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FEATURE ARTICLE

The Judicial Discipline of Judge Clark

The Code of Judicial Conduct warns that a judge is a judge "at all times" and that his "extra-judicial" conduct may be subject to scrutiny—even discipline—if it undermines the judge's independence, integrity, or impartiality; demeans the judicial office; demonstrates actual impropriety; or creates the appearance of impropriety. Most judges would expect these conditions to limit or prohibit their ability to engage romantic or sexual conduct and communications with litigants or attorneys who appear in their courtrooms. Likely fewer expected these conditions to limit or prohibit their romantic or sexual conduct and communications wholly unrelated to their judicial office. And yet they were in *Matter of Clark*, --- Kan. ---, No. 123,911, filed Jan. 28, 2022—despite the strong opinion of two Kansas Supreme Court justices that (1) the lawful, private, consensual sexual conduct practices at issue did not violate the Code of Judicial Conduct; and (2) any consequence for Clark's conduct was for voters—not the court—to deliver.

Panel B of the Commission on Judicial Conduct heard Clark's case based on facts to which the parties stipulated and found all stipulated facts were proved by clear and convincing evidence. But the panel emphasized six facts it believed were "critical" to the disposition of the case:

> "1. Respondent used the social media website known as Club Foreplay ('C4P') which he described as 'a dating website for couples.'
>
> "2. Respondent maintained an account on the C4P website on and off for a couple of years.
>
> "3. Respondent used the website to give access to other users to view nude and partially nude photos of himself, including a picture of Respondent standing in water with his penis visible.
>
> "4. Respondent sent sexually revealing photographs of himself to the complainant's wife.
>
> "5. Respondent requested that complainant's wife send sexually explicit photos to him.
>
> "6. The parties stipulated that the sexually revealing photographs were not available to be viewed by any C4P subscriber without permission from the Respondent. He also claims the photographs were not available to the general public. However, as with any social media posting, the photographs could be disseminated to the general public once they are released.

Matter of Clark, slip op. at 2.

Based on these facts, the panel concluded Respondent Clark had violated Canon 1, Rule 1.2 and Canon 3, Rule 3.1(C) of the Kansas Code of Judicial Conduct. Canon 1, Rule 1.2 states:

> 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.

And Canon 3, Rule 1.3(C) states:

> A judge may engage in extra-judicial activities, except as prohibited by law or this Code. However, when engaging in extra-judicial activities, a judge shall not:
>
> …
>
> (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality; or demean the judicial office…

The panel recommended Judge Clark be disciplined for these violations by public censure.

The argument before the hearing panel centered upon the extent to which the Code of Judicial Conduct should properly be used to regulate the private morality of judges. The Examiner argued, in essence, that the judge's conduct was a sign of impaired integrity that would undermine public confidence in the judiciary. The defense warned that such an expansive view of the regulatory power of the Commission under the Code of Judicial Conduct created a "slippery slope":

> "The Respondent cautions the Commission to steer clear of stepping on the slippery slope of regulating a judge's moral conduct. Respondent has articulated that when the Canons are interpreted to prohibit conduct in a judge's private sex life that has no effect upon his conduct in judicial office and is not prohibited by law, then the enforcement authority—be it an inquiry review board, a hearing panel for formal judicial complaints, or a court-enters 'the realm in which private moral beliefs are enforced and private notions of acceptable social conduct are treated as law.' *In the Matter of Dalessandro*, 483 Pa. 431, 457, 397 A.2d 743 (1979) (a married judge maintaining an intimate relationship with a married woman does not warrant censure, even if such is open and notorious, since such conduct is not prohibited by law.); But see *In Re Matter of Discipline of Turco*, 137 Wash.2d 227, 970 P.2d 731 (1999) ('We reject the implication in the *Matter of Dalessandro*, 483 Pa. 431, 397 A.2D 743 (1979), that matters in one's personal life which legitimately reflect upon the jurist's professional integrity are immune from censure').
>
> "Respondent maintains that matters of personal morality that do not affect a judge's integrity or ability to judge impartially are best left to the ballot box. See Dalessandro, 483 Pa. 431, 460 ('Standards in these private areas are constantly evolving and escape, at any given moment, precise definition. Conduct of a judge or any public official which may be offensive to the personal sensitivities of a segment of the society is properly judged in the privacy of the ballot box.')

