



AMERICAN  
BANKRUPTCY  
INSTITUTE

## 2019 Annual Spring Meeting

# Leading Issues in Ethics and Civility, In and Out of the Courtroom

**James T. Markus, Moderator**

*Markus Williams Young & Hunsicker LLC; Denver*

**Hon. Bruce A. Harwood**

*U.S. Bankruptcy Court (D. N.H.); Concord*

**David W. Houston, IV**

*Burr & Forman LLP; Nashville, Tenn.*

**Jerry M. Markowitz**

*Markowitz, Ringel, Trusty + Hartog, P.A.; Miami*

**Tara E. Nauful**

*BEAL, LLC; Columbia, S.C.*

## Ethics Program: Leading Issues in Ethics and Civility, In and Out of the Courtroom

- ▶ **James Markus, Moderator**  
*Markus Williams Young & Hunsicker, LLC; Denver*
- ▶ **Hon. Bruce A. Harwood**  
*U.S. Bankruptcy Court (D. N.H.); Concord*
- ▶ **David W. Houston, IV**  
*Burr & Forman LLP; Nashville, Tenn.*
- ▶ **Jerry M. Markowitz**  
*Markowitz, Ringel, Trusty + Hartog, P.A.; Miami*
- ▶ **Tara E. Nauful**  
*Beal, LLC; Columbia, S.C.*

### Civility and Ethical Matters Relating to Professional Conduct in the Courtroom:

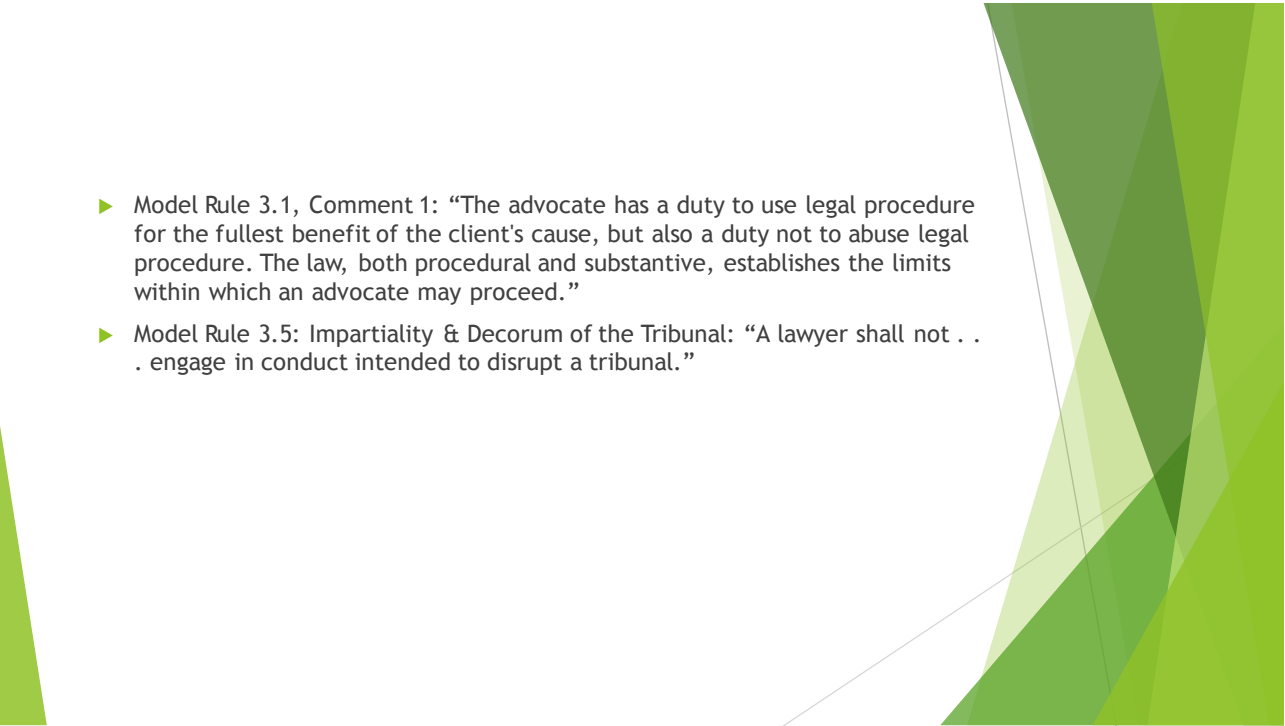
- ▶ Issues:
- ▶ When, acting under the guise of being a “zealous advocate” do attorneys cross the lines of ethics and civility, and what (if any) are the consequences?
- ▶ Is uncivil behavior unethical, or merely a “stain on the legal profession”?
- ▶ Can ethically zealous advocacy be a shield or justification for uncivil behavior?

