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Judicial Ethics in the Twenty-First Century: Tracing the Trends

By: Roger J. Miner\*

Introduction

As the Twenty-First Century begins, public confidence in the judiciary is on the wane. In a poll sponsored by the American Bar Association, only thirty-two percent of those responding to questions on this subject said that they were extremely confident or very confident in judges.<sup>1</sup> During a recent argument of an appeal before a panel of which I was a member, a distinguished law professor, arguing that the district judge should have recused, said that the public has not much confidence in judges anyway. We certainly were grateful for his input, which I am sure greatly advanced his client's cause. But lack of confidence in the judiciary is surely a serious matter, for the citizenry is well aware that a properly functioning, impartial, and ethical judiciary is the sine qua non of a just and democratic society.

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It seems clear, however, that at least some of this loss of confidence derives from factors over which judges have little or no control. These factors include: inadequate judicial resources;<sup>2</sup> procrastination and ineffectiveness of counsel; the expense of litigation; restrictions on judicial discretion, such as sentencing guidelines;<sup>3</sup> and litigants' unrealistic goals as well as their disappointment with the outcomes of their litigation. It can also be said that some loss of confidence derives from the failure of judges to fully exercise their authority when confronted with such matters as inordinate litigation delays, discovery abuses, repeated adjournment requests and courtroom misbehavior on the part of lawyers and litigants. And, of course, there is the loss of confidence that inevitably flows from individual experiences or media reports of wrong-headed judgments, illogical decisions, disproportionate or disparate sentences, and secret court proceedings and settlements. What brings us together for this conference, however, is the major cause of the loss of public confidence in the American Judiciary — the failure of judges to comply with established professional norms, including rules of conduct specifically prescribed. In brief, it is the unethical conduct of judges, both on and off the bench, that most concerns the citizenry and is principally responsible for the crisis in

confidence that the judiciary faces in these early years of this new millennium.

The trend toward greater public scrutiny of judicial conduct and the increasing demand for judicial accountability have their roots in this crisis of confidence. These trends have given rise to the development of an ever-expanding industry of public and private institutions and individuals devoted variously to: analyzing the governing rules; interpreting the rules and suggesting additions and refinements to them; opining upon individual cases of alleged judicial misconduct; offering advisory opinions; issuing reports and studies; and, where authorized to do so, imposing sanctions upon judges for rules violations. Involved in this judicial conduct industry, on a full-time or part-time basis, are law professors, journalists, lawyers, citizen court-watchers, judges, and the members and staffs of judicial conduct commissions and boards, and of various other institutions, including Congress and state legislatures, that have, or take, an interest in this area. Their work — your work — is critically important in assuring an accountable, respected and impartial judiciary.

But there is a downside to this industry, and that is overzealousness in the performance of its work. Too much public scrutiny, too many

rules, too many interpretations of rules, conflicting opinions respecting specific conduct, picayune concerns, and overregulation impact the enterprise of judging in a negative way. Ultimately, such excesses can result in timid judges, who continually seek advisory opinions on ethical matters, recuse when it is unnecessary to do so and generally look over their shoulders to see if they are being fitted up by lawyers for some ethical violation or other. Such activities can be a waste of precious judicial time and an unnecessary distraction from the judicial business at hand, and may even have an untoward effect on the decision-making process itself. These concerns are magnified by unwarranted threats or unjustified instigations of disciplinary proceedings. The ultimate consequence of all these concerns could very well be the undermining of judicial independence.

Under the heading of picayune concerns, I can only refer to the listing of advisory opinions under the title “Issues for New Judges” in the Spring 2003 Judicial Conduct Reporter of the American Judicature Society Center for Judicial Ethics, a leader in the judicial conduct industry.<sup>4</sup> These advisory opinions, some apparently given in response to specific inquiries by judges in different parts of the country to various organizations that respond to such inquiries, opine upon gifts that new

judges may receive. They say that it is okay to receive a gavel from a former employer or client, a robe from a bar association, and a reception from a judge's former law firm. Also in the okay category are clocks and chairs. Now I ask you, should judges be proposing questions of this nature? Do judges have such an irrational fear of doing the wrong thing as to worry enough about these matters to seek an opinion? Is there a real concern that a judge must recuse from all cases involving any member of a bar association that presented him with a robe?

There was a time when recusal under these circumstances would be unthinkable. In 1768, Sir William Blackstone wrote: "[I]t is held that judges or justices cannot be challenged. For the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."<sup>5</sup> Alas, although there is still no written code of ethics for English judges, the following rule is now applied in the courts of England: "The Court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether these circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."<sup>6</sup>

This test, calling for courts to identify the perception of a fair-minded and informed observer, is, as will later be discussed, a recurring theme in recusal cases as well as in other types of cases implicating judicial conduct. This should not be a surprising thing, for in modern-day society, it is perception, rather than reality, that has the greater importance. The manipulation or “spinning” of perception has become a specialized occupation. Law firms consult with such specialists in an effort to advance public understanding and sympathy for their clients’ causes. It is no wonder that a court was recently constrained to rule on the extension of the attorney-client privilege to a public relations consultant retained by counsel on the client’s behalf.<sup>7</sup> So with the thought in mind that the overall societal trend is toward the elevation of perception over reality, I turn to the trends in the rules and norms governing judicial conduct in six discrete areas: (i) getting to the bench; (ii) recusal; (iii) courtroom behavior; (iv) off-bench activity; (v) financial disclosure; and (vi) competence.

#### I. Getting to the Bench

Although most bar organizations, editorial writers, and other elite groups seem to favor appointment over election of judges, the great majority of Americans seem to prefer the election route for getting to the

bench. Seventy-five percent of those polled in an American Bar Association survey last year said that their confidence is greater in judges they elect than in judges who are appointed.<sup>8</sup> Nearly the same proportion saw cause for concern in campaign fundraising for judges, and almost two-thirds of the representative group polled said that they would be more trusting of judicial candidates unaffiliated with a political party.<sup>9</sup> In other words, the public seeks an unrealistic purity in the election of judges. The public seems to be ahead of the ethical curve on electioneering by judges. Six in ten of those polled said that they saw no problem with the expression of views by judicial candidates and had no fear that such expressions would be indicative of later partiality.<sup>10</sup>

