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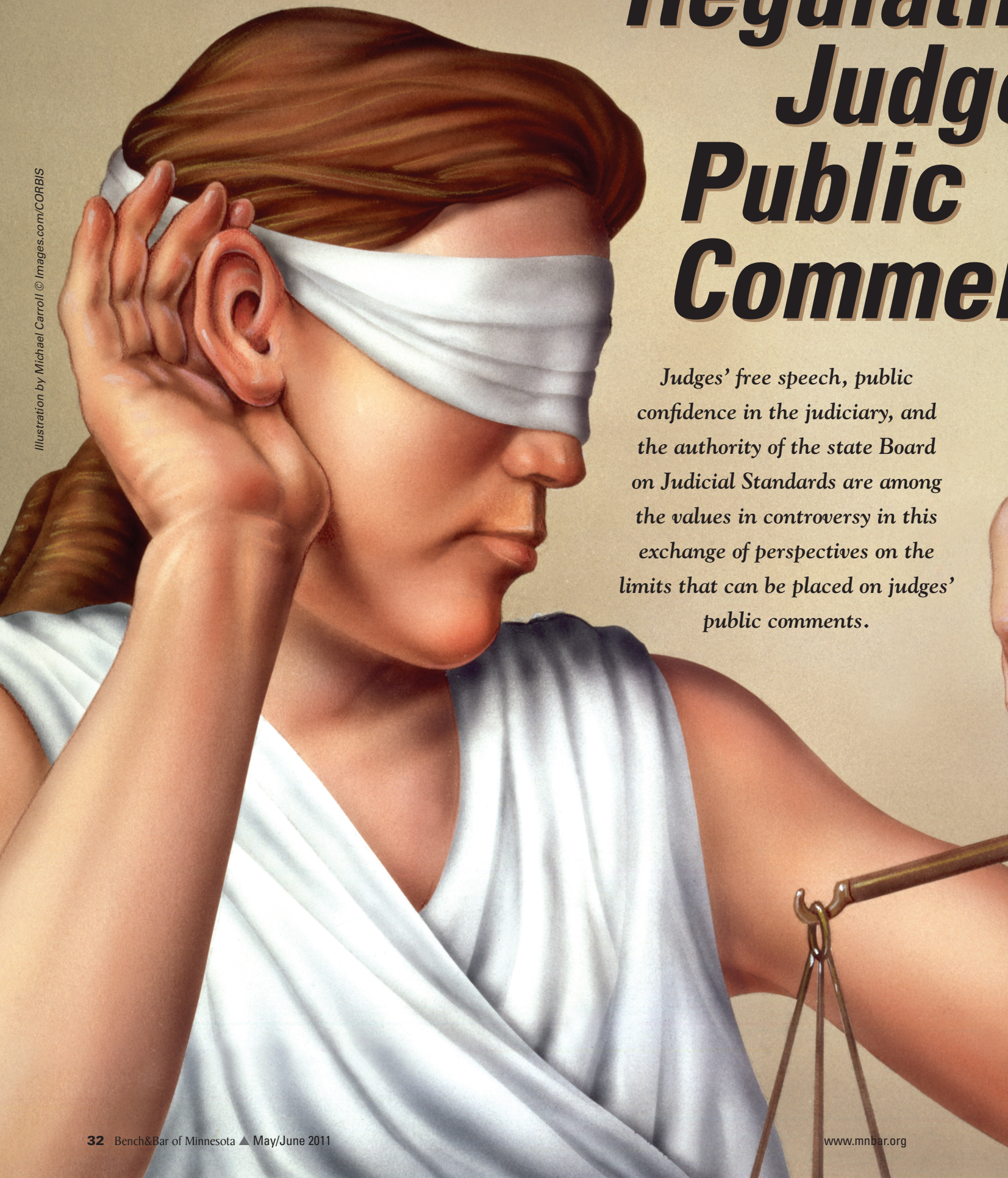
Judges' free speech, public confidence in the judiciary, and the authority of the state Board on Judicial Standards are among the values in controversy in this exchange of perspectives on the limits that can be placed on judges' public comments.