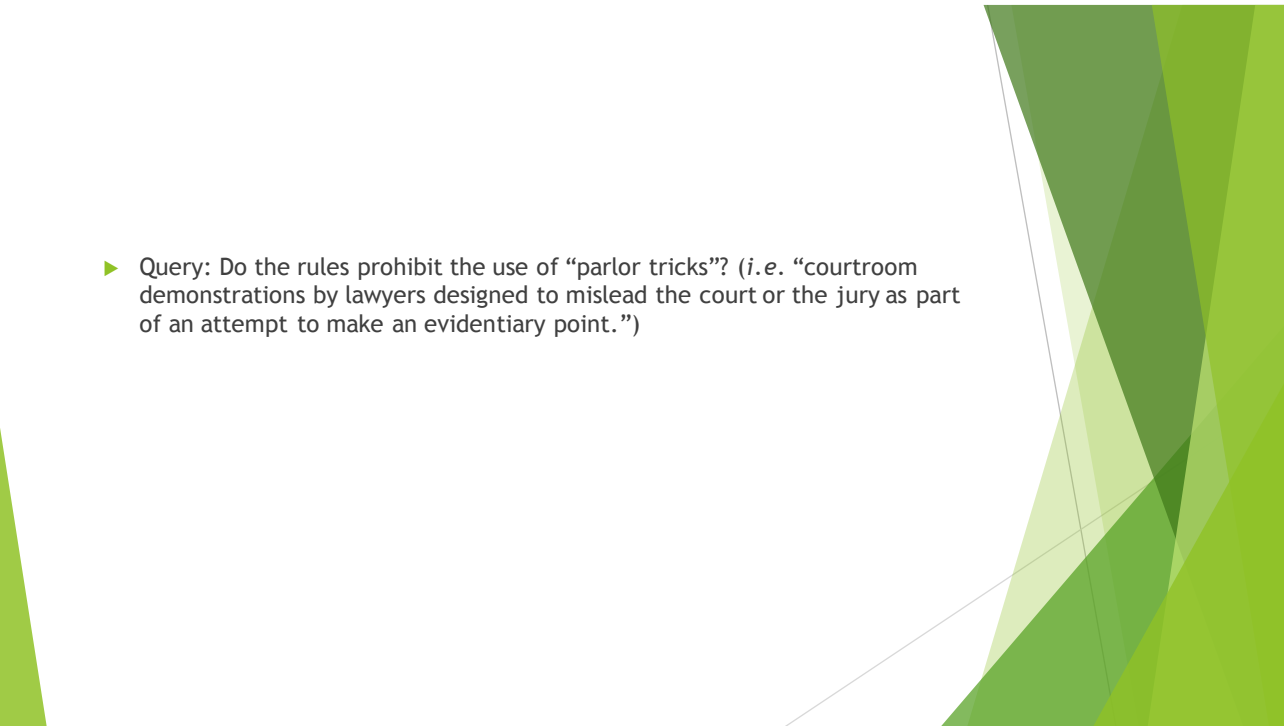
## What is “zealous advocacy”?

- ▶ **Zealous Advocacy:** is sometime defined as “doing everything reasonable, within a lawyer’s means, to help a client achieve the goals set forth at the outset of the representation.”
- ▶ The term “zealous advocate” is not defined in the ABA Model Rules of Professional Conduct (“Model Rules”), but is discussed throughout:

## What is “zealous advocacy”?

- ▶ Preamble to the Model Rules, Preamble ¶2 (2018): “[a]s advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”
- ▶ Model Rule 1.3, Comment 1: “A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. . . . The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.” (Emphasis Added).

- 
- ▶ Model Rule 3.1, Comment 1: “The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed.”
  - ▶ Model Rule 3.5: Impartiality & Decorum of the Tribunal: “A lawyer shall not . . . engage in conduct intended to disrupt a tribunal.”

- 
- ▶ Query: Do the rules prohibit the use of “parlor tricks”? (*i.e.* “courtroom demonstrations by lawyers designed to mislead the court or the jury as part of an attempt to make an evidentiary point.”)

- ▶ Model Rule 3.5, Comments 4 & 5: “
  - ▶ The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics. (Emphasis added)
  - ▶ The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.

## “Zealous Advocacy” - Crossing the Lines

- ▶ *Matter of Delio*, 290 A.D.2d 61, 731 N.Y.S.2d 171 (N.Y. App. Div., 2001): Lawyer, arriving late to hearing, learns that his case has been dismissed, is permitted to approach the bench and engages in an exchange with the Court regarding the ruling:
  - ▶ This is [inaudible] other than your own self interest— . . . You're so pompous on the bench. It's ridiculous. You should remember what your jobs are. . . . I don't have to respect you if you're not—. . . You're wrong.”

- ▶ Zealous advocacy must be tempered by adherence to the ethical duties of counsel, and counsel's professional obligations to his clients.
- ▶ Advocates must keep in mind the fact that, first and foremost, they are officers of the Court, with duties to the Tribunal.
- ▶ "Unprofessional litigation tactics affect everyone exposed to such behavior and the ripple effect of incivility is spread throughout the bar." *Lee v. American Eagle Airlines, Inc.*, 93 F.Supp.2d 1322 (S.D. Fla., 2000).

- ▶ *The Florida Bar v. Wasserman*, 675 So.2d 103 (Fla., 1996):
  - ▶ After an unfavorable ruling, Lawyer lost his temper, stood and shouted his criticism, waved his arms, challenged the Court to hold him in contempt and displayed his arms as if to be handcuffed stating his "contempt" for the court. He also banged on the table and generated such a display of anger that the bailiff who was present felt it necessary to call in a backup bailiff. Immediately thereafter, outside the hearing room, in the presence of both parties and opposing counsel, Wasserman stated that he would advise his client to disobey the court's ruling.
  - ▶ After getting an unfavorable response to a question asked over the telephone of a Judge, through Judge's judicial assistant, Lawyer said to the assistant, "You little motherf-----; you and that judge, that motherf----- son of a b-----." The assistant was so upset by the incident that she had to leave the office early that day.

- ▶ *In re Disciplinary Action Against Garaas*, 2002 N.D. 181, 652 N.W.2d 918 (N.D., 2002)
  - ▶ At a hearing on motion to compel, Lawyer made repeated assertions that opposing counsel was making false representations of fact and had lied to the court, at one point stating: “Your Honor, I cannot let it go by one more time because [opposing counsel] Mr. Spaeth just lied to you.... That representation . . . is an absolute falsehood and he can't get away with it anymore.... And we will never accept [opposing counsel's] false representation in violation of the Canons and in violation of every concept of due process that I know.
  - ▶ In another hearing, Lawyer argued the court lacked jurisdiction in the matter because there was an appeal pending. The trial judge asked Lawyer if his client would act if ordered to do so by the Court. Lawyer Responded:  
*I guess frankly I have a question in my mind as to whether or not the Court wants to enter into a course of action [by entering an Order] that places the trial court judge and the State of North Dakota at risk....So when you ask me a question as to whether or not we are going to [obey the order] why would the Court want to put this Court and the State of North Dakota at risk....”*

- ▶ *Kimzey v. Wal-Mart Stores, Inc.*, 907 F.Supp. 1309 (W.D. Mo., 1995): Court, when comparing jury's \$5 Million punitive damage award against its award of \$35,001, noted that, “More than likely, the disparity arose from the aggravating behavior of defense counsel at trial. For example, while cross-examining plaintiff, counsel approached, waved ‘the finger’ in her face, and rudely shouted, ‘f[\*]ck you’.”