The Supreme Court recently brought itself into line with public thinking on this latter point. In Republican Party of Minnesota v. White,<sup>11</sup> which I am sure will be the subject of considerable and extended discussion at this conference, the Court invalidated the so-called “Announce Clause” that was part of the Minnesota Code of Judicial Conduct.<sup>12</sup> That Clause, promulgated by the Minnesota Supreme Court, provided that a candidate for judicial office could not “announce his or her views on disputed legal or political issues.”<sup>13</sup> Seeing First Amendment violations at every turn, the Federal Supreme



Court observed that the Announce Clause was not narrowly tailored to serve the interests of impartiality<sup>14</sup> and was “woefully underinclusive” to serve the purpose of “open-mindedness” in the judiciary.<sup>15</sup> In her concurring opinion, Justice O’Connor famously expressed her distaste for judicial elections, setting forth a parade of “horribles” that emanate from trusting the people to choose their judges.<sup>16</sup> Ironically, she herself was once an elected judge. Justice Scalia’s opinion for the five-to-four majority took special pains to note what it was not deciding, as follows: “[T]he Minnesota Code contains a so-called ‘pledges or promises’ clause, which separately prohibits judicial candidates from making ‘pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office . . . — a prohibition that is not challenged here and on which we express no view.’”<sup>17</sup>

A number of states have adopted a “pledges or promises” clause similar to the one adopted by Minnesota.<sup>18</sup> Such clauses are based on a 1990 Amendment to the ABA Model Code of Judicial Conduct designed to prohibit “statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court.”<sup>19</sup> In the wake of White, there are sure to be First Amendment challenges to these types of provisions also. In a decision

issued just a few days after the Minnesota case was handed down, the New York Court of Appeals held that the campaign phrase “law and order candidate” was not a violation of the pledges or promises provision of the New York Rules Governing Judicial Conduct.<sup>20</sup> On the other side of the coin, the Florida Supreme Court has found an ethics violation in the campaign literature of a candidate who claimed the universal endorsement of police officers, referred to criminal defendants as “thugs” and “punks,” and said that she would be supportive of victims.<sup>21</sup>

Since the extent of permissible regulation of judicial election campaign speech remains an open question, it is certain that the canons of judicial ethics in this area will be tested as never before. Court challenges as well as proposals for rules changes are already in progress.<sup>22</sup> There are those who say that only voluntary pledges to comply with certain standards of campaign conduct will be permissible.<sup>23</sup> However this all plays out, it now will be extremely difficult for judicial candidates to win election if they refuse to announce their positions on the issues of the day. They will be under intense pressure by the media and by special interest groups to respond to specific questions, and they cannot now use judicial ethics codes as an

excuse to remain silent. Minnesota v. White will also increase pressure upon those who seek judicial office through appointment to state their views on subjects that previously were considered taboo. Confirmation hearings for judicial nominees in the federal system already are taking on a different aspect as United States Senators insist on the disclosure of views on a variety of subjects and test the “ideology” of the nominees.<sup>24</sup> And although a majority of the population may see a significant difference between the announcement rule and the pledges and promises rule, a substantial minority in the poll previously mentioned perceived that a judicial candidate who announces his or her views will be committed to those views after taking the bench.

The financing of judicial elections has also become a topic of great interest. As previously noted, the public is rightly concerned about judicial fundraising. In recent years, interest groups have expended considerable money in pressing for the election of judicial candidates they think will favor them from the bench.<sup>25</sup> Although the public desire is for restrictions on campaign spending by all who run for office, but especially by judges, issues of constitutional magnitude present themselves in this regard. A growing trend seems to be in the direction of public financing for judicial campaigns. North Carolina recently

adopted a Judicial Campaign Reform Act. It provides for nonpartisan judicial elections and also for funding for Appellate and Supreme Court candidates.<sup>26</sup> Consideration of public funding is also said to be under way in six other states.<sup>27</sup> The public perception is that judges who raise millions of dollars to get elected to the bench cannot be fair and impartial when it comes to the interests of their major contributors. The required isolation of judges from the identities of their contributors is not always secured.

A disturbing phenomenon in recent times has been the expenditure of funds to influence the appointive process. These funds, usually raised by special interest groups, are spent on advertisements or mailings to those involved in the appointment or confirmation of judges in order to exert influence for or against appointments.<sup>28</sup> The trend of judicial rules of conduct in this area is difficult to predict, but it would seem to be a good rule for candidates for appointment to steer clear of any association with the interest groups that provide that type of financing. First Amendment concerns are implicated here also, and the extent of any regulation of this type of conduct is problematic.

The participation of judges in elections that are not really elections at all presents another question involving the ethics of getting to the

bench or remaining there. The situation occurs, for example, when one political party is so dominant that it cannot be said that there are contested elections. The party nominee is often chosen by political leaders for political reasons, including ethnic balancing. In New York City, where there is an ongoing grand jury investigation into judicial corruption, allegations of payoffs to political organizations and party leaders for judicial nominations, which are tantamount to election, have surfaced.<sup>29</sup> Even where direct payoffs are not suspected, political contributions by judges and their families have given the public a significant negative impression.<sup>30</sup>

In Minnesota, another method has been developed to stymie a true electoral process. There, it has become the practice for judges to step down shortly before the end of their elective terms, thereby enabling gubernatorial appointments of new judges who then run as incumbents.<sup>31</sup> The appointment process has become so common that 91 percent of 297 current trial and appellate judges were initially appointed, and some courts have even gone decades without an open seat to be filled initially by the voters.<sup>32</sup> As information of this type comes to the attention of the public, the trend in judicial conduct rules will be to require judges and judicial candidates to take whatever steps are necessary to assure their

participation only in fair and open judicial elections. The goal, of course, is the installation of qualified and competent judges, free of any taint that may occur by judicial elections that are merely illusory.

An interesting way to make sure that judges remain in office for their entire terms is found in the Wisconsin Constitution, as interpreted by that state's Supreme Court. That court has concluded that the Constitution prohibits judges from holding any other public office during the terms for which they were elected to the bench, even if they step down from the bench before their elected terms are over.<sup>33</sup> Thus, the will of the people to elect judges is not thwarted by judges.

## II. Recusal

Nowhere is a standard for judicial conduct so dependent upon public perception as in the rules governing recusal. Henri de Bracton, in his thirteenth-century treatise, "The Laws and Customs of England," opined: "[T]here is only one reason to recuse — suspicion, which arises from many causes."<sup>34</sup> Some of the "many causes" for suspicion referred to by Bracton are now set forth in various statutes and rules governing judicial conduct.<sup>35</sup> Yet, it is not the lawyer or the judge whose suspicion is the standard, according to modern day British law and custom.<sup>36</sup> It is the judge in England, as well as in the United States, who must measure

the suspicion of the reasonable man to determine whether to recuse. In present day litigation in this country, lawyers often battle fiercely for tactical purposes to get judges as well as each other recused from cases. In many situations of this nature, recusal either has no basis or makes no sense, and much judicial time is occupied with the issue for naught.

