipes from the British cooks known as “The Two Fat Ladies,” do not—for God’s sake, do not—type in “Fat Ladies.” You have been warned!

Regarding follow-up phone calls, just say no! A Justice of the Peace down in Amarillo, Texas, developed a taste for phone calls to teenage girls he had sentenced to probation—he liked to “talk dirty.” He was suspended. I’ll bet he was swept up into this criminality after reading the Starr Report.

VIII. Thou Shalt Not Make Racist And Sexist Statements

Canons 3B.(5)-(6) now provide:

(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, including but not limited to bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge’s direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age,

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152. Id.
153. Id.
154. Id.
155. Cox, supra note 18.
sexual orientation or socioeconomic status, against parties, witnesses, counsel or others.156

In In Re Barr, a judge was removed from office for “base sexual comments” to attorneys in his court.157 The judge referred to female prosecutors as “babes,” and made references to his “all-babe court.”158 In In re J. Kevin Mulroy, a judge attended a charity event where he urged the prosecutor in a case pending before him to make a reasonable deal to dispose of a murder case because the victim was “just some old [] bitch.”159 At another charity event, the same judge remarked to someone “you know how you Italian types are with your Mafia connections.”160 Then there was Justice of the Peace Bill Lowery, who got in trouble for, among other things, shouting racial epithets at a parking lot attendant who would not let him park for free.161 The Judicial Tourette’s Syndrome Award goes to Manhattan Supreme Court Judge Salvador Collazo, who got caught passing a note to his clerk regarding a new judicial intern—“She has some k......s—Look at those n......s sticking out.” He got into even more trouble by making up a convoluted explanation about how this was all the clerk’s fault.162

Along the same line, do not sexually harass anyone, especially your law clerk.163

IX. Thou Shalt Not Punch Your Spouse In The Courthouse - Save That For A More Appropriate Forum, Like The Christ Episcopal Church

Location - Location - Location. No - I am not talking real estate.

158. Id.
159. In re Mulroy, 731 N.E.2d 120, 121 (N.Y. 2000) (racial epithet omitted). Imagine the kind of language one might hear in a klavern held at a red-neck bar, or the kind of language that actually was used at an infamous University of Kentucky Board of Trustees Meeting.
160. Id. at 122.
162. Id.
Believe it or not I am talking about “mitigating factors” in judicial disciplinary cases. Consider the case of Judge Ralph Turco out in Tacoma. According to the Washington State Judicial Performance Commission, one “mitigating factor” was that when he “knocked his wife to her knees” during a dispute having something to do with carrying Christmas presents from the car, he did so at the Christ Episcopal Church, and not at the courthouse! For an attorney disciplinary case in Kentucky, in which the late Justice Leibson drew some geographical distinctions, see the wonderfully crazy case of Kentucky Bar Ass’n v. Jernigan, which I mentioned in connection with the subject of comment to the media. The lawyer was reprimanded for kicking a judge in the “groin” and writing a letter to the editor containing scurrilous language. Justice Leibson sympathized with the lawyer, noting that he had been provoked, that the attack took place in a hallway and not in the actual courtroom, and that the matter was personal/private. Perhaps he should have said it was a “privates” matter.

X. Thou Shalt Not Attack Thy Colleagues

I recommend an article on the “Special Professional Challenges of Appellate Judging” by Randall Shepard, which collects a number of incidents of incivility between appellate colleagues, including at least one fist fight between two Ohio Supreme Court Justices. I found particularly interesting the author’s comments on “venomous language” in court opinions, particularly U.S. Supreme Court opinions. It does seem to me that it would be better if the Justices of that most august body refrained from characterizing each other’s views as “absurd” and “foolish.” Again, this sort of juvenile sniping should be left for law school faculty meetings, where it belongs! By the way, did I detect the odor of a Tenth Commandment violation wafting out of the Sixth Circuit with the publication of Grutter v.
If you have a complaint about another judge, take it up with that judge, or file a complaint, or seek an ethics opinion. Do not wage the war in the opinions of the court, or in the press.\textsuperscript{171}

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