Matter of Clark, slip op. at 6. Rejecting Respondent's argument, Panel B stated, in part:

> "The Kansas Judicial Code's repeated use of the term 'integrity' accentuates the Commission's duty to enforce moral conduct that does not promote public confidence in the judiciary. A judge must act at all times in his or her professional and personal life in a way that promotes public confidence in the integrity of the judiciary. Similarly, a judge must veer away from conduct that suggests the appearance of impropriety as undermining a judge's integrity. The Commission discussed at great length the term integrity and its expressed definition in the Kansas Judicial Code as including the quality of uprightness. Nearly all of the definitions of 'uprightness' describe a person who is 'honorable.' We are unanimously convinced the Respondent's actions in this case cannot be described as 'honorable.' Other cases have come to this conclusion as well. ...
>
> "Despite Respondent's warning about drawing a bright line on a judge's moral conduct, the Kansas Judicial Code imposes a duty that encompasses a judge's moral conduct when those actions question the very nature of integrity and demean the judicial office. The Respondent's decision to take a picture of his penis and post that picture on a social media website crossed that bright line and violated the Judicial Canons requiring a judge to act with integrity and would appear to a reasonable person to undermine the judge's integrity and demean the judicial office. The Respondent has violated Rules 1.2 and 3.1(c).

Id. at 7-9.

Before the Kansas Supreme Court, Respondent Clark did not take exception to the panel's finding of facts or conclusions of law. While noting that it was not bound to follow the panel's determination of whether it a judge violated the judicial canons, the court determined that no further inquiry or discussion was warranted in light of the procedural posture of the case and the Respondent's retirement:

> Ultimately, the question whether a respondent violated a rule is a question for this court and subject to de novo review. The non-filing of exceptions does not bind this court. However, in these unique circumstances concerning a complaint against a retired lay magistrate judge and where neither party has filed exceptions and each has affirmatively accepted the hearing panel's conclusions and resolution, we accept the respondent's stipulations and take no additional action.

Id. at 12-13. But the court's opinion may be more far-reaching than this limited circumstance—perhaps more far-reaching than intended.

In upholding the hearing panel's decision to impose a public sanction upon Judge Clark for the reasons stated, the Kansas Supreme Court has now made it very clear that judges' private behavior will, in effect, be scrutinized and liable for punishment 24 hours a day, seven days a week. Further, the criterion for such scrutiny and potential sanction is whether the judge's behavior is "upright" and "honorable"—amorphous terms that may well signal that any judicial actions in or

out of court, private or public, that do not comport with the predominant moral codes in the state at the time of the actions, no matter how personal, may lead to disciplining a judge. Such an interpretation of the Code sets up the Kansas Commission on Judicial Conduct and the Kansas Supreme Court as moral arbiters of private judicial behavior to what will be a frightening extent in the opinion of many.

Justice Stegall, who concurred the decision to take no further action against Clark, wrote separately to address this issue—and to explain why Judge Clark's behavior "was not a violation of any of our rules governing judicial conduct" even if it was "embarrassing," "foolish," or even "grossly immoral." In his concurring opinion, Justice Stegall wrote:

> To be sure, there was a time in our society when private, consensual sexual practices were not deemed off-limits to government regulation. For good or ill (or good and ill), that time has passed. Through a slew of judicial decisions, society has by now clearly decided that sexual conduct between consenting adults is none of the government's business…

Id. at 13. Warning of the dangers of "norming" regulation of private behavior in a society in which the technology of surveillance has now made constant and continuing intrusions into private life frighteningly real, Justice Stegall continued:

> If the information about Judge Clark generated by this self-surveilling system genuinely showed sexual conduct that interfered with the ethical performance of his judicial duties, the Examiner, the Commission, and this court would have a duty to act on it….
>
> But Judge Clark's actions did not have any real, factual connection to his role as a judge. So what is really going on? In short, Judge Clark has embarrassed us—the Examiner, the Commission, this court, the judiciary, and the wider legal community. And this may be the unforgivable sin of our day. The complex and ubiquitous shaming and shunning rituals our society has concocted and enacted in recent decades may best be understood as an elaborate response to collective embarrassment. Scapegoating and "canceling" the most embarrassing among us becomes a quasi-religious way of purging collective shame and guilt….
>
> The Examiner and panel in this case have acted as grand inquisitors on behalf of an allegedly scandalized public...
>
> So who has really been scandalized? As with the excessive rhetoric, the legal justifications given by the Examiner and panel in this case are thin cover for the naked embarrassment—and the accompanying need to close ranks and restore a facade of judicial superiority—felt by all.

Id. at 17-19.