Despite the present practice of Supreme Court Justices in recusing without providing an explanation,<sup>37</sup> the great Chief Justice, John Marshall, recused in an 1804 case and gave an explanation: He said that he had “formed a decided opinion on the principal question, while his interest was concerned.”<sup>38</sup> Today, recusal in the federal court system is governed by statute, and the rules of recusal in state courts generally are similar to the federal statutory provisions. Disqualification, which I use interchangeably with recusal, is required of a federal judge who knows that her or his spouse “has a financial interest in the subject matter of the controversy, or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.”<sup>39</sup> Financial interest is defined to mean any ownership of a legal or equitable interest, no matter how small.<sup>40</sup> And so it has become that a judge who owns one one-thousandth of one percent of a publicly traded company that is a party must recuse. Now, recusal seems to be required

in the case of any parent or subsidiary company of a party.<sup>41</sup> A “substantial holdings” rule would make more sense, but those who make the rules are too much concerned about the “suspicion” referred to by Bracton to allow such a rule. I think that the suspicion of the laity is not as great as the rulemakers think it is.

The rules governing recusal often list a number of specific situations and relationships that call for disqualification.<sup>42</sup> Also contained in most rulebooks is a provision similar to the federal recusal statute that requires “that any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”<sup>43</sup> This type of provision raises several questions: What circumstances should give rise to a question of impartiality? When is it reasonable to question impartiality? What tests should be applied? One can only refer to prior cases and advisory opinions to formulate an answer to these questions. The Supreme Court has said that an objective test should be applied, but was not clear, as usual, as to how this was to be done.<sup>44</sup> I once practiced before a county judge who recused in a case because one of the witnesses was a man who pumped gas for him at a local gas station. That, of course, was in



the day when they actually had people who pumped gas. This was the fear of perception run amok.

The Court also has noted that a judge's "lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons."<sup>45</sup> Is there any wonder why judges have tended to be such "scaredy-cats" when it comes to recusal? Appearance concerns have also been raised in cases where judges have held small financial interests in companies that have been victims of crime.<sup>46</sup>

In one case, a mail fraud sentence was vacated by an appellate court because the trial judge held some shares in a bank that had announced its intention to merge with the victim bank.<sup>47</sup> In another case, a defendant in a criminal case accused of looting a bank president's estate, sought recusal of a district judge who was acquainted with the deceased victim. The appellate court observed that there were less than a dozen personal contacts between the judge and the bank president, and that there was one letter from the judge to the bank president thanking him for supporting his nomination and appointment to the federal bench.<sup>48</sup> Fortunately, the appellate court determined in that case that recusal was not necessary.<sup>49</sup>

Recently, the entire bench of a state supreme court recused and was replaced by judges from the state's court of appeals in connection with a petition by a member of the state supreme court.<sup>50</sup> The petition apparently was filed by the member to secure a writ of prohibition to prevent a court of appeals judge from pursuing a judicial ethics complaint against her for, of all things, misrepresentations made in campaign literature. Why the court did not invoke the Rule of Necessity, once invoked by the U.S. Supreme Court to avoid recusal involving judicial compensation,<sup>51</sup> is a mystery. By invoking the Rule of Necessity, the judges of the state supreme court, excepting only the petitioning judge, could have served. Only last month, an ethics complaint was filed against a judge who struck down a national rule prohibiting road building in wilderness areas, the complaint being based on the judge's extensive interest in the oil and gas industry.<sup>52</sup> As the judge pointed out, none of the companies included in his financial holdings was a party to the lawsuit.<sup>53</sup> Here, too, was presented an appearance question, and perhaps the response was somewhat overdone.

The rules governing judicial conduct that include specific situations in which recusal is required are clear enough, but there is a large, gray area presented by the "appearance of evil rule." This has

provided great grist for the mills of the judicial conduct industry, and lawyers and professors can debate at length questions about when a reasonable person might, could, or would question a judge's impartiality.<sup>54</sup> Questions pertaining to disqualification based on prior positions, commitments, relationships, and comments will continue to be explored on a case-by-case basis.<sup>55</sup> Inconsistency in responses to questions such as whether and when a judge must recuse when the judge's former attorney appears in a case will no doubt continue as well.<sup>56</sup>

I make one personal comment on recusal trends. There seems to be a trend to recuse law clerks or even their judges in cases involving law firms with which the clerks have interviewed for post-clerkship positions.<sup>57</sup> There is even a stronger move for recusal where the clerk has been offered or has accepted a post-clerkship position. I think that recusal is insulting to the judge and arises from an overblown perception of the importance of law clerks.<sup>58</sup> Although clerks are very valuable to judges, they provide assistance only and are not involved in the actual decision-making. Recusal rules for them only serve to reinforce the erroneous perception.

Finally, it appears that the presumption against recusal that came with the notion of duty to sit has been replaced by the “err on the side of caution” rule that counsels recusal in an arguable situation.<sup>59</sup> I do not think that this trend is a desirable one, for it will lead inevitably to a presumption in favor of recusal, with a concomitant burden upon the judge to rebut the presumption.

### III. Courtroom Behavior

When it comes to judicial behavior in the courtroom, the television icon Judge Judy is a prime example of the rude, sarcastic, arrogant, intemperate, inconsiderate, short-tempered, and downright nasty judge. Although she acts in the capacity of a small claims judge or referee who deals only with litigants directly in what is essentially a staged setting, millions applaud her direct way of getting things done.<sup>60</sup> Her popularity is a paradox, because each member of her television audience would expect much better courtroom behavior from a judge presiding over a case in which he or she was a party. Indeed, the trend has been for disciplinary bodies in appellate courts to identify, criticize, and take appropriate action in cases of inappropriate courtroom behavior. Intemperate remarks by appellate judges themselves have been subject to notice and appropriate sanction.<sup>61</sup>