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A Critique

By William J. Wernz

Suppose District Court Judge Jay gave a talk at a Law Day conference. In the Q & A, a citizen stated, regarding the then-pending Coleman – Franken recount case, "The presiding judges are all politically appointed and they'll follow party lines—isn't that right?" Jay wanted to answer, "Let me assure you that the judges participating in these cases are honest, impartial and competent." Jay believed the answer would promote confidence in the judiciary.

Unfortunately, Jay's answer is prohibited by a Board on Judicial Standards (BJS) policy:

> The Board takes the position that a judge violates Canon 2, Rule 2.10(A) when the comment relates to the merits of a pending or impending case, regardless of intent. Judicial comments, in the Board's opinion, should not disclose personal opinions relating to any participant in the case, including the parties, witnesses or any judge connected to the proceedings.[1]

How could BJS adopt a policy that exceeds its authority, chills free speech and, in some cases, impairs public confidence in the judiciary? History provides background, but not an answer.

The 2004 Amendment

In 2004, the Minnesota Supreme Court asked its Committee on the Code of Judicial Conduct to consider amending a canon that flatly prohibited "public comment about a pending or impending proceeding in any court… ." The court was concerned the canon was not narrowly tailored to achieve its goal of fair and impartial resolution of cases. The committee recommended, and the court adopted, an amendment that prohibits judges' public comment only when it "might reasonably be expected to affect the outcome or impair the fairness of a matter."[2]

The amendment substantially narrowed the application of Rule 2.10. BJS has, however, not given the amendment its due. The BJS policy makes a simple but important error. The policy focuses *solely* on what a judge *states*, but the rule, being centered on *causation*, requires consideration of many additional circumstances. Causation involves much more than what was said.

Hypothetical Applications

The failure of the BJS policy to take causal factors into account leads to obviously overbroad applications of Rule 2.10. For example, Minnesota Supreme Court Justice Elder teaches a course in international human rights.

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Response

By The Minnesota Board on Judicial Standards

Limits on the speech of judges are not new to Minnesota or the nation. Judicial speech has been formally regulated since the states began to first adopt the American Bar Association's model judicial code in 1972.[1] Courts have consistently held that ethical standards limiting judicial speech are both necessary and constitutional.[2] Restrictions on judicial speech have been part of Minnesota's ethical tradition since the adoption of its first code.[3]

The commentator claims that the Board on Judicial Standards (Board) has adopted a policy that exceeds the authority conferred on it by Canon 2, Rule 2.10(A) of the Code. In making this proposition the commentator assumes, incorrectly, that the Board applies an expansive interpretation of its internal policy while ignoring an important limitation on the Board's authority as stated in the canon.

The Board's policy does take the position that a violation of Canon 2, Rule 2.10(A) occurs when a judge comments on a "pending or impending case, regardless of intent." The commentator presumes that when the Board applies the policy, it does so blindly by acting on any judicial comment, regardless of its potential outcome on a case. That is simply incorrect. The Board only undertakes action if the judge's comment, pursuant to Canon 2, Rule 2.10(A), "might reasonably be expected to affect the outcome or impair the fairness of a matter."

Thus, in the commentator's hypothetical, a reasonable person would not expect the district judge's comment (that the judges participating in the recount cases are honest, impartial and competent) would affect the outcome or impair the fairness of the matter. Such a comment would not be in violation of Canon 2, Rule 2.10(A). The Board's internal policy is consistent with the application of Canon 2, Rule 2.10(A).

The commentator takes the position that the Board, in the past, has exceeded its authority in cases relating to public comments by judges on pending and impending cases. The Board respectfully disagrees with this charge. The Board has never acted on a judicial comment case unless it believed that the comment "might reasonably be expected to affect the outcome or impair the fairness of a matter."

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A Critique

In class, a student asks Elder's opinion whether Guantanamo cases about to be decided by the United States Supreme Court were correctly decided by lower courts. BJS forbids both Elder and Elder's secretary, who is a student in the class, to opine.[3]

Another example: District Court Judge Parker is a well-known expert on sentencing guidelines. The legislature asks Parker to appear at an important committee hearing on the guidelines. Different panels of the Minnesota Court of Appeals have decided sentencing issues inconsistently. Some of these cases have been argued and are awaiting decision by the Minnesota Supreme Court. Parker is asked which decisions are correct and incorrect, and why.