- ▶ *Lee v. American Eagle Airlines, Inc.*, 93 F.Supp.2d 1322 (S.D. Fla., 2000): When awarding prevailing plaintiff attorney's fees under the statute, the Court reduced the fee awarded under statute by \$358,423.20 (more than half) because of the conduct of plaintiff's counsel, which included:
  - ▶ Entering the Courtroom at the start of trial and announcing loudly "Let's kick some ass,"
    - ▶ The Court viewed this language as being "suited more to a locker room than a courtroom of the United States. . . ."
  - ▶ Subjecting opposing counsel and defendant's representatives to a barrage of comments out of the hearing of the Court and jury that were likened to trash talk at a sporting event.
  - ▶ Calling local counsel for the Defendant a "Second Rate Loser";
  - ▶ Saying each day as court began, "Let the pounding begin."
  - ▶ Asking, in front of defense counsel's client, "How are you going to feel when I take all of your client's money?"

- ▶ Hanging up on a telephone conversation with an associate of defense counsel after wrongfully accusing her of misrepresentations and telling her she had only been assigned to work on the case because she was African-American.
  - ▶ The associate later testified that her experience with opposing counsel in this case was a factor in her decision to leave her litigation practice.
- ▶ Challenging the impartiality of the Court anytime anything happened that they did not like:
  - ▶ "Your Honor, I know you're angry at me, but I hope you're not taking it out on my client."
  - ▶ "In fact, I think that the Court has exhibited extreme bias in this case and your rulings on objections."
  - ▶ "Well, Your Honor, I respectfully disagree with you, that's for a court of appeals ultimately to decide, but to put a motive on it I think it exhibits a substantial amount of bias on behalf of Your Honor."
  - ▶ "And I concur with what my brother has said. There's been clear animus by this Court to this side."
  - ▶ "I've practiced 26 years and I've tried over 50 cases, and I've won multimillion dollar verdicts on more than a dozen cases. I don't need for this Court to allow a witness to have his wife introduced. I can't think of any reason or purpose, other than prejudice, that this Court would allow such an act to occur."

► Other examples of counsels' conduct following rulings include:

- tossing a pen;
- exclaiming, "This is outrageous";
- the rolling of eyes;
- exasperated looks at the ceiling;
- flailing of arms;
- laughing at rulings and, when the Court called them on this behavior, stated, "I'd like to add, Your Honor, there's a continuing pattern of conduct we believe shows enormous bias and has turned this trial into a circus-like atmosphere."

► The Court found:

- that the conduct of Plaintiff's counsel "disrupted the adversary system and interfered with the resolution of a civil dispute."
- "Plaintiff's counsel were unrepentant, attacking opposing counsel and accepting no responsibility for their own actions [instead arguing] that the perceived misconduct was only a matter of style and the exercise of first amendment rights.
- Counsel's decision to end the evidentiary hearing on fees "with the proclamation that he had called his opponent a loser, but not a second-rate loser because, 'I don't rate losers' . . . reflects that he has no clue about what it means to be a lawyer."

## “Zealous Advocacy” - Staying behind the Ethical Line, but Crossing the Line of Civility

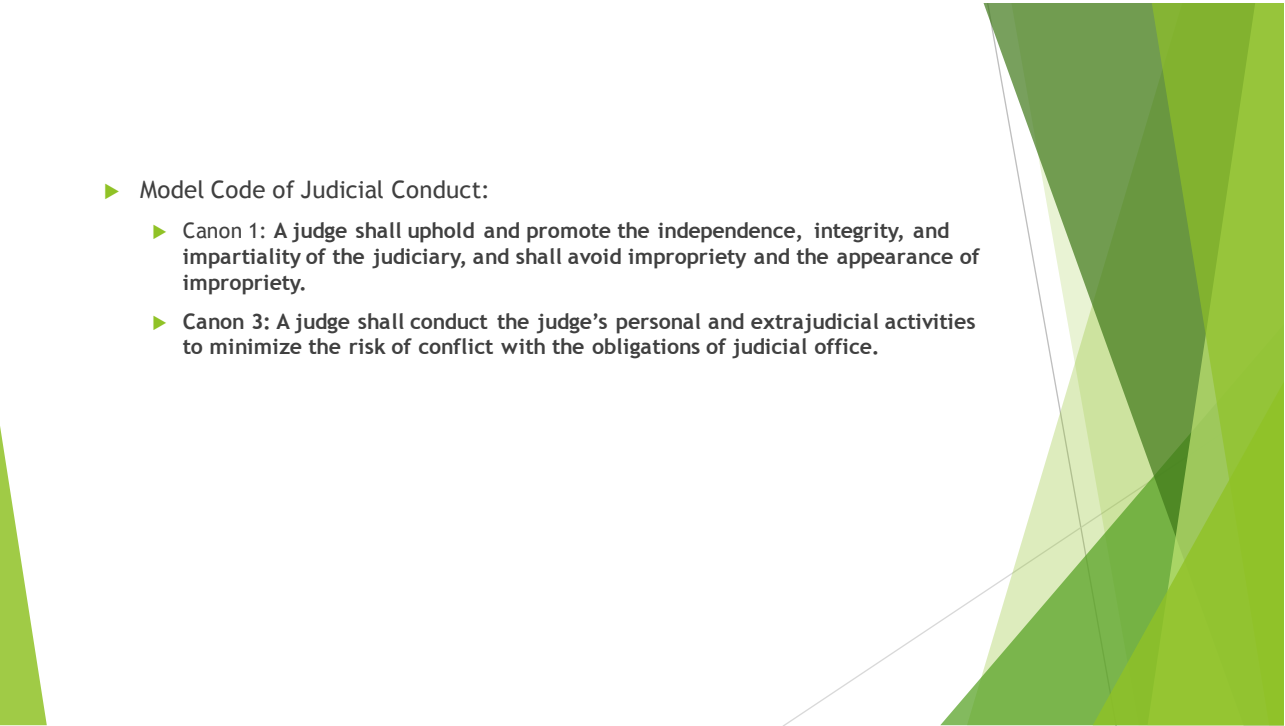
- ▶ *Revson v. Cinque & Cinque*, 70 F. Supp. 2d 415 (S.D.N.Y. 1999), *vacated in part, rev'd in part by*, 221 F.3d 71 (2d Cir. 2000):
  - ▶ Attorney represented plaintiff in fee dispute against Attorney's former law firm. In a pre-suit letter, Attorney threatened "to conduct the legal equivalent of a proctology exam on [Defendant Law Firm's] finances and billing practices." At the trial, Attorney called his former partner "a professional disgrace, accused him of extortion, [and] said that he would prove 'that there is a reason why lawyers are sometimes referred to as snakes.'" The district court, offended both by Attorney's conduct at trial and the "proctology letter" and sanctioned Attorney \$50,000. The Second Circuit reversed, holding that, "though the reference to proctology was offensive and distinctly lacking in grace and civility, it is, regrettably, reflective of a general decline in the decorum level of even polite public discourse. Although we, like the district court, find the reference to proctology repugnant, . . . we cannot conclude that that reference was sanctionable."