Justice Stegall's concurring opinion goes on to examine the underlying views of judges in our society and how the panel's conclusions reflect a very "elevated" view of judges, so elevated that it may be impossible for most judges to live up to. After all, judges are human beings, and human beings are not perfect all of the time. All of us make mistakes, and not all mistakes should be prosecuted. Nor is it particularly beneficial to live in a society in which we monitor every aspect of the lives of political and judicial leaders. On the contrary, we should want judges in particular to be imperfect humans capable of understanding the other imperfect humans over whom they must sit in judgment.

This is not to say that judicial behavior should be free of all limitations. The panel was correct that the Code of Judicial Conduct exists because the public expects government to impose some limitations on judicial behavior. But there must be limitations on the extent of behavior subject to disciplinary regulation administered by the courts, rather than social or political regulation delivered by the public.

One must ask what impact the Clark case will have. Is it going to assure judicial moral purity from this point on? Will it improve the public reputation of the judiciary in Kansas? Will it actually improve the judiciary in Kansas? That seems highly unlikely. More likely, it will make potential candidates for judicial office think twice about putting their hats in the ring—knowing they will not only face the scrutiny of retention elections but also disciplinary penalties based whatever a hearing panel may deem to be "honorable" and "upright" at the time.

FORTHCOMING AUTHORITY

Judicial Commands to Remove the Masks

The Covid pandemic has now gone on for more than two years. Much of the American population is tired of the various mitigation methods that have been either required or suggested, while others remain steadfastly committed to them. For example, although many people are ready to ditch their masks, plenty still prefer to wear them. Like the rest of the population, attorneys and judges fall on various points of the spectrum regarding preferences and opinions for masking, and their varying opinions have resulted in more than one conflict over the past two years. One recent disagreement between an attorney and a judge on the United States Court of Appeals for the Fifth Circuit may soon result in guidance regarding a judge's ethical obligations when such a situation arises.

On February 3, 2022, Gabe Roth, the executive director of the organization Fix the Court, filed a complaint against Circuit Judge Jerry Smith after Judge Smith ordered a lawyer in his court to remove his mask during oral argument. When asked to remove his mask, the lawyer, Josh Koppel,

demurred. Roth's complaint reported the following exchange:

> According to the audio recording, Judge Smith said to Koppel, "Remove your mask, if you would." Koppel responded by saying: "I prefer to leave it on," after which Smith said, "We would prefer that you remove it, thank you. [...] We would prefer that you remove it." It seems as if Koppel then did remove his mask. His initial response was plainly audible on the court's audio recording, indicating that the mask was not impeding Judge Smith's ability to hear him.

The complaint explained that Mr. Koppel was reluctant to remove his mask because he had just flown into New Orleans, which was experiencing a surge in Covid cases at the time, and Mr. Koppel had two young children not yet old enough to be vaccinated against Covid. The complaint intimated that Mr. Koppel feared being exposed to Covid during his court appearance not only because he might become infected, but because he might then infect his two young children. Further, according to the complaint against Judge Smith, Mr. Koppel was "adhering to CDC regarding indoor masking." The complaint further stated that Judge Smith knew all of this because it was contained in a prior filing with the court.

Fairness requires that anyone who would draw conclusions from Judge Smith's requirement that Mr. Koppel remove his mask know all of the facts of the incident, and we do not yet know all those facts. But the facts that we do know, unless they have not been stated fully and honestly, suggest that Judge Smith's actions in his courtroom were unsympathetic and perhaps even unkind. Indeed, if Mr. Koppel's statements while wearing his mask were as easy for the judges to hear as they were for the court's recording equipment to pick up, the Judge's reasoning is difficult to comprehend.

The question posed by the complaint, however, is not whether the Judge Smith's insistence that Mr. Koppel remove his mask was sympathetic or kind, but whether it violated Canon 3(A)(3) of the *Code of Conduct for United States Judges*. That Canon states:

> 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 by those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

The Comment to this Canon states:

> **Canon 3A(3).** The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.
>
> The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

The judge's language was respectful when he asked Mr. Koppel to remove his mask. But was the act requested itself respectful and courteous? The complaint certainly suggests it was not.

Indeed, the complaint goes even further by suggesting Judge Smith violated his duty to act with "integrity and impartiality" in all the judge's activities, including the discharge of the judge's "adjudicative…responsibilities," where it states:

> What's more, if Judge Smith does not take COVID seriously, even as 2,500 of his fellow Americans are dying each day on average and close to 900,000 Americans have died from it in total, it is likely he will not be unbiased should cases concerning the disease reach his courtroom.