Perhaps BJS would not investigate or discipline Jay, Elder or Parker. However, analyzing restrictions on speech involves evaluating literal applications of a prohibition. Such analysis was used in *Republican Party v. White*, 536 U.S. 765 (2002), in which BJS members were losing parties. Moreover, free speech is chilled when a judge must depend on BJS discretion to avoid discipline. Two actual cases show how BJS has applied Rule 2.10(A).

Actual Cases

Judge Kevin Burke. In 2004-05, BJS initiated an investigation of Hennepin County District Court Judge Kevin Burke. An assistant Hennepin County Attorney and an assistant Minneapolis City Attorney had been charged with cocaine possession. Burke was never assigned the cases, which were transferred to Ramsey County. Burke responded to inquiries from the *Star Tribune*, by stating the lawyers' courtroom performances did not indicate drug impairment, and the lawyers' conduct in court was very "professional" and "committed."

BJS issued a private discipline to Burke. Burke retained counsel (the author) and appealed. BJS sought public discipline. Burke filed a response, reiterating the positions he had already communicated to BJS. BJS promptly withdrew its charges, stating it wished to avoid the risk of paying Burke's attorney fees. BJS has never acknowledged its charge against Burke was erroneous. The BJS policy appears to forbid Burke to repeat his conduct.

Judge Michael Roith. In 1980, Ming Sen Shiue was convicted in federal court of kidnapping and other crimes. In 1981, in Anoka County, Michael Roith prosecuted Shiue for murder of a boy, who witnessed Shiue's crimes. Upon conviction, Shiue was given a state court sentence concurrent with his federal sentence. Roith spoke publicly and critically of the concurrent sentence.

In 2010, Shiue's civil commitment trial generated great publicity. The *Star Tribune* sought comment on the 1981 sentencing from Roith, by now a veteran Anoka County District court Judge. The BJS Executive Secretary told Roith that statements about past proceedings would not violate any rule.[4] After the Shiue case was under advisement by another judge, Roith gave the interview, on the understanding he would talk only about the past criminal case. The title of the *Star Tribune* article conveyed its substance, "Prosecutor Still Objects to Shiue's Sentence." Nonetheless, BJS notified Roith it was investigating whether his interview violated Rule 2.10(A).

BJS cited five statements in the article.[5] Three statements reiterated Roith's 1981 criticism. Roith also stated (a) Mary Stauffer (Shiue's victim in 1980) "is a fantastic person," and (b) if sentencing had been consecutive, "friends and relatives of [the victims] wouldn't

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The commentator chooses to focus his remarks on two specific cases that were previously processed by the Board, disclosing certain factual contentions relating to those matters. The Board does not discuss the facts of any case except when specific conditions exist.[4] Those conditions are not present and we decline to address those specific cases.

The Board's Authority

It is first important to note that neither the Code in general nor Canon 2, Rule 2.10(A) in specific address the authority of the Board. Indeed, the Code does not even mention the Board—not even once.

The Board's authority, however, is clearly stated in the Board Rules. Pursuant to Board Rule 2 (a), the Board is authorized to "receive complaints, investigate, conduct hearings and make certain summary dispositions, and make recommendations to the Minnesota Supreme Court." Upon receipt of a complaint, the Board reviews the evaluation of a matter and then, by majority vote, is authorized to "determine whether there is reasonable cause[5] to believe the judge committed misconduct." Where, in the Board's view, reasonable cause exists, the case proceeds forward. Where the Board members believe reasonable cause to be absent, the matter is dismissed.[6]

The commentator errs when he equates Board action with adopting "policy." In fact, the Board has no power to make final interpretations or rulings regarding any of the principles contained in the Code, including Canon 2, Rule 2.10(a). A judge subject to an inquiry may choose to have almost any Board action reviewed by the Minnesota Supreme Court. Except for the mildest types of private action and discipline reached by mutual consent, every determination the Board makes may be challenged on its merits through an appeal process.

Indeed, there is a material difference between making final pronouncements and finding "reasonable cause to believe" that misconduct may have occurred. The reasonable cause finding is an intermediate step in the process. Unlike a court, the Board makes determinations by a consensus drawn from an intentionally diverse membership. The Board consists not just of four judges, but also two lawyers and four citizens who are neither judges nor lawyers. Under this structure, no specific Board action is ever controlled by a single constituency and all points of view must be considered.