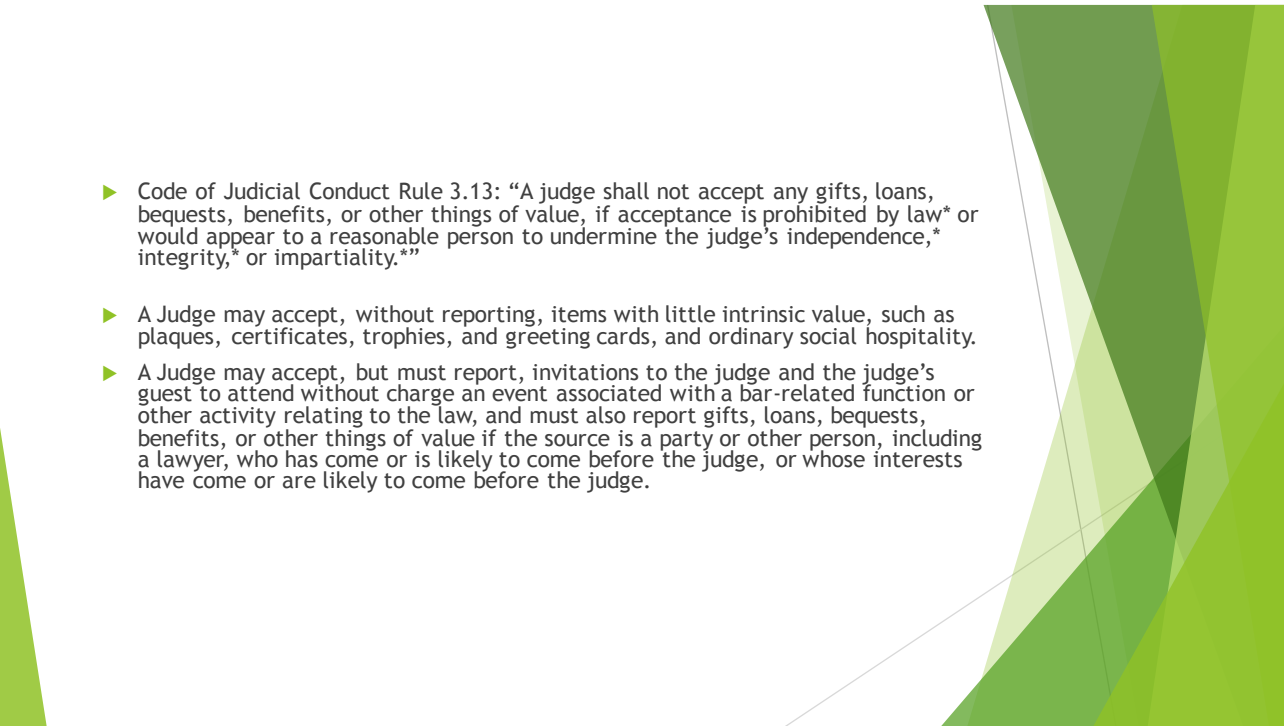
## Civility and Ethical Matters Relating to Personal Conduct Outside the Courtroom

## Outside the Courtroom: Holiday Gifts, Cards, Parties, Social Functions

- ▶ Is it permissible to give holiday gifts to judges and Court staff, or to invite them to holiday or other social engagements parties?
  - ▶ Is it unethical to engage in “civilized”, social behavior?

- ▶ Model Rule 7.2 (Specific Rules concerning Lawyer’s Communications regarding her services).
  - ▶ Under 7.2[5] it is permissible “to give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer’s services.”
- ▶ Model Rule 3.5, prohibits a lawyer from seeking “influence a judge, juror, prospective juror or other official by means prohibited by law.”

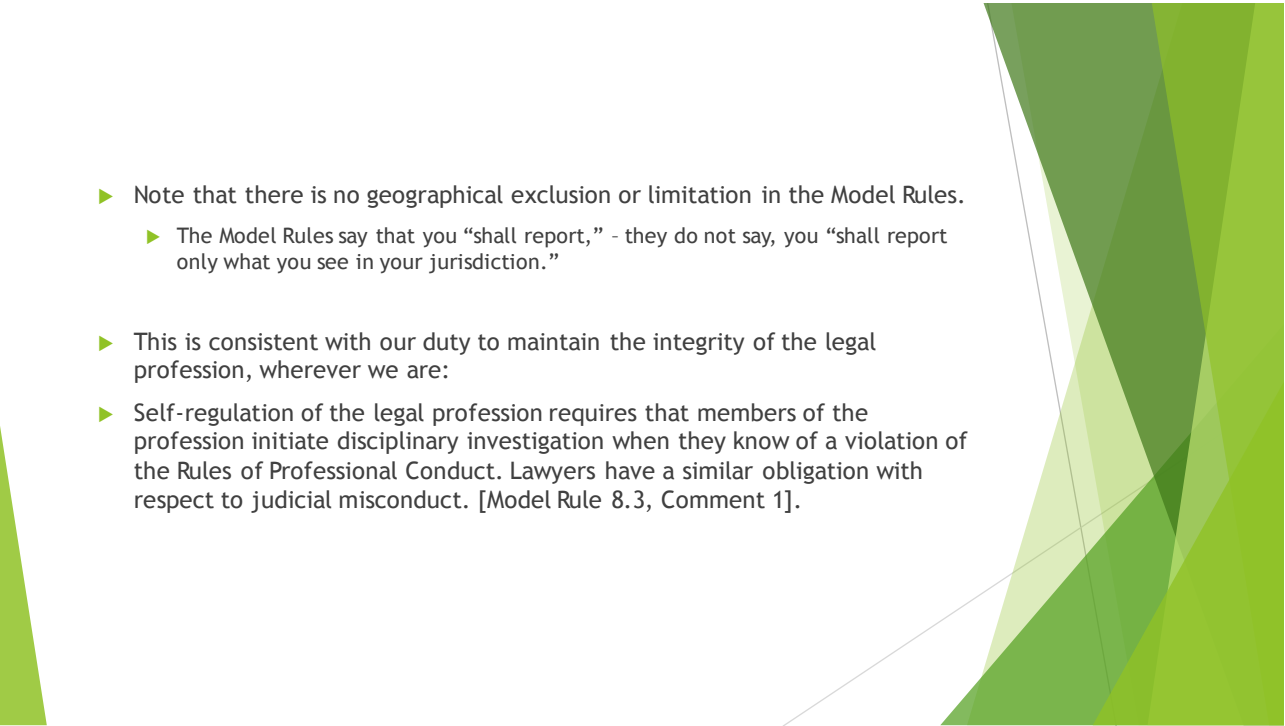
- 
- ▶ Model Code of Judicial Conduct:
    - ▶ Canon 1: A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
    - ▶ Canon 3: A judge shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office.