Here, too, care must be taken lest the judicial conduct industry get involved in the micro-management of courtroom behavior. It is only extreme behavior that should be targeted. When a judge simply rules against or criticizes counsel, there is no basis for the disqualification motion that lawyers often make. A judge is entitled to question witnesses “to clarify both legal and factual issues and thus minimize possible confusion in the jurors’ minds.”<sup>62</sup> The Federal Rules of Evidence specifically provide that “[t]he court may interrogate witnesses, whether called by itself or by a party.”<sup>63</sup> The familiar rule is that a judge “need not sit like a ‘bump on a log’ throughout the trial” and, in a jury trial, must accept the “active responsibility to insure that the issues are clearly presented to the jury.”<sup>64</sup>

There is a downside for litigants even where judges are acting within the bounds of propriety. My father once said to a judge who was examining one of his witnesses: “I don’t mind if you question my witness, but don’t lose the case for me.” Only questions that imply the judge’s view of the merits are prohibited.<sup>65</sup> Such questions unfairly impose the judge’s views upon the jury, especially where they cast doubt on the credibility of a witness. Without a showing of extra-judicial

antagonism, however, judicial rulings alone cannot form the basis for a claim of partiality or bias on the part of the judge.<sup>66</sup>

On the criminal side, a judge who opines at sentencing that a defendant is a “menace to society” and concludes that an extended term of imprisonment is warranted by reason of a life devoted to crime, is not disqualified from presiding over a later retrial.<sup>67</sup> However, a judge who spoke at length at a proceeding following a jury verdict of guilty in a murder case, accusing the defense of scurrilous allegations, praising the work of the police, and promising to “restore the reputations of those accused of misconduct by the defense,” was admonished by a judicial conduct commission.<sup>68</sup> Appellate judges recognize over-the-top courtroom conduct when they see it, and have vacated or remanded judgments in cases where there have occurred such examples of unfairness as extensive cross-examination of a witness by a judge, indicating disbelief in his testimony;<sup>69</sup> comments indicating to the jury a fixed and unfavorable opinion of defendants and their counsel;<sup>70</sup> and extensive interruption of an opening statement, and frequent suggestions that counsel object to witnesses’ testimony.<sup>71</sup> In one such case, the appellate court was constrained to remark that “[t]he comments of the

judge as they appear in the record often would have been questionable even coming from a prosecuting attorney.”<sup>72</sup>

The trend is to call judges strictly into account for intemperate conduct in the courtroom. It is clear that cursing in the courtroom, disrespectful conduct toward litigants, threats of punishment beyond the power of a judge to impose, and the bullying of counsel are meeting with zero tolerance.<sup>73</sup> This is all to the good.

Ethical questions for judges are continuing to arise as the result of the burgeoning volume of pro se litigation. The courtroom behavior of judges toward pro se litigants presents a special dilemma where the opposing party is represented by counsel. Although a judge is always barred from acting as an attorney for a pro se litigant, there may be some duty to level the playing field to avoid a miscarriage of justice at trial.<sup>74</sup> There are great risks to the appearance of justice when a judge assists a pro se litigant to make a case. Opposing counsel and the opposing party may think that the judge is showing undue preference. On the other hand, the pro se party will be angered if he loses his case and may think the judge “threw him in.” Boundaries certainly should be established for judicial participation, for judges need to be able to point to fixed rules to get them off the hook that impales them in pro se litigation cases.

Affirmative obligations already have been imposed upon administrative law judges in the social security and immigration contexts to fully develop the administrative record where parties are unrepresented by counsel.<sup>75</sup> Can the imposition of such obligations upon courts be far behind?

In recent years, there has been a trend not only to assist but to encourage pro se litigation. As a result, the volume of pro se litigation has been increasing in the courts of the nation.<sup>76</sup> Some courts have established booths in the courthouse where pro se litigants can come for assistance in starting their lawsuits, and others provide assistance all along the line as the suit progresses.<sup>77</sup> The American Judicature Society, which describes itself as the “leading national resource on pro se litigation,” has generated several publications analyzing methods for helping pro se litigants.<sup>78</sup> Whether undertaken by court clerks and administrative personnel or judges themselves, the practice of law by a court in this manner undermines the traditional notion of an adversarial system that includes an impartial interlocutor as an essential component. Moreover, a pro se litigant whose case is dismissed after she follows the course set by the court will have a skewed view of the judicial process.



The great majority of pro se litigants are pro se because they are poor and cannot afford lawyers.<sup>79</sup> My own solution to stem the rising tide of pro se litigation is to require lawyers to represent these indigent people without charge. There are a great many lawyers practicing today, and each one could yield some of his or her time to assist a few indigent clients in simple cases each year. This suggestions harks back to an earlier day, when I, and others like me, were ordered by the courts or asked by the bar association to represent indigents in criminal or civil cases without charge. I was told that this was an obligation that went with admission to the bar. The concept that this is involuntary servitude in violation of the Constitution is pure hogwash.<sup>80</sup> The representation of pro se litigants without charge is an ethical obligation and should be a legal requirement for lawyers to fulfill. Otherwise, the judicial ethical dilemma will continue as pro se litigation grows ever more voluminous, with litigants looking to courts for guidance rather than impartiality.

A majority of the cases resulting in the removal of judges from the bench during the last decade has involved conduct related to the exercise of judicial power.<sup>81</sup> Other than misconduct in the courtroom, these cases have concerned such matters as wrongful issuance of arrest warrants, failure to remit court funds, neglect of administrative duties, abuse of the

contempt power, refusal to set appeals bonds, ex parte communications, improper issuance of a temporary restraining order, and dismissal of criminal charges in willful disregard of the law and without notice to prosecutors.<sup>82</sup> There are also the cases of the outright abuse of judicial power through criminal conduct such as sexual harassment, theft, acceptance of bribes, and the like.<sup>83</sup> But whether criminal or not, the abuse of judicial power is judicial misconduct of the most evil kind, for it undermines the very foundations of the judicial system. As in the past, misconduct in the performance of a judge's duties, or in the exercise of his or her powers, will justly bring forth the greatest condemnation and sanctions.

#### IV. Off-Bench Activity

Although off-bench misconduct has not given rise to as many disciplinary proceedings and sanctions as has misconduct in the courtroom and in the exercise of judicial power,<sup>84</sup> it has become an area of increasing concern. Certain trends are apparent in the approaches to such off-bench conduct as discussion of specific cases, maintenance of memberships in various organizations, participation in social and charitable activities, acceptance of trips to educational seminars funded

by private interest groups, and involvement in the political activities of a non-judicial spouse.