Perception—Not Causation

The commentator asserts that the Board's policy ignores a "causation" element of Canon 2, Rule 2.10(A). There is no causation element in Canon 2, Rule 2.10(A). Canon 2, Rule 2.10(A) does not state that a prohibited judicial

have had to relive painful memories during Shiue's civil commitment trial."

Roith told BJS his comments were irrelevant to the facts and standards for Shiue's commitment. The commitment concerned whether, in 2010, Shiue was mentally ill, his illness was treatable, and he was a risk to the public. The judge presiding in Shiue's commitment proceeding averred that none of the media reports influenced her decision.

BJS courteously and professionally met with Roith and counsel, and freely exchanged differing views. Although BJS dismissed without discipline, BJS cautioned Roith to follow its Rule 2.10(A) policy.

Devil in the Details

Rule 2.10(A) has demanding requirements for proof that a judge's public statement is *likely* to *cause* actual *prejudice* in a case. Proof of causation involves, in detail, the who, what, when, where, and how of events. The BJS policy ignores the when, where, and how of events and considers only one dimension of the who and what factors. The policy does not consider, for example, to whom a statement was made, or whether it is likely to be publicized, or who the adjudicator is, or even who the judge is, in detail. The BJS policy's focus is *solely* on the content of the judge's statement. BJS should, however, consider at least the following circumstances.

"If a Tree Falls in the Forest …" The first circumstance is foundation. How likely is it that a judge or juror will hear or read, and remember, a judge's statement? Burke's brief statements were buried in a carry-over page of a long article. Those most likely to notice and recall the article—the defense counsel and prosecutor, as well as five lawyers specializing in professional ethics—*all* averred they either did not notice or did not recall what Burke said. A Ramsey County jury pool would not "reasonably be expected" to have noticed Burke's statements, let alone recall them, months later. The cases on which Burke commented were effectively decided by plea bargains after order on a suppression motion, a predictable result. Roith's statements were a miniscule part of publicity about Shiue. The BJS policy applies, however, to all "public" statements, including those which are not in public media or apt to be publicized.

"When Candles be Out, All Cats be Gray." Under the BJS policy, all cases are equally susceptible to prejudice from a judge's statement. However, different types of cases have different degrees of susceptibility to prejudice. "Civil trials may be less sensitive [than criminal trials]. Hearings not involving a jury and arbitration proceedings may be even less affected."[6] Some types of matters—appellate, federal court, foreign—would be most unlikely to be adversely affected by comment of a district court judge.

A bench trial, such as the Shiue commitment, is objectively unlikely to be prejudiced by public comment from any observer. Judges are bound by Rule 2.9(C) to ignore publicity and there is a "presumption that a judge has discharged his or her judicial duties properly."[7]

Bystanders Aren't Presiders or Stakeholders. For the BJS policy, the only "who" inquiry is whether the speaker is a Minnesota judge. Other important "who" questions include, however, the audience, the adjudicators, and the particulars of the judge's identity and role. The likelihood that, say, a Winona District Court judge could prejudice a Minnesota Supreme Court or federal court proceeding is remote at most.

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comment "must" in fact affect the outcome or impair the fairness of a matter. The canon requires that a prohibited judicial comment is one that "*might* reasonably be expected" to affect the outcome or impair the fairness of a matter. The term "might" does not impose any kind of "cause in fact" requirement as the commentator suggests. It does not even impose a "more likely than not" requirement. "Might" in the context of this canon means "possible."

The Board's policy, which is derived from the mandates of the Code itself, simply reinforces the fact that a judge can violate the canon without intending to do so. The Board must address judicial misconduct that not only is intentionally improper but that appears improper to the public and to litigants. This is not merely a Board policy, but a requirement of the Code of Judicial Conduct as adopted by the Minnesota Supreme Court.[7] The canons provide an *objective* test for the appearance of impropriety. The Board does not inquire whether there exists a direct cause between a judge's comment and the outcome of a court proceeding. Instead, Canon 1, Rule 1.2 and Board Rule 6 direct the Board to inquire whether there is "reasonable cause" to believe a judge's comment "*might* reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court."