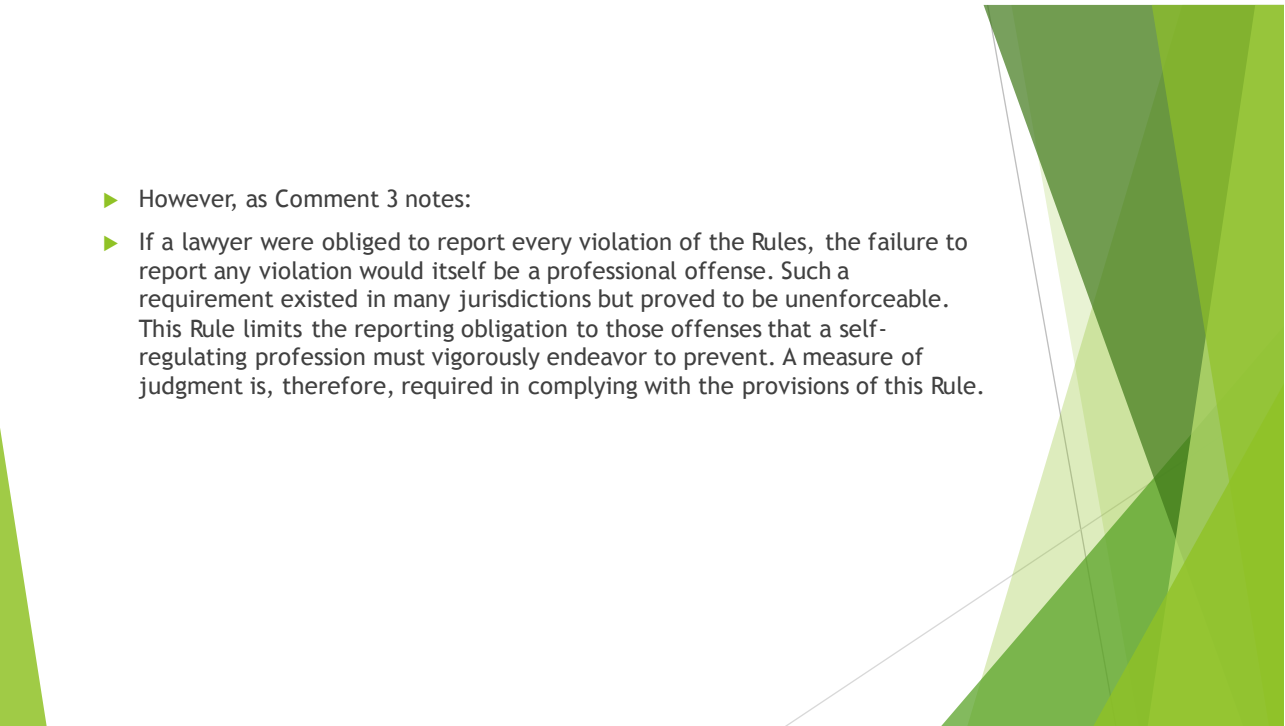
- 
- ▶ Code of Judicial Conduct Rule 3.13: "A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law\* or would appear to a reasonable person to undermine the judge's independence,\* integrity,\* or impartiality.\*"
  - ▶ A Judge may accept, without reporting, items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards, and ordinary social hospitality.
  - ▶ A Judge may accept, but must report, invitations to the judge and the judge's guest to attend without charge an event associated with a bar-related function or other activity relating to the law, and must also report gifts, loans, bequests, benefits, or other things of value if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.

## Outside the Courtroom: Reporting Professional Misconduct

- ▶ Issue: As members of our respective state bars, and of the larger insolvency community, do we have a duty to report incivility and/or unethical conduct?
  - ▶ If so, are there temporal or geographical, or other limitations of that duty?

- ▶ Model Rule 8.3: Reporting Professional Misconduct
- ▶ (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
- ▶ (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

- 
- ▶ Note that there is no geographical exclusion or limitation in the Model Rules.
    - ▶ The Model Rules say that you “shall report,” - they do not say, you “shall report only what you see in your jurisdiction.”
  - ▶ This is consistent with our duty to maintain the integrity of the legal profession, wherever we are:
  - ▶ Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. [Model Rule 8.3, Comment 1].

- 
- ▶ However, as Comment 3 notes:
  - ▶ If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule.

Query: Is there merely an obligation to report ethical violations? What if the conduct is not unethical, but is uncivil, or puts the integrity of the profession at risk - should or must it be reported?

Example: Is there an obligation to report another lawyer who you have seen from drive drunk, beat her children, shoplift? How about berate a paralegal? Berate a shopkeeper?