With regard to comments by judges about specific cases, the Code of Conduct for United States Judges is typical. It simply proscribes “public comment on the merits of a pending or impending action” except where made in the course of official duties, to explain court procedures or as a scholarly presentation made for purposes of legal education.<sup>85</sup> The 1990 ABA Model Code of Judicial Conduct is slightly different, as it prohibits public comment on a proceeding pending or impending “in any court” where the comment “might reasonably be expected to affect its outcome or impair its fairness.”<sup>86</sup> A First Amendment challenge to the public comment provision of the New Jersey Canons of Judicial Ethics was rejected in the case of a judge who acted as a television commentator on various high-profile cases.<sup>87</sup> The pertinent New Jersey Canon had incorporated the “any court” provision of the ABA Model Code.

The principal thrust of public comment canons has been against comments by judges in cases pending before them. In a celebrated case of two years ago, because the trial judge had granted secret interviews to the press during the course of the trial, the interviews having been

granted on condition that they would not be released until final judgment had been entered, the appellate court remanded for retrial before a different judge altogether.<sup>88</sup> The rule against public comment on impending cases has been somewhat more difficult to apply, since it deals with expectations. The belief that a case may be filed is sufficient to trigger the rule.<sup>89</sup> Comment on the great public issues of the day would seem to be enjoined, because many such issues invariably end up in the courtroom after they have been mashed up by the executive and legislative branches of government.

In any event, unless First Amendment jurisprudence eventually dictates otherwise, the rule that squelches all judicial comment on pending cases will continue to be enforced. Here again, the basis for the rule is the need to guard against the public perception of impartiality and bias. But questions needing resolution will arise over what is impending, what is encompassed by the exception allowing for explanation of courtroom procedures, and what comment is allowed for judges through teaching and scholarly writing.<sup>90</sup> I would hope that I am not in violation when I lecture my law students about the wrong-headed Supreme Court reversals of my decisions. Courts and disciplinary authorities will continue to have little difficulty in dealing with judges

who have used the media to publicly criticize appellate court decisions that have remanded their judgments for further proceedings, to respond to criticism in a pending case or to comment on a case pending before another judge.

Most codes of judicial conduct, including the Code of Conduct for Federal Judges, follow the ABA Model Code provision prohibiting “membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.”<sup>91</sup> Several states have added sexual orientation to the list of invidious discrimination bases.<sup>92</sup> One of those states, California, has exempted non-profit youth organizations from the list. As a result of that exemption, judges there may participate in the Boy Scouts, which discriminates against homosexuals.<sup>93</sup>

Recently, the California Supreme Court declined to withdraw the exemption, but added a commentary to the Code as follows: “[A] judge should disclose to the parties his or her membership in an organization, in any proceeding in which the judge believes the parties or their lawyers might consider this membership relevant to the question of disqualification, even if the judge concludes there is no actual basis for disqualification.”<sup>94</sup> As noted by some commentators, this is a

problematic provision, for it permits applications to disqualify even when membership in a specific organization is permitted.<sup>95</sup> The rationale is stated in the first sentence of the added commentary: “[M]embership in certain organizations may have the potential to give an appearance of partiality, although membership in the organization generally may not be barred.”<sup>96</sup> The trend has been to tweak these “invidious discrimination” provisions in an effort to avoid constitutional problems. For example, the new Code of Judicial Conduct promulgated by the Massachusetts Supreme Judicial Court includes the following: “As long as membership does not violate any other provision of this Code, nothing in this Section bars membership in any official United States military organization, in any religious organization, or in any organization that is in fact and effect an intimate, purely private organization.”<sup>97</sup> This type of specificity should be helpful, because, as the ABA commentary points out, the question of invidious discrimination is a complex one, and “depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of a legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations

could not be constitutionally prohibited.”<sup>98</sup> Fortunately, Cynthia Gray and the American Judicature Society have provided an excellent paper summarizing and analyzing the various invidious discrimination canons.<sup>99</sup> The trend toward specificity has been greatly assisted by this paper, which is very useful as a guide for judges.

As to the participation of judges in social and charitable events, the trend has been toward rather strict enforcement of the rule against participation in fundraising events, even though conducted by and for worthy charities. The reason for the prohibition is clear: The prestige of the judicial office may not be used for the solicitation of funds or for other fundraising activities.<sup>100</sup> This is not to say that judges cannot be involved in charitable organizations. Judges are permitted to participate in educational, religious, charitable, fraternal, or civic organizations not conducted for profit.<sup>101</sup> Judges must take care, however, to avoid involvement with organizations that are frequent litigants.<sup>102</sup>

In regard to fundraising, it is of course a matter of great concern that those solicited may feel compelled to contribute or hold the expectation that they may somehow benefit from contributing to a charity in which the judge is interested. However, as an author has noted: “[I]t is certainly accurate to say that lawyers or court personnel

can be intimidated into contribution by the solicitation of sitting judges, [but] it seems less likely that average citizens would feel equally compelled, particularly where the format of the solicitation is relatively anonymous.”<sup>103</sup> The rule nevertheless is strictly enforced. A judge of my acquaintance was censured some years ago for participating in a “jail or bail” charitable fund-raiser, even though he did not personally solicit funds.<sup>104</sup> Any advertised appearance of a judge at a fundraising event violates the rule, as does the imprint of a judge’s name and judicial title on a fundraising solicitation letter.<sup>105</sup>

As to social events, judges have been allowed to accept ordinary social hospitality but are constrained to avoid events that carry the appearance of partiality.<sup>106</sup> The Canons of Ethics encourage judges to participate in the activities of bar associations and other groups dedicated to the improvement of justice, and the judge and spouse may attend bar functions such as dinners and retreats as guests of bar groups.<sup>107</sup> The trend has been to encourage judges, within ethical constraints, to speak, write, lecture, and teach about the law and the legal system.<sup>108</sup> I have long held the view that judges have a positive duty to educate and that the duty extends to the education of law students as well as of the practicing bar. Judges in the federal system may receive



payment, up to certain limits based on their salaries, for teaching, although honoraria are disallowed.<sup>109</sup>

Many bar associations take positions on matters of social policy. The American Bar Association has taken a number of positions on social policy, as has the Association of the Bar of the City of New York, just to give two examples. The trend is for judges to maintain their memberships in such associations, but to avoid participation in the development of controversial public policy positions and to avoid voting upon them as well.<sup>110</sup> Some judges apparently feel so uneasy about this phase of bar association activity that they have resigned from membership rather than be associated in any way with policies with which they do not agree or which they feel may be tested in their courts.