Perhaps if the judge's requirement that Mr. Koppel derived from some discriminatory or biased beliefs, then those actions did violate Canon 3(A)(3).

On the other hand, if the judge's actions simply reflected his decision as to how lawyers and others in the court must behave, absent any prejudice or bias, then holding that the judge violated Canon 3(a)(3) may well be a step too far. The Canon does not require that judges be compassionate; it only requires that they "act in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and "avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias."

Here, a broad interpretation of Canon 3(A)(3) may lead to a chilling effect on judicial behavior that may have unexpected and negative ramifications. But that does not necessarily mean judges can or should force lawyers to expose themselves and their families to risk of infection. That, too, is highly problematic.

The ultimate determination as to whether or not Judge Smith violated Canon 3(A)(3) will be of interest to every lawyer who must appear in court—many of whom may have already had an experience similar to Mr. Koppel's.

BOOK REVIEW

The Anointed: New York's White-Shoe Law Firms — How They Started, How they Grew, and How They Ran the Country

This month, rather than publish a list of current articles of interest, we are providing a short review of an extremely interesting new book: Jeremiah D. Lambert and Geoffrey S. Stewart's *The Anointed*, published in 2021 by Lyons Press. The subtitle of the book tells you what it is all about: "New York's White Shoe Law Firms—How They Started, How They Grew, and How They Ran the Country." And the authors—both successful lawyers and writers, graduates of elite law schools (Harvard and Yale) and worked at elite large law firms (Cravath; Davis Polk ; Wilmer Hale)—seem the perfect fit to write it.

The volume is a somewhat idiosyncratic history of the rise of large, elite, urban law firms, often referred to as "white shoe" firms. Unlike many academic history tomes, this volume is a good read. It is well-written and chock full of anecdotes about some of this country's most important lawyers and law firms. In addition to telling the story of how these law firms became centers of legal practice, the book explains how these firms helped to make law practice at the elite level immensely rewarding financially and an entry point for those who sought not only riches, but power.

The histories of the elite firms that are included in this volume will probably annoy many partners, associates, and alumni of the firms discussed. For instance, in discussing the rise of the "Cravath System," the authors write:

> Cravath wanted only the best and brightest. A Phi Beta Kappa man from a good college who had become a law review editor at Harvard, Columbia, or Yale was the first choice. Colorless, narrow-minded bookworms need not apply (nor, for many years women, Jews, Blacks, and others not of WASP origins).

Other anecdotes seem almost incredible:

> William O. Douglas, once a Cravath associate, recalled being with him when Moore received a telephone call from his wife that his house was on fire. "Why in Hell bother me?" Moore replied. "Call the fire department.

In many respects, this is a history of the American legal profession's "bad old days"—of the time in the profession when large law firms, in response to their clients' demands and their own ambitions, became firms "organized on factory principles by which is ground out standardized legal advice, documents, and services." It is the story of the radical changes in the legal profession that took place in the "Gilded Age" and of the legal battles between great industrialists like Thomas Edison and George Westinghouse, led by lawyers like Paul Drennan Cravath, that established the framework for the development of the American legal profession in the twentieth century and today. It is a book well worth reading.

BLAST FROM THE PAST

Excerpt: The Oath of an Attorney at Law

For centuries, every lawyer has been required to swear an oath in order to be admitted to the Bar. This oath not only signifies that the new lawyer has been admitted but it also lays out the most basic obligations that a lawyer must undertake when admitted to practice. Below is one of the first recorded oaths known:

The Oath of an Attorney at Law

> You shall do no falshood [sic], nor consent to any to be done in the Court, and if you know of any to be done you shall give knowledge thereof unto my Lord Chief Justice, or other his Brethren, that it may be reformed ; you shall delay no man for lucre or malice ; You shall increase no Fees, but shall be contented with the old Fees accustomed ; you shall plead no Foraign [sic] Plea, nor suffer no Foraign [sic] Suits unlawfully to hurt any man, but such as shall stand with order of the law, and your conscience ; you shall seal all such Processe [sic] as you shall sue out of the Court with the Seal thereof, and see the Kings' Majesty, and my Lord Chief Justice discharged for the same ; ye shall not wittingly nor willingly fine, nor procure to be fined any false Suit, nor give aid, nor consent to the same, in pain to be expulsed [sic] from the Court forever; And furthermore, you shall use your self in the Office of an Attorny [sic], within the Court according to your Learning and discretion ; so help you God, &c.

From: *The Book of Oaths and the Several Forms Thereof, Both Ancient and Modern* (London, 1686)

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