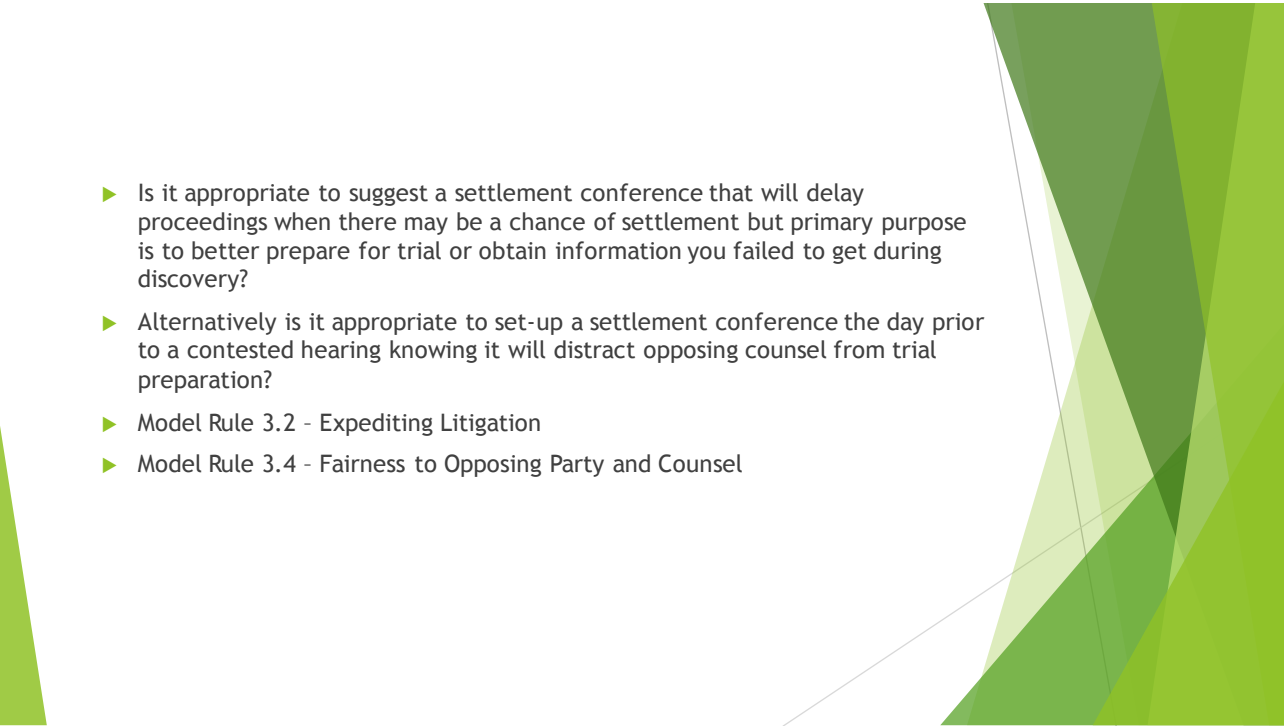
Comment 3 states that, "A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances."

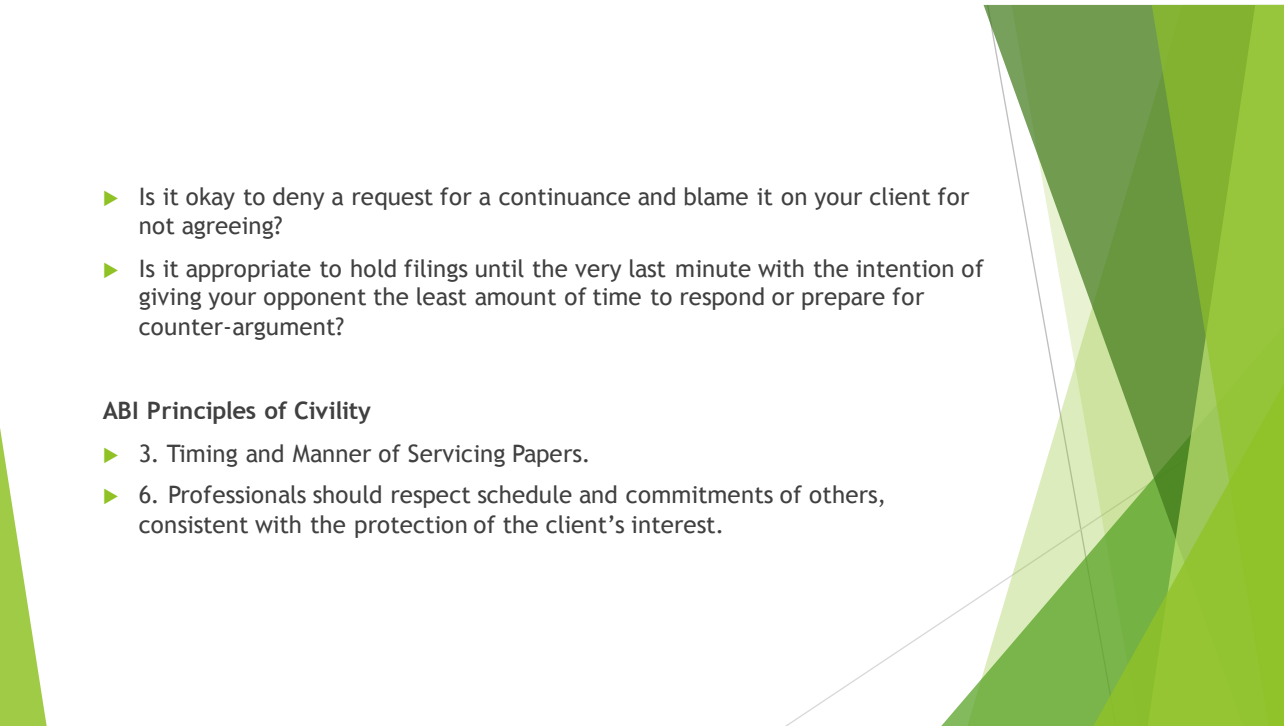
## Civility and Ethical Matters Relating to Professional Conduct Outside the Courtroom

- ▶ Standards of Professional Courtesy and Civility.
- ▶ American Bankruptcy Institute: Report on Standards of Professional Courtesy and Conduct.

### Preamble

- ▶ Professionals should be mindful of the need to protect the integrity of the bankruptcy process in the eyes of the public and in the eyes of the legal community around us.