The commentator suggests that the Board's analysis should begin and end by asking the judges and lawyers involved in the case whether or not they regard a judge's comment in the case as harmful. However, this is precisely what Canon 1, Rule 1.2 warns against. The subjective views of court participants do not satisfy the objective test required by the Code. The Board reviews judicial comments, not with the inside knowledge of a judge or lawyer, but as the objective "reasonable person" referenced in the canons. The "reasonable person" contemplated by the canon must be one whose only expectation is that judges and judicial officers will conduct themselves in a manner that "ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence."[8]

Without discussing specific matters, the Board notes that most cases involving a Board inquiry into judicial comments have certain common elements. Typically, there is a great deal of local, regional or national interest in such cases. Usually, the judge's comment is directed at one or both of the parties or the merits of the case. Always, the comments in question must meet the requirement that a reasonable person would expect that the comment might affect the outcome or impair the fairness of a matter pending or impending in any court.

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A Critique

Nationwide, discipline for public comments involves judges who presided in the matter on which they commented, or were otherwise stakeholders. Because mere observers have much less potential for prejudicing a proceeding, the 1st Amendment demands that a policy restricting speech on matters of public importance, "must carry a very difficult burden in order to demonstrate that its concededly legitimate interest in protecting the efficiency and impartiality of the state judicial system outweighs ... first amendment rights."[8] Nonetheless, the BJS policy again does not make the distinctions that are crucial to causation analysis.

Measures of Prejudice

An Instructive Comparison. Although Rule 3.6, the rule governing "Trial Publicity" by lawyers, is narrower than Rule 2.10(A), Rule 3.6 is instructive for application of Rule 2.10(A). Rule 3.6 applies only to (1) lawyer participants, not observers, (2) public statements that are apt to be publicized, and (3) criminal jury trials. These limitations all reflect lesser likelihoods of prejudice. Rule 2.10(A) does not include these nuances, but BJS policy should take them into account, as relevant to calculating likelihood of prejudice.

"Impair The Fairness." The Burke and Roith comments were most unlikely to "affect the outcome" of the related proceedings. Might they have "impaired the fairness?" Fairness seems a more nebulous standard. However, the possible effect of publicity on trials has been considered in many criminal cases. Only in "extreme" and unusual circumstances will such unfairness be found. For example, evidence of unfairness might be found where public comments by a lawyer or judge caused a change of venue or "extensive voir dire ... to filter out all of the effects of pretrial publicity."[9] The author has not found a reported case in which a bystander judge's public statement was even alleged to have prejudiced a proceeding.

Courting Disaster?

In the litigation challenging Minnesota's restrictions on judicial candidate speech, approximately $1.7 million in public funds have been paid to date, by court award to the prevailing parties, for attorney fees. This litigation arose when a judicial candidate was inhibited by existing rules from making contemplated campaign statements and could not obtain an advisory opinion that he would not be subject to discipline. A Minnesota judge who contemplates public statements permitted by the 1st Amendment and by Rule 2.10(A), but prohibited by BJS policy, might also contemplate a federal court declaratory judgment action and fee award. The 8th Circuit has recently made clear that persons whose speech is "reasonably chilled" by a law have standing to seek a federal judicial declaration that the law violates their 1st Amendment rights, and that content-based speech restrictions are subject to strict scrutiny.[10]

What Should Be Done?

Rule 2.10(A), properly applied, complies with the 1st Amendment. The BJS policy, however, applies the rule beyond its terms. BJS could do better, in several ways.

BJS should broaden its focus to take account of all the causal factors that determine whether Rule 2.10(A) applies, rather than focusing solely on a judge's words.

BJS generally should not initiate investigations where the lawyers and judge involved in the case do not regard a by-

Response

Such comments always raise the same questions for the Board, in its quest to initially determine whether there is "reasonable cause" to believe that a judge's comment "might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court." Might such a comment be helpful to one party or the other by, for example, assisting one party to obtain an ultimate determination of guilt or innocence? Could such a gratuitous statement make the job of the parties more difficult or easier? What about the general public? Is there a possibility that the general public might suspect "special treatment" of one party, based on these comments? Could such a comment be construed as an improper use of the judicial office on the grounds that it appeared to lend the prestige of the office "to advance the personal or economic interest of the judge or others?"[9] Most importantly, did the judicial comments make the judicial system in general appear to lack impartiality?

Notably, there is precedent for judicial discipline in cases in which a judge makes a comment concerning the merits of a case or the nature or character of a party or court participant.[10]

The reference to "reasonable minds" in the Comment to Canon 1, Rule 1.2 certainly includes highly educated and trained lawyers and judges. However, the canon does not limit its application to those trained in the law. As the preamble to the Code notes, the rules of conduct were established to ensure the "greatest possible *public* confidence" in the judicial system. The perceptions of the public, including those who are not trained in the law or the art of argument, are of grave concern.

Public Confidence Paramount

Indeed, the authority of the judiciary is dependent in large measure on the confidence that the public has in the judicial process and in our judicial officers. When the Board considers whether to undertake disciplinary action against a judge—in any case, not just judicial comment cases—that public confidence is paramount. Does Canon 2, Rule 2.10(A) impose a high standard on judges? Certainly. Does it limit a judge's right to speak publicly on matters of public interest? Yes, it does. But in the view of the Minnesota Supreme Court, limiting an individual judge's ability to publicly comment in a way that could be viewed as prejudicial to a pending or impending case is a small price to pay for public confidence in a fair and impartial judiciary. The Board supports this policy and, as is mandated by the Code, acts in accordance with it. ▲

stander judge's comment as prejudicial.

BJS should recognize that speech by bystanders about public matters is unfettered except in compelling circumstances. BJS should consider how to adapt, for judges, the Minnesota Supreme Court's century-old endorsement of free speech for lawyers: "[T]hough one became an attorney, he still retains his rights as a citizen and a freeman ... . Above all others, the members of the bar have the best opportunity to become conversant with the character and efficiency of our judges ... . The rule contended for by the prosecution, if adopted in its entirety, would close the mouths of all those best able to give advice, who might deem it their duty to speak disparagingly."[11] ▲

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Notes

[1] On November 8, 2010 BJS sent a "letter of caution" stating the BJS policy, to Judge Michael J. Roith. Roith's case is described in this article. Roith and Judge Kevin Burke have waived confidentiality rights and consented to this article. Mark Anfinson was Roith's lead counsel and the author was cocounsel. As of January 1, 2011, Roith is no longer a judge.

[2] The September 16, 2004 amendment was to Canon 3(A)(8). Effective July 1, 2009, that Canon became current Rule 2.10(A). In this article "likely" and "apt to" will be used for "might reasonably be expected" and "prejudice" will be shorthand for "affect the outcome or impair the fairness."

[3] Rule 2.10(C)

[4] The Board may issue advisory opinions, within 30 days of written request. Rule 2(a)(2) *R. Bd. Jud. Stds*. BJS informed Roith that judges cannot rely on the Executive Secretary's opinion, but that opinion was correct—the cases on which Roith (and Burke) commented were past, not "pending or impending."

[5] One of the statements under investigation was that Roith "criticized" the sentencing judge or sentence. The implication seemed to be that BJS would investigate criticisms of judicial acts where it might not investigate praise. Any such predilection would, of course, violate the 1st Amendment as a content-based restriction. *RAV v. City of St. Paul*, 505 U.S. 377 (1992).

[6] ABA Model R. Prof. Conduct 3.6 cmt. 6.

[7] *State v. McKenzie*, 583 N.W.2d 744, 747 (Minn. 1998).

[8] *Scott v. Flowers*, 910 F.2d 201, 212 (5th Cir. 1990).

[9] *Skilling v. United States*, 130 S. Ct. 2896, 2913 (2010). *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075 (1991).

[10] *281 CARE COMMITTEE v. Arneson et al.*, 638 F.3d 621 (8th Cir. 2011).

[11] *State Bd. of Exam'rs in Law v. Hart*, 104 Minn. 88, 117–18, 116 N.W. 212, 216 (Minn. 1908).

Notes

[1] *See*, E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct*, Canon 3A(6) (1973), p. 12.