A hot issue for federal judges has been the propriety of attendance at all-expense-paid seminars sponsored by private interest groups. At least one application for recusal on the basis of a judge's attendance at such a seminar was rejected.<sup>111</sup> Recently, congressional legislation to prohibit such attendance has been attached to proposals for pay raises for federal judges.<sup>112</sup> Despite the support of the Chief Justice and the Judicial Conference of the United States for such programs,<sup>113</sup> adverse publicity about the appearance of partiality will tend to hold down

judicial participation in such privately financed activities. At least that is the way I see it. It does seem strange, though, that no questions have been raised about judges who accept all-expense-paid trips from specialty bar associations, such as the one based in New York City, that regularly fly judges and their spouses to high-end resorts in such places as Hawaii and Mexico under cover of participation in brief panel discussions.

Inevitably, First Amendment challenges to restrictions on the political activities of sitting judges not campaigning for their own elections will be mounted in the wake of Minnesota v. White. Just as inevitably, the rules governing the extent to which a judge may be involved in the political activities of a spouse will be subject to First Amendment testing. Present rules generally prohibit judges from any direct participation in a spouse's political campaign. This includes such things as soliciting funds, handing out campaign literature, posting signs, soliciting votes, accompanying the spouse to campaign events, or driving a car with a spouse's campaign sticker attached.<sup>114</sup>

Some of the rules regarding participation in spousal candidacies are downright silly. For example, it appears that New York prohibits a judge from contributing to a spouse's political campaign.<sup>115</sup> There are

conflicting opinions about whether funds from a joint bank account can be withdrawn by a judge's spouse to be used for political purposes.<sup>116</sup> Questions have even been raised about a judge's attendance at non-political events with a candidate spouse, whether a judge's photograph may be included in a campaign brochure, and the permissible uses of a jointly owned house during a spouse's campaign.<sup>117</sup>

While it is true that a spouse's political activities may be perceived as reflecting the judge's views, care must be taken so as not to impede the political career of a spouse through the overregulation of a judge. The rights of a spouse may be affected through the application of rules of judicial ethics. When I first became a judge, I acquainted my wife with the then-applicable 1972 ABA Model Code, which provided that a judge "should encourage members of his [note the archaic "his"] family to adhere to the same standards of political conduct that apply to him."<sup>118</sup> My wife, a well-known political activist at that time, responded: "Consider me encouraged," and went on to lead some statewide and national campaigns. The encouragement to adhere to judicial conduct rules now applies only in regard to the judge's own political campaign.<sup>119</sup>

## V. Financial Disclosure

A spouse of a judge may also become involved in issues of judicial ethics through the requirement that judges file financial disclosure statements. Such requirements exist in almost every state and in the federal system.<sup>120</sup> Designed primarily to reveal conflicts of interest, the financial statements required are often so detailed and the forms for disclosure so cryptic that many judges retain the services of certified public accountants to prepare the reports. Indeed, federal judges are allowed reimbursements of up to \$1000 for such fees.<sup>121</sup> In any event, a federal judge is required to disclose financial information concerning his or her spouse and dependent children as well as his or her own financial information.<sup>122</sup> Exempt from disclosure are assets in which the spouse has a sole financial interest, and (1) which are not derived from the assets or income of the judge; (2) from which the judge does not derive or expect any benefit; and (3) of which the judge has no knowledge.<sup>123</sup> Compliance with the last prong of the exemption provision is almost impossible. A similar rule applies to the reporting of liabilities.<sup>124</sup> Earned income and honoraria received by a spouse must also be reported. So must gifts to the spouse, including transportation, lodging, food, and entertainment. These items must be reported in the same

manner as the judge must report them, except when the spouse receives such gifts totally independent of the judge.<sup>125</sup>

While no substantial changes in the rules pertaining to financial disclosure are on the horizon, the public perception being that what judges are up to financially is important to know, at least one commentator has objected to the federal disclosure rule provision that judges be notified when an application for a copy of a financial report has been fulfilled.<sup>126</sup> The objection is grounded in the belief that the provision tends “to chill public access” in the case of lawyers or litigants who would prefer to access this information anonymously.<sup>127</sup> I see little validity in this argument and do not know of any lawyer or litigant who has been “chilled” by this requirement. One thing the notice provision has demonstrated to me, however, is that access is requested in the most part by newspapers and other media organizations strictly for gossip purposes.

The Judicial Conference of the United States recently addressed the question of public access to financial disclosure reports by issuing detailed regulations pertaining to the release of the reports.<sup>128</sup> The regulations recognize the security concerns that some judges have, and provide that notice must be given to the judge prior to release.<sup>129</sup> They

provide that any financial disclosure report that may be publicly disseminated after release may be redacted “to prevent public disclosure of personal or sensitive information that could endanger the filer directly, or indirectly by endangering another, if possessed by a member of the public hostile to the filer.”<sup>130</sup> Reasons for the redaction sought must be given, and the Committee on Financial Disclosure of the Judicial Conference of the United States is empowered to decide questions of redaction after consultation with the Marshal’s Service.<sup>131</sup> In these times of heightened security consciousness, state as well as federal authorities will be confronted with the need to balance the people’s right to know against the need to redact or withhold financial disclosure information for the protection of judges from specific and identifiable threats.

## VI. Competence

Codes of judicial conduct invariably require judges to be competent. The Code of Conduct for United States Judges is typical. It states: “A judge should be faithful to and maintain competence in the law.”<sup>132</sup> Competence has various components, including intellectual capacity, knowledge of the law, good judgment, understanding of the judicial process and of the role of the judge, and diligence. The

requirement for judicial diligence is often separately stated in judicial ethics codes in such phrases as: "A judge should dispose promptly of the business of the court."<sup>133</sup> If there is any trend in this area, it is in the direction of greater expectations of judicial competence by a citizenry that is becoming increasingly knowledgeable about the functioning of the legal system. This trend will lead to demands for greater efforts to enforce competence requirements.

