

Sample Answer
Professional Responsibility -- Golden Gate School of Law
Summer 2005

This question centered on judicial conduct. It was not necessary to identify the relevant canons by section or subsection number to receive full credit for your answer. Points were based on knowing the applicable ethical standard or standards, with proper terminology. Nevertheless, I include the full citation to the canons for your information.

1. Judge Jackson's negative comments regarding female civil attorney in open court subject him to discipline.

Attorney Arnstein could argue that the first comment regarding the ineptitude of civil attorneys in criminal cases violated Canon 1 (requiring a judge to uphold the integrity of the judiciary); Canon 2 (requiring a judge to avoid impropriety in all of the judge's activities); and Canon 3 (requiring a judge to perform the duties of judicial office impartially). Under Canon 3-B(3) in particular, a judge is required to maintain order and decorum in proceedings before the judge. Under Canon 3-B(4), a judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity. Attorney Arnstein could make a case that the Judge Jackson's remarks about her inability to handle a criminal case impugn the judiciary in violation of Canon 1 because, under Canon 3, they sound biased, improper, impatient, undignified, and discourteous. However, her unexplained absence interfered with the Judge's obligation to run an efficient courtroom pursuant to Canon 3, so she could also be in trouble under the Model Rules!

With respect to the Judge's second comment, Canon 3-B(5) requires a judge to perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. The Judge's comment about her family situation was also an unprofessional remark in open court that was based on personal knowledge in violation of Canon 3-E(1), which is grounds for disqualification. The remark was also sexist, reflecting negatively on the integrity of the judiciary by gossiping. His words also sound biased and prejudiced. Some students compared this to the "lawyerette" appellation in *Kirby*.

Note: The judge made these remarks at a bail hearing. Even though it was in open court, a jury would not be present.

The judge should have apologized and possibly should have removed himself from the case. His introduction of personal information about the lawyer is grounds for disqualification from the case but not likely to result in more than censure per *Kirby*.

2. The Judge's directed entry of a "corrected" judgment that identified a nonparty as a defendant and required him to pay the damages in question.

Although a judge has authority to conduct settlement conferences, he has an obligation to comply with the law and to act with competence pursuant to Canon 2-A. He cannot overstep. In

this case, the parties and Donovan all agreed that the latter should be present at the settlement conference, so there was no judicial misconduct in allowing him to attend or in allowing him to assume the duty of paying some of the damages. However, the Judge committed prejudicial misconduct because he failed to comply with the law and to act competently in violation of Canon 2-A when he corrected the judgment on his own initiative without a motion by the parties, and ordered Donovan, a nonparty, to pay based on his own opinion. He gave Donovan no notice and no opportunity to be heard or to retain counsel. Such conduct reflects partiality, incompetence, and an unwillingness to follow the law. This would be subject to strong discipline, since it implicates the integrity of the judiciary (Canon 1).

3. The Judge's private conversation with Ringo's mother does not subject him to discipline.

Canon 3-B(7) provides that 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. The issue, then, is whether this rule applies only to proceedings before the Judge in question, or whether it extends to all proceedings in general and whether it applies to someone who is not directly involved in the litigation. Since this part of the Canon applies to the Judge's adjudicative responsibilities, it is reasonable to assume that it applies only to parties who come before the Judge. Here, Ringo is before another Judge, although in the same court, and the Judge was talking to Ringo's mother and not Ringo.

Canon 3-B(7)(i) and (ii) expressly provide that ex parte communication may be permissible if: (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and (ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond. If Ringo were before Judge Jackson, such ex parte contact with Ringo's mother would likely constitute prejudicial conduct and would give the appearance of impropriety in violation of Canon 1. But Ringo was not before the Judge and did not contact the Judge himself.

Thus, a Judge is not foreclosed from speaking with friends (and Ringo's mother is a fellow congregant with the Judge and thus an acquaintance or friend) about matters pending in another courtroom. Here, the Judge did not provide legal advice or offer to intervene in the case, nor did he discuss substantive matters; he merely provided information about court procedures and explained that the court could not order someone to receive Christian counseling. Ringo derived no procedural or tactical advantage as a result of the communication. However, as a precaution, the Judge should have notified the Judge who is hearing Ringo's case of the ex parte communication, in the event that he was called upon to sit in for the other judge.

4. Judge Jackson's Involvement of Dan Defoe in the Church Fellowship Group.

The District Attorney can contend that the Judge has violated a number of judicial canons in this instance.

Canon 1 requires a judge to act independently, and this activity looks like a problematic interplay of religious affiliation and judicial obligations, particularly when other members of the Judge's fellowship group attempt to counsel Dan in front of the Judge.

Canon 2-B, dealing with impropriety, prevents a judge from allowing social, political or other relationships to influence the judge's judicial conduct or judgment. This calls the judge's involvement of a defendant in the judge's church activities into question. It also allows the judge to convey or permit others to convey the impression that they are in a special position to influence the judge; in other words, if Defoe cooperates with the fellowship group, he will get a break on sentencing.

Canon 3-B(11) provides that a judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity. It is not clear what the Judge has read in papers submitted to him, and this creates a temptation to break confidentiality.

Canon 3-B(8) requires a judge to dispose of all judicial matters promptly, efficiently and fairly. The fellowship group activities create an appearance of unfair treatment based on coercion and favoritism. Could a woman or a nonbeliever receive the same advantage in sentencing?

Canon 2-B provides that 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; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. Here, the Judge may have allowed his involvement in the church group to influence his judicial conduct by staying Defoe's sentencing. He may have been advancing his private interests by "persuading" Defoe to join his church group, especially given the judicial power he has over Defoe. He may have allowed fellowship members to convey the impression that cooperation with them can favorably influence the Judge.

A number of students pointed out that Canon 2-C prevents a Judge from holding membership in any organization that practices *invidious* discrimination on the basis of race, sex, religion or national origin (emphasis added). A moral support group for men is unlikely to qualify as a group practicing invidious discrimination.

Canon 4-A(1) prohibits a judge from engaging in extra-judicial activities that conflict with his office and cast reasonable doubt on the judge's capacity to act impartially as a judge. Canon 4-A(3) prohibits a judge from engaging in extra-judicial activities that interfere with the proper performance of judicial duties. Involving Defoe in the fellowship group appears to violate both rules.

Finally, and most important, the discussion of Defoe's treatment of his wife is a forbidden ex parte communication with the Judge. Defoe should have been represented by counsel, and both defense counsel and the district attorney should have been notified immediately if not present.

In short, under Canon 3-E(1)(a), the judge was required to disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned, based on his personal knowledge of disputed evidentiary facts concerning the proceeding.