[2] *Halleck v. Berliner*, 427 F. Supp. 1225 (D.D.C. 1977); *In re Rome*, 218 Kan. 198, 542 P.2d 676 (1975); *U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001); *In re White*, 651 N.W. 2d 551 (Neb. 2002). The decision of the United States Supreme Court in *Republican Party v. White*, 536 U.S. 765 (2002) was expressly limited to statements made in an election campaign.

[3] *See*, *Minnesota Code of Judicial Conduct (Code),* Canon 3A (8) (February 20, 1974).

[4] *See*, Rules of the Board on Judicial Standards (Board Rules), Rule 5.

[5] Prior to July 1, 2009, the rule required the Board to find "sufficient cause" before proceeding on a complaint. *See*, prior Board Rule 6(d).

[6] *See generally*, Board Rule 6(f).

[7] *See* Comment [5] to Canon 1, Rule 1.2.

[8] *See,* Preamble to the Code.

[9] *See*, Canon 1, Rule 1.3 and Canon 2, Rule 2.10.

[10] *See, e.g., Commission on Judicial Qualifications v. Rome,* 623 P.2d 1307 (Kan. 1981); *In re Broadbelt,* 683 A.2d 543 (N.J. 1996); *In re Ross* (California, 2005) (judge disciplined for commenting about a criminal defendant's "charisma" and economic status; 1st Amendment argument rejected); *In re Hey*, 425 S.E.2d 221 (W. Va. 1992) (judge violated canons by making negative comments on television program about parties involved in a custody dispute); *In re Hayes*, 541 S.2d 105 (Fla. 1989) (judge disciplined for discussing with a journalist the judge's opinions about the behavior of parties, lawyers, witnesses and the jury).

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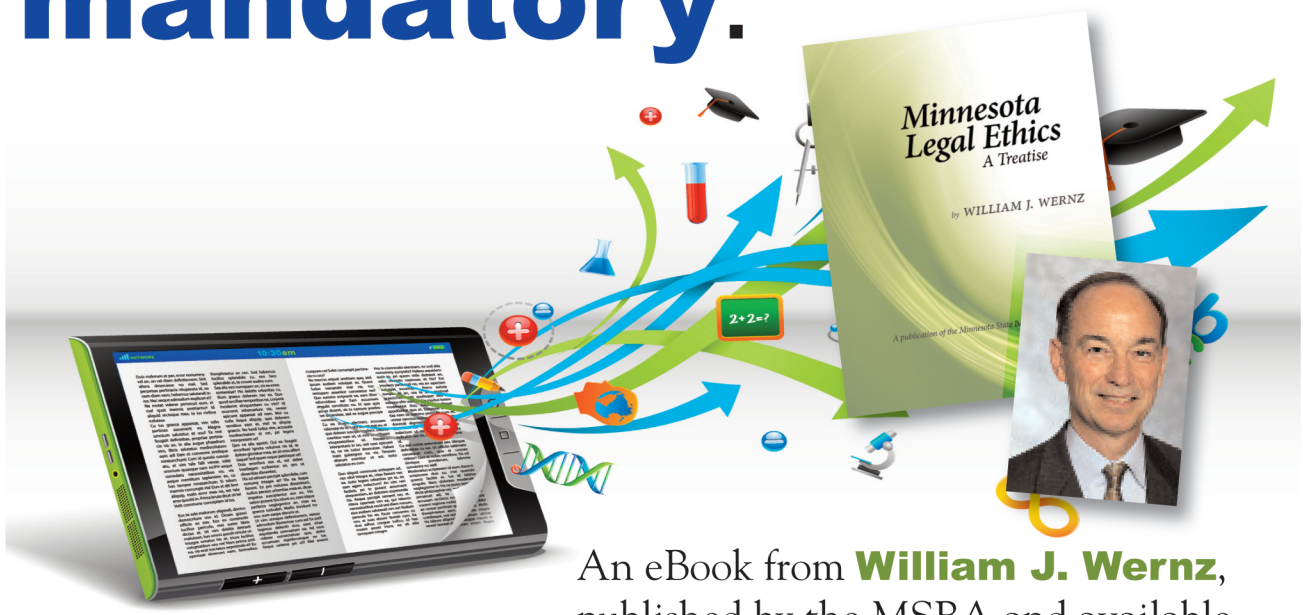

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