Probably the greatest source of frustration for lawyers and litigants is the failure of judges to deliver decisions in a timely manner. This frustration is all the greater because of the fear that even a request to expedite a decision will incur the judge's wrath and produce an undesirable result. While the heavy workloads of many judges may cause inevitable delays in the issuance of opinions, it is often necessary for a judge to prioritize in order for time-sensitive cases to receive early attention.<sup>134</sup> A few years ago, criminal case overload was so great in one United States District Court that it was necessary to place a temporary hold on civil cases until the criminal backlog was reduced. Dilatoriness and inefficiency, however, can never be countenanced.<sup>135</sup> With respect to case processing, time standards and reporting requirements have been established in a number of states, as well as in the federal system.<sup>136</sup> The

consequences of failure to comply with these standards and requirements range from peer pressure to suspension.<sup>137</sup> When I first became a Circuit Judge, there was an ongoing discussion about what to do with a district judge who was far behind in his work. A senior judge suggested that some of the district judge's cases be taken away until the backlog was disposed of. I thought that this was a very curious punishment, but the senior judge said that he could think of no greater insult. In the United States Court of Appeals for the District of Columbia Circuit, it is said to be the custom to withhold opinion-writing assignments from judges who are not current in their work.<sup>138</sup>

Competence requires that judges see to the competence and diligence of their staffs and those under the judge's administrative control.<sup>139</sup> It also requires that judges keep abreast of new statutes, new Supreme Court precedent, and recent developments in the law of the jurisdiction in which he or she serves. More importantly, competence requires familiarity with procedural as well as substantive law. Lawyers seem to be skeptical about the competence of judges in regard to legal knowledge, and often start their arguments with explanations of basic law. Apparently, they begin with the assumption that judges know little or nothing, an assumption probably instilled in them by law professors.



I once stopped an attorney who started his argument by ticking off the elements of a contract. I said: "You may proceed to concepts of intermediate difficulty and assume that we know the basics." On this point, I am put in mind of the barrister who argued before the Court of Appeal in London. One of the judges said to the barrister: "I have been listening to your argument for half an hour and am none the wiser." The barrister answered: "I am aware of that, your Lordship, but I had hoped that you would be better informed."

Knowledge of the law and diligence in its application to the facts of the case are not too much to ask of judges. Judges are sometimes wrong on the law, but that is why appellate courts exist. However, their decisions should reflect their personal attention and involvement in the case, and the decisions should be their own. The question recently has arisen as to whether a judge's decision is his own in a situation where an appellate opinion repeated verbatim large chunks of the brief of one of the parties.<sup>140</sup> As is frequently the case, academic opinion within the judicial conduct industry is divided on this question. Some see no harm in the practice; others see it as plagiarism.<sup>141</sup>

In my practice days, I considered it a good thing if a judge lifted some of my language from a brief. Wholesale lifting probably is

questionable. A colleague on the state court during my state trial judge days had two rubber stamps — one with the imprint “found” and the other with the imprint “not found.” He would ask for enumerated findings of fact and conclusions of law from both sides and would use one stamp or the other in the margin of each item. Appellate courts generally have disapproved of this practice.<sup>142</sup> Nevertheless, courts generally have been reluctant to reverse for the verbatim adoption of prepared findings, especially where the judge has revised them in certain respects and thereby has demonstrated his or her own input in the decision.<sup>143</sup>

It seems to me that the duty of competence includes the duty to assist in the selection of those who will serve as competent judges. Typically, ethics codes allow judges to “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 concerning a person being considered for a judgeship.”<sup>144</sup> I see this as an affirmative duty, although it is ordinarily not so framed. Close attention should be paid to the opinions of sitting judges as to who is competent to join them. Judicial competence is too important to be left to committees of lawyers alone to determine. In this

regard I quote from the records of the Constitutional Convention as they reflect the tongue-in-cheek remarks of Benjamin Franklin during the debate of the issue of the proper method of judicial selection: "He then in a brief and entertaining manner related a Scotch mode, in which the nomination proceeded from the Lawyers, who always selected the ablest of the profession in order to get rid of him, and share his practice (among themselves)." <sup>145</sup>

### Conclusion

I conclude with an observation and a suggestion. My observation is that judicial malefactors constitute but a very small percentage of the American Judiciary at any given time. There are more than 30,000 full and part-time judges in the nation. <sup>146</sup> In the twenty-one-year period between 1980 and the end of 2001, only about 285 were removed from office through state disciplinary proceedings. <sup>147</sup> It is true that some judges during that period resigned, retired, were defeated or did not run for reelection, or died before complaints against them were resolved; <sup>148</sup> and that disciplinary sanctions other than removal were imposed in a number of cases. Nonetheless, it was the very rare case in which an ethical violation was of sufficient magnitude to warrant removal.

Although one ethical violation is too many, regardless of the penalty imposed, the ethical condition of the judiciary is not as much in need of repair as the judicial conduct industry sometimes makes it out to be. I referred earlier to the possible effects upon judges of the overzealousness of the industry in the performance of its work. The same excessive zeal may also affect the citizenry by contributing to an unwarranted lack of confidence in the judiciary as a whole. The industry should be attentive to this concern.

My suggestion is for greater transparency in judicial disciplinary proceedings. Unsurprisingly, the press has been clamoring for this for some time,<sup>149</sup> and I, for one, think it would be a good thing. So do other judges.<sup>150</sup> Secrecy is usually not desirable in matters of this kind, and I believe that open proceedings would go far toward restoring public confidence in the judiciary. Various reasons have been advanced for keeping judicial disciplinary proceedings closed. They include: (1) shielding complainants and witnesses from retribution and harassment; (2) protecting innocent judges from being wrongly accused; (3) maintaining confidence in the judicial system by avoiding premature disclosures of misconduct; (4) encouraging offending judges to resign in

place of a formal hearing; and (5) insulating Judicial Conduct Commission members from outside pressures.<sup>151</sup>

My rebuttal to these arguments includes the following: (1) witnesses in these proceedings need no more protection from retaliation and harassment than they need in any other type of judicial proceeding; (2) many wrongly accused judges would like it to be known publicly that the accusations against them are baseless; (3) public confidence in the system is enhanced when the public can follow the accusation, the proceedings employed to resolve it, and the ultimate disposition; (4) offending judges should not be permitted to have the accusations disposed of merely by resigning; and (5) there is no demonstrable need to protect carefully-chosen commission members from “outside pressure.” Indeed, it is interesting to note that some judges in closed-hearing states have demanded that their hearings be open.<sup>152</sup>

According to recent dispatches,<sup>153</sup> the New York Judicial Conduct Commission received 1,435 complaints about judges in the year 2002. There are nearly 3,500 full and part-time judges in New York. Only twenty-eight judges received public discipline of any kind. If all of these complaints had all been made public, it would have been clear to the citizenry that the vast majority of complaints about judges were

made by litigants who simply were unhappy with the outcomes of their cases. It would also have been clear that the vast majority of judges conform to the highest ethical standards in their judicial service. And it would have been clear that the judiciary as a whole well deserves the confidence of the public it serves.