- 
- ▶ Is it appropriate to suggest a settlement conference that will delay proceedings when there may be a chance of settlement but primary purpose is to better prepare for trial or obtain information you failed to get during discovery?
  - ▶ Alternatively is it appropriate to set-up a settlement conference the day prior to a contested hearing knowing it will distract opposing counsel from trial preparation?
  - ▶ Model Rule 3.2 - Expediting Litigation
  - ▶ Model Rule 3.4 - Fairness to Opposing Party and Counsel

- 
- ▶ Is it okay to deny a request for a continuance and blame it on your client for not agreeing?
  - ▶ Is it appropriate to hold filings until the very last minute with the intention of giving your opponent the least amount of time to respond or prepare for counter-argument?

**ABI Principles of Civility**

- ▶ 3. Timing and Manner of Servicing Papers.
- ▶ 6. Professionals should respect schedule and commitments of others, consistent with the protection of the client's interest.

# Civility and Ethical Matters Relating to Judicial Conduct *In the Courtroom*

## Judicial Conduct in General

- ▶ Both the ABA Model Code of Judicial Conduct and Code of Conduct for U.S. Judges contain at their outset, general guidelines for the conduct of Judges.
- ▶ ABA Model Code of Judicial Conduct - Rule 1.2
  - ▶ A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.
- ▶ Code of Conduct for U.S. Judges - Canon 1
  - ▶ An independent and honorable judiciary is indispensable to justice in our society. A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

## Judicial Conduct with Litigants and Jurors

- ▶ ABA Model Code of Judicial Conduct - Rule 2.3(A)-(B)
  - ▶ A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.
  - ▶ A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.
- ▶ ABA Model Code of Judicial Conduct - Rule 2.8(A)-(B)
  - ▶ A judge shall require order and decorum in proceedings before the court.
  - ▶ A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.
  - ▶ A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

## Judicial Conduct with Litigants and Jurors... Continued

- ▶ Code of Conduct for U.S. Judges - Canon 2(A)
  - ▶ A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
- ▶ Code of Conduct for U.S. Judges - Canon 3(A)(3)
  - ▶ A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

## Judicial Conduct with Litigants and Jurors... Continued

- ▶ Query: What happens when a Judge is *too friendly* with opposing counsel?
- ▶ Example:
  - ▶ *De Soleil South Beach Residential Condominium Association v. De Soleil South Beach Association, Inc. et. al.*
    - ▶ Petitioners sought a writ of prohibition against a Judge in Miami-Dade County, alleging that the Judge had a very close, intimate and special relationship with opposing counsel.
    - ▶ This allegation stemmed from an observation that the Judge and opposing counsel were holding hands, smiling, and laughing together in the Courtroom after a hearing.

## Disability/Competency/Fitness for Office

- ▶ ABA Model Code of Judicial Conduct - Rule 2.5(A)
  - ▶ A judge shall perform judicial and administrative duties, competently and diligently.
- ▶ ABA Model Code of Judicial Conduct - Rule 2.14
  - ▶ A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

# Civility and Ethical Matters Relating to Judicial Conduct *Outside of the Courtroom*

## Extrajudicial Conduct in General

- ▶ ABA Model Code of Judicial Conduct - Rule 3.1(A)-(C)
  - ▶ A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:
    - ▶ Participate in activities that will interfere with the proper performance of the judge's judicial duties.
    - ▶ Participate in activities that will lead to frequent disqualification of the judge.
    - ▶ Participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

## Extrajudicial Conduct in General... Continued

► Code of Conduct for U.S. Judges - Canon 4

- A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below...
- Canon 4 then elaborates on various extrajudicial activities, including law-related activities, involvement civic and charitable organizations, and fundraising.

## Judges on Social Media

► ABA Model Code of Judicial Conduct - Rule 2.9(A)

- Prohibits ex parte communications, except in limited circumstances.
- This does not just include "standard" written/verbal communications. Think about messaging on Facebook, Twitter and LinkedIn.

## Judges on Social Media . . . Continued

### ▶ ABA Model Code of Judicial Conduct - Rule 2.10(A)-(B)

- ▶ A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.
- ▶ A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

### ▶ Code of Conduct for U.S. Judges - Canon 3(A)(6)

- ▶ A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

## Judges on Social Media . . . Continued

### ▶ Example

#### ▶ *In the Matter of Senior Judge Edward W. Bearse, Amended Public Reprimand, Minnesota Board on Judicial Standards*

- ▶ The Judge was publicly reprimanded for posting comments on his Facebook page concerning cases to which he was assigned as a Senior Judge.

### ▶ *Query: Can narrowly tailored privacy settings, i.e., those restricting who can view posts, remove social media posts from the purview of the Rules?*

- ▶ In the case above, the Minnesota Board on Judicial Standards seemed to indicate that such privacy settings *would* remove social media posts from being deemed "public statements."
- ▶ The Board noted that "Judge Bearse states that he believed that his Facebook posts were available to approximately 80 family members, friends and members of his church, but in fact they were available to the public."

## Judges Conducting Independent Factual Research on the Internet

- ▶ What happens if a Judge decides to Google-search facts and issues related to a case pending before the Judge's Court?
- ▶ Alternatively, what if a Judge conducts research on social media?
  - ▶ Example: A Personal injury Plaintiff posting pictures of himself/herself on Facebook, engaging in physical activities which negate the extent of his/her injuries.
- ▶ ABA Model Code of Judicial Conduct - Rule 2.9(C)
  - ▶ A judge shall not investigate facts in a matter independently and shall consider only the evidence presented and any facts that may properly be judicially noticed.

## Inappropriate Conduct with Judicial Staff and Litigants

- ▶ Remember Rules 2.3 and 1.8 of the Model Code of Judicial Conduct, as well as Canons 2(A) and 3(A)(3) of the Code of Conduct for U. S. Judges
  - ▶ A Judge must act in a manner that promotes public confidence in the integrity and impartiality of the judiciary
  - ▶ A Judge should be patient, dignified, respectful and courteous to litigants, jurors, witnesses, lawyers and Court staff
  - ▶ A Judge shall not, in the performance of his/her duties, by words or conduct, manifest bias or prejudice, or engage in harassment, based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

## Inappropriate Conduct with Judicial Staff and Litigants . . . Continued

### ► Example

#### ► Public Reprimand, CJC Nos. 17-1488, 17,1489 and 17-1523

- In Texas, Judge Guy Williams of Corpus Christi, received a public reprimand for groping three women, including a fellow Judge, during a social function. The Judge was also accused of inappropriately touching two court clerks at the same party.