Q. What happened then?

A. He told me, he says, "I have to kill you because you can identify me."

Q. Did he kill you?

A. No.

Q. Now I am going to show you what has been marked as plaintiff's Exhibit No. 2 and ask if you recognize the picture.

A. John Fletcher.

Q. That's you?

A. Yes, sir.

Q. And you were present when the picture was taken, right?

Q. Now, Mrs. Johnson, how was your first marriage terminated?

A. By death.

Q. And by whose death was it terminated?

Q. What is your name?

A. Ernestine McDowell.

Q. And what is your marital status?

A. Fair.

Q. Are you married?

A. No, I am divorced.

Q. What did your husband do before you divorced him?

A. A lot of things that I didn't know about.

~~Q. At the time you first saw Dr. McCarthy, had you ever seen him prior to that time?~~

Q. Mr. Jones, is your appearance this morning pursuant to a subpoena which was served upon you?

A. No. This is how I dress when I go to work.

Q. And lastly, Gary, all your responses must be oral. Okay? What school do you go to?

A. Oral.

Q. How old are you?

A. Oral.

Q. Do you have any sort of medical disability?

A. Legally blind.

Q. Does that create substantial problems with your eyesight as far as seeing things?

Q. Are you qualified to give a urine sample?

A. Yes, I have been since early childhood.

Q. Was there some event, Valerie, that occurred which kind of finally made you determined that you had to separate from your husband?

A. Yes.

Q. What did he do?

A. Well, uh, he tried to kill me.

Q. All right. And then you felt that that was the last straw, is that correct?

Q. As you were driving your car just before the accident, where was your right foot located?

A. It was located at the end of my right leg!

~~Q. Doctor, did you say he was shot in the weeds?~~

~~A. No, I said he was shot in the lumbar region.~~

Q. Do you recall approximately the time that you examined the body of Mr. Edgington at the mortuary?

A. It was in the evening. The autopsy started about 8:30 P.M.

Q. And Mr. Edgington was dead at that time, is that correct?

~~Q. James stood back and shot Tommy Lee?~~

~~A. Yes.~~

~~Q. And then Tommy Lee pulled out his gun and shot James in the fracas?~~

~~A. No sir, just above it.~~

Q. Do you know how far pregnant you are right now?

A. I will be three months November 8th.

Q. Apparently then, the date of conception was August 8th?

A. Yes.

Q. What were you and your husband doing at that time?

Q. What doctor treated you for the injuries you sustained while at work?

A. Dr. J (name omitted).

Q. And what kind of physician is Dr. J.?

A. Well, I'm not sure, but I remember you said he was a good plaintiff's doctor.

~~Q. Is there somebody in the gang called "Insane"?~~

~~A. Yeah.~~

~~Q. Is there a Big Insane?~~

~~A. Yeah.~~

~~Q. Is there a Little Insane?~~

~~A. Yeah.~~

~~Q. You don't happen to know their Christian names by any chance, do you?~~

~~A. Their Christian names?~~

~~Q. Yeah, like Bill, Charlie, you know Fred?~~

~~A. Perfectly honest, I never knew they was Christian.~~



~~These are things people actually said in court, word for word, taken down and now published by court reporters who had the torment of staying calm while these exchanges were actually taking place.~~

~~Q: What is your date of birth?~~

~~A: July fifteenth.~~

~~Q: What year?~~

~~A: Every year.~~

+++++  
Q: What gear were you in at the moment of the impact?

A: Gucci sweats and Reeboks.

+++++  
~~Q: This myasthenia gravis, does it affect your memory at all?~~

~~A: Yes.~~

~~Q: And in what ways does it affect your memory?~~

~~A: I forget.~~

~~Q: You forget. Can you give us an example of something that you've forgotten?~~

+++++  
Q: How old is your son, the one living with you?

A: Thirty-eight or thirty-five. I can't remember which.

Q: How long has he lived with you?

A: Forty-five years.

+++++  
Q: What was the first thing your husband said to you when he woke that morning?

A: He said, "Where am I Cathy?"

Q: And why did that upset you?

A: My name is Susan.

+++++  
Q: And where was the location of the accident?

A: Approximately milepost 499.

Q: And where is milepost 499?

A: Probably between milepost 498 and 500.

+++++  
Q: Sir what is your IQ?

A: Well, I can see pretty well.

~~Thank you to Opononi Resort Hotel for the sponsorship of the holiday newsletter and to Hokianga Historical Society for the use of their photocopier.~~

Q. I understand that you want a new lawyer because your present lawyer is not interested in your case, is that right?

A. Yes, Your Honor.

Q. Counselor, what do you have to say?

A. Could you repeat that, Your Honor? I wasn't listening.

#### VOIR DIRE

Q. Can you participate in an endeavor in which the ultimate result might be death by lethal injection?

A. They do that up in Huntsville, don't they?  
Yeah, I guess I could do it if it was on the weekend.

~~Q. Can you tell us that you would follow the court's instructions regardless of what else happened during the course of the trial?~~

~~A. Cognitively, yes. Rationally, yes. Emotionally, effectively, I don't know. Or perhaps effectively, yes, and rationally, no.~~

Q. Property holder?

A. Yes, I am, Your Honor.

Q. Married or single?

A. Married for twenty years, Your Honor.

Q. Formed or express an opinion?

A. Not in twenty years, Your Honor.

#### EXPERT WITNESS

Q. Doctor, what is the meaning of sperm being present?

A. It indicates intercourse.

Q. Male sperm?

A. That is the only kind I know.

4625

In a murder trial, the defense attorney was cross-examining a pathologist. Here's what happened:

<sup>Q</sup>  
Attorney: Before you signed the death certificate, had you taken the pulse?

<sup>A</sup>  
Coroner: No.

<sup>Q</sup>  
Attorney: Did you listen to the heart?

<sup>A</sup>  
Coroner: No.

<sup>Q</sup>  
Attorney: Did you check for breathing?

<sup>A</sup>  
Coroner: No.

<sup>Q</sup>  
Attorney: So, when you signed the death certificate, you weren't sure the man was dead, were you?

<sup>A</sup>  
Coroner: Well, let me put it this way. The man's brain was sitting in a jar on my desk. But I guess it's possible he could be out there practicing law somewhere.

FIRST

Testimony from an Expert Witness

<sup>Q</sup>  
Lawyer: Doctor, as a result of your examination of the plaintiff, is the young lady pregnant?

<sup>A</sup>  
Witness: The young lady is pregnant, but not as a result of my examination.