## Political Involvement, Affiliations and Activities

### ► ABA Model Code of Judicial Conduct - Rule 2.4(B)-(C)

- A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.
- A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

### ► ABA Model Code of Judicial Conduct - Rule 3.6(A)

- A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

### ► ABA Model Code of Judicial Conduct - Rule 3.7 (A)-(B)

- Governs a Judge's participation in educational, religious, charitable, fraternal or civic organizations or activities

## Political Involvement, Affiliations and Activities . . . Continued

► Code of Conduct of U.S. Judges - Canon 2(C)

- A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.

► Code of Conduct for U.S. Judges - Canon 4

- A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects. However, a judge should not participate in extrajudicial activities that detract from the dignity of the judge's office, interfere with the performance of the judge's official duties, reflect adversely on the judge's impartiality, lead to frequent disqualification, or violate the limitations set forth below.

► Code of Conduct of U.S. Judges - Canon 5

- A Judge should not:
  - act as a leader or hold any office in a political organization;
  - make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or
  - solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate.

## Political Involvement, Affiliations and Activities . . . Continued

► Model Code of Judicial Conduct - Canon 4

- A Judge or candidate for judicial office shall not engage in political or campaign activity that is inconsistent with the independence, integrity or impartiality of the judiciary.

► Model Code of Judicial Conduct - Rule 4.1(A)

- Rule 4.1(A) contains various restrictions on the activities of Judges
  - Example: Rule 4.1(A)(1)-(3) → A Judge cannot act as a leader in, or hold an office in, a political organization. A Judge also cannot make speeches on behalf of a political organization, nor can a Judge publicly endorse or oppose a candidate for public office

## Political Involvement, Affiliations and Activities . . . Continued

► Example

► *In re Judicial Misconduct*, 664 F.3d 332 (U.S. Jud. Conf. 2011)

► The Court found that the Chief Judge of the U.S. Bankruptcy Court for the Middle District of Tennessee, was in violation of Canons 2A and 2C of the Code of Conduct for United States Judges, where he was a member of a country club that “invidiously discriminates against women and African Americans.”

► *Query: Consider the rules regarding political affiliations in the context of social media: A post would probably count as a public endorsement, but what about simply “liking” / “sharing” / “retweeting” a political post?*

## Reporting Obligations

## Reporting Obligations - Judges vs. Judges

- ▶ Under the ABA Rules, Judges have a duty to report other Judges who violate the Rules
- ▶ Mental/Emotional/Physical Fitness
  - ▶ Model Code of Judicial Conduct - Rule 2.14
    - ▶ A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.
- ▶ Political Impropriety
  - ▶ Model Code of Judicial Conduct - Rule 4.1(B)
    - ▶ A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).

## Reporting Obligations - Judges vs. Judges . . . Continued

- ▶ Under the Code of Conduct for U.S. Judges, Federal Judges do not appear to be *required* to report misconduct.
- ▶ Code of Conduct for U. S. Judges - Canon 3(B)(5)
  - ▶ A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.
- ▶ Commentary to Canon 3(B)(5)
  - ▶ Appropriate action may include direct communication with the judge or lawyer; other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or otherwise participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

## Reporting Obligations - Lawyers vs. Judges

- ▶ Under the ABA Rules, lawyers have an obligation to report Judges
  - ▶ Fitness for Office
    - ▶ ABA Model Rules of Professional Conduct - Rule 8.3(b)
      - ▶ A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.
  - ▶ Knowingly Aiding a Violation
    - ▶ ABA Model Rules of Professional Conduct - Rule 8.4(f)
      - ▶ It is professional misconduct for a lawyer to . . . knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

*If a lawyer knows that a Judge is violating the Rules and knowingly turns a blind eye, does this constitute knowing assistance?*

## Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct

## Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct

- ▶ On September 13, 2018, the Judicial Conference committees on the Codes of Conduct and Judicial Conduct and Disability released for public comment, proposed changes to, among other things, the Code of Conduct for United States Judges.
- ▶ These proposed changes respond to recommendations provided in the June 1, 2018 Report of the Federal Judiciary Workplace Conduct Working Group.

## Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct... Continued

- ▶ These proposed changes include changes to the commentary include (but are not limited to) :
  - ▶ The Commentary to Canon 2A
    - ▶ Canon 2A: A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
    - ▶ Commentary to Canon 2A:
      - ▶ An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges, **including harassment and other inappropriate workplace behavior.**

## Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct.... Continued

- ▶ The proposed changes also include changes to Canon 3, including the scope of Canon 3
  - ▶ The duties of judicial office take precedence over all other activities. *In performing the duties prescribed by law, The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased.* The judge should adhere to the following standards:
- ▶ Canon 3B(4) has also been added as a new section to specifically state:
  - ▶ A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff. A judge should not engage in any form of harassment of court personnel. A judge should not engage in retaliation for reporting of allegations of such misconduct. A judge should seek to hold court personnel who are subject to the judge's control to similar standards in their own dealings with other court personnel.

## Proposed Changes to Code of Conduct for U.S. Judges and Judicial Conduct... Continued

- ▶ The Commentary to Canon 3B(4) also specifically outlines the type of conduct constituting harassment and inappropriate workplace conduct.
  - ▶ Canon 3B(4) states:
    - ▶ A judge should neither engage in, nor tolerate, workplace conduct that is reasonably interpreted as harassment, abusive behavior, or retaliation for reporting such conduct. The duty to refrain from retaliation reaches retaliation against former as well as current judiciary personnel.
    - ▶ Under this Canon, harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct directed at judicial employees or others. See also Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 4(a)(2) (providing that "cognizable misconduct includes: (A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault; (B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or (C) creating a hostile work environment for judicial employees") and Rule 4(a)(3) (providing that "cognizable misconduct includes discrimination on the basis of race, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability").