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Hart Failure: The Supreme Judicial Court's Interpretation of Nonjudicial Demeanor

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HART FAILURE: THE SUPREME JUDICIAL COURT'S INTERPRETATION OF NONJUDICIAL DEMEANOR

I. THE PREMISE OF ACCOUNTABILITY

Among the inherent powers of the Maine Supreme Judicial Court is the power to regulate the officers of its courts.[1] As the court explained in *Board of Overseers of the Bar v. Lee*, "each [of the three co-equal branches of government] has, without any express grant, the inherent right to accomplish all objects necessarily within the orbit of that department when not expressly allocated to, or limited by the existence of a similar power in, one of the other departments."[2] It is not surprising that the Supreme Judicial Court has for many years regulated, through formal disciplinary proceedings, the conduct of attorneys who practice in its courts.[3] The power of the court to do so has been constitutionally established[4] and legislatively recognized,[5] and is necessary to ensure that attorneys will remain accountable for their conduct.

What is perhaps surprising is that the court's judges, who "[p]lainly . . . are even more significant officers of the court than are lawyers,"[6] have only for the past decade been monitored by a

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1. Board of Overseers of the Bar v. Lee, 422 A.2d 998, 1002 (Me. 1980), *appeal dismissed*, 450 U.S. 1036 (1981).

2. *Id.*

3. *See, e.g.*, Board of Overseers of the Bar v. Murphy, 570 A.2d 1212 (Me. 1990) (lawyer disbarred for serious violations of bar rules; matter referred by Board of Overseers of the Bar); Sanborn v. Kimball, 64 Me. 140 (1875) (lawyer prohibited from practice because of his dishonesty and forgery conviction; formal complaint filed with the Supreme Judicial Court by the local bar).

4. ME. CONST. art. VI, § 1 ("The judicial power of this State shall be vested in a Supreme Judicial Court, and such other courts as the Legislature shall from time to time establish.").

5. This power has been recognized legislatively. In pertinent part, [ME. REV. STAT. ANN. tit. 4, § 1] provides:

> The Supreme Judicial Court shall have general administrative and supervisory authority over the judicial department and shall make and promulgate rules, regulations and orders governing the administration of the judicial department.

In pertinent part, [ME. REV. STAT. ANN. tit. 4, § 7] provides:

> [The Supreme Judicial Court] has general superintendence of all inferior courts for the prevention and correction or errors and abuses where the law does not expressly provide a remedy . . . .

Matter of Ross, 428 A.2d 858, 868 (Me. 1981).

6. Matter of Benoit, 487 A.2d 1158, 1171 n.20 (Me. 1985). *See also* Geiler v. Comm'n on Judicial Qualifications, 515 P.2d 1, 12 (Cal. 1973) (judge removed from office because of his pattern of judicial misconduct) ("[B]efore the advent of the Commission on Judicial Qualifications the bar of this state was held to a higher stan-

permanent investigatory body similar to that which monitors the conduct of the state's attorneys.[7] Through the adoption of the Code of Judicial Conduct and the establishment of the Committee on Judicial Responsibility, the Supreme Judicial Court told the public that judges, like other officers of the court, would be subject to the court's regulatory authority.[8] In an early judicial discipline opinion, the court emphasized that "it is essential for the efficient provision of even-handed justice for the people of Maine that this court have the power to sanction judges who violate the Code of Judicial Conduct."[9]

The court's early declaration of the need to effectively regulate its judges follows from the conclusion that judges should be bound to high standards, whether or not these standards have been codified into rules such as the Code of Judicial Conduct.[10] Consider two of a judge's roles in our adversarial system. As a decider of cases and controversies, a judge applies the rule of law as established by the people's representatives in the legislature or by the common law. As the authority presiding over a legal dispute, he is not to favor one particular litigant over another, and must afford opposing parties equal opportunity to be heard in court. In neither role does the judge have any sovereign power of his own—he derives his power exclusively from the people who, through either direct election or executive appointment, put him on the bench.[11]

Because the judge derives all his power from the people, he must reciprocate this trust by showing respect for the people. The courts must ensure that the right of the judge to perform duties he has been empowered to perform is balanced with the people's right to have the judge perform those duties only as the people have contem-

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dard of conduct than the bench. This anomaly has since been rectified and the reverse is now true.").

7. The Committee on Judicial Responsibility and Disability was established in 1978 by an order of the Supreme Judicial Court. Me. Rptr., 385-388 A.2d LX-LXII. The power of the court to establish the committee has been legislatively recognized. ME. REV. STAT. ANN. tit. 4, § 9-B (West 1989). For a discussion of the Committee, *see infra* part II.

8. "[T]he power of the Supreme Judicial Court to discipline judges for misconduct finds its source in the Constitution's grant of judicial power to the Court and in the legislative recognition of the power of the Supreme Judicial Court in [ME. REV. STAT. ANN. tit. 4, §§ 1, 7, 9-B]." Matter of Ross, 428 A.2d at 868.

9. Matter of Benoit, 487 A.2d at 1171.

10. The Supreme Judicial Court adopted the Maine Code of Judicial Conduct in 1974, giving it "the force of a Rule pursuant to the inherent power of [the] Court . . . ." Me. Rptr., 313-319 A.2d XXXVII. For more on the Code of Judicial Conduct, *see infra* part II.

11. The judge's power is regulated by the judicial branch. ME. CONST. art. VI, § I. Judicial officers are appointed by the governor subject to confirmation through the legislative process. ME. CONST. art. V, pt. 1, § 8. The governor and the Legislature are the elected enforcer and creators of the laws.

plated. In other words, a judge must operate in such a way that he is accountable to the people for his actions. The judge who holds himself accountable to those who empower him is the judge who is willing to respect not only the law, but other people as well.[12]

Furthermore, the need for judges to act in a way that commands the public's respect cannot be limited to a judge's role as a decider of cases and controversies. Judges conduct a court's affairs under the supposition that those before them should respect minimum standards of tolerable conduct—laws established by either a legislature or common-law jurisprudence. Given their authority to pass judgment on others, judges should themselves respect the highest standards of conduct.[13] Although the people cannot expect their judges to be beyond fault, in order to earn the public trust judges must be accountable for *all* their actions.[14] Judges themselves must be able to be judged, not only for what they say and do on the bench but for what they say and do away from it. Given the gravity of his obligations, a judge's conduct away from the eyes of the courtroom spectator must be susceptible to review, and given the acknowledged

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12. Independence of the judiciary is not inconsistent with accountability for judicial conduct. Lawless judicial conduct—the administration, in disregard of the law, of a personal brand of justice in which the judge becomes a law unto himself—is as threatening to the concept of government under law as is the loss of judicial independence. We see no conflict between judicial independence and judicial accountability. Indeed, a lack of judicial accountability may itself be the greatest danger to judicial independence.

Matter of Ross, 428 A.2d at 861.

13. *See, e.g.*, Matter of Kellam, 503 A.2d 1308 (Me. 1986), in which a judge was censured for his pattern of nonjudicial courtroom demeanor:

> Judge Kellam professes to believe that the present complaints arise out of his efforts to be helpful, accommodating and efficient within the constraints imposed by the judicial system. Such a paradox can only be explained by an abject failure to appreciate that the litigant has no understanding of the constraints as perceived by Judge Kellam. By announcing his actions rudely, brusquely and without explanation, he creates the impression of judicial arrogance and indifference. It is difficult to assess whether he intends to create that impression, but it is beyond dispute that he should recognize the result.

Id. at 1311-12.

14. This is reflected in Maine Code of Judicial Conduct Canon 2.

> **Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities.**
>
> A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
>
> B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Me. Rptr. 313-319 A.2d XXXIX [hereinafter Code of Judicial Conduct].

need for public confidence in the judiciary, even the appearance of impropriety should not go unexamined.[15]

When contemplating an example of judicial "impropriety," one might initially consider a serious and obvious violation of the law[16] or a flagrant abuse of the judicial office.[17] Perhaps less obvious is an instance where the judge, though neither engaging in illegal acts outside the courtroom nor seriously misapplying the law within it, demeans jurors with racial insults[18] or unfairly berates an attorney in the judge's chambers.[19] Clearly, a misapplication of the law might effect an unjust result in a case, and similarly, the impropriety of failing to meet high standards of judicial demeanor can severely weaken the confidence people place in the judiciary.[20]

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15. *Id.*

16. *See, e.g.*, Matter of Benoit, 487 A.2d at 1167, in which a District Court judge was found to have violated the Code of Judicial Conduct. A thirteen-year-old boy who had been arrested on a number of charges made his initial appearance in District Court before Judge Benoit. The judge advised the boy, who was unrepresented by counsel during the appearance, of his right to counsel in subsequent appearances, and then ordered the boy to be detained at the Maine Youth Center pending the adjudication hearing, then six weeks away. The Supreme Judicial Court concluded that:

> Judge Benoit's order detaining a juvenile for a period of nearly six weeks, before the boy had the assistance of counsel, and without the court's taking any evidence, ignored the most basic liberties and procedural requirements of the law. . . . By denying [the boy] his fundamental rights, Judge Benoit committed an error that was obvious and of a most serious nature.

Id.

17. *See, e.g.*, Matter of Cox, 553 A.2d 1255, 1256 (Me. 1989), in which a judge proposed to counsel the sentence he would impose on a particular defendant if the defendant were to forego a trial and enter a plea of guilty, and the more severe sentence the judge would impose if the defendant were tried and found guilty. Because "a judge [who] participates in the specifics of a plea negotiation . . . runs afoul of the fundamental values set forth in [the Code of Judicial Conduct]," *id.* at 1257, Judge Cox was reprimanded for his misconduct. *Id.* at 1258.

Some abuses of the judicial office border on the bizarre. *See, e.g.*, Matter of Perry, 385 N.Y.S.2d 589 (1976), in which a judge was removed from office. Displeased with the cup of coffee he had purchased from a street vendor outside his chambers, the judge had three law enforcement officers bring the vendor before him in his chambers, whereupon the vendor was handcuffed and excoriated for the quality of his product. Under oath before the Commission on Judicial Conduct, the judge lied about the incident. *Id.* at 590.

18. *See, e.g.*, Gonzalez v. Commission on Judicial Performance, 657 P.2d 372, 381-82 (Cal. 1983) (judge removed for his pattern of misconduct that included an inquiry, during the voir dire of a black grocery clerk, asking whether or not she knew the price of watermelon); Aldrich v. State Comm'n on Judicial Conduct, 447 N.E.2d 1276, 1278 (N.Y. 1983) ("his displays of vulgarity and racism and his threats of violence both on and off the Bench have 'resulted in [an] irretrievable loss of public confidence in his ability to properly carry out his judicial responsibilities' ") (alteration in original) (citation omitted).

19. *See, e.g.*, Matter of Del Rio, 256 N.W.2d 727, 750 (Mich. 1977) (judge suspended for pattern of misconduct that included berating an attorney for approximately one-half hour in the judge's chambers).

20. For a discussion of lapses in judicial demeanor in Maine, *see infra* part III.

Calling on judges to maintain the highest standards of conduct and to avoid appearances of impropriety, all fifty states and the District of Columbia have adopted rules governing judicial conduct.[21] These rules are for the most part based on the American Bar Association's Model Code of Judicial Conduct, which will be discussed below. Although these rules seek to provide ethical guidance for judges, it must be recognized that judges have an obligation to remain accountable to the people even absent these mandatory standards. The Model Code is simply an attempt to summarize the conduct to which judges must conform by virtue of the public trust reposed in them. Properly, the Model Code addresses what is and what is not appropriate judicial demeanor on and off the bench, with an acknowledgment that suitable appearances do indeed matter when the public's confidence in the judiciary is at stake.

This Note will discuss the judiciary's efforts to ensure that its judges preserve the respect of the people by remaining accountable for their actions. The Note will examine rules which reduce to writing unwritten norms of judicial conduct, such as the ABA's Model Code of Judicial Conduct, with particular attention to the rules that govern judicial demeanor. All rules, of course, need mechanisms through which they can be enforced. Accordingly, Maine's Committee on Judicial Responsibility and Disability will be reviewed as an example of a state judicial-conduct organization charged with enforcing its version of the Code. Having been charged with this responsibility, the Committee investigates and, when appropriate, refers disciplinary matters to the courts. The law of judicial discipline as it has developed in Maine will be discussed, and this Note will show how the court's most recent decision, *Matter of Hart*,[22] significantly departs from previous cases in its unwillingness to recognize the need to ensure that judges remain ultimately accountable to the people.

II. THE CODE OF JUDICIAL CONDUCT AND THE COMMITTEE ON JUDICIAL RESPONSIBILITY AND DISABILITY

Although the idea that judges must be accountable for their ac-

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For a collection of cases in which judges have been subject to disciplinary action for their intemperate language or conduct, see generally Annotation, *Disciplinary Action against Judge on Ground of Abusive or Intemperate Language or Conduct toward Attorneys, Court Personnel, or Parties to or Witnesses in Actions, and the Like*, 89 A.L.R. 4TH 278 (1991).

21. Forty-seven states have adopted rules based on the 1972 ABA Model Code of Judicial Conduct. Wisconsin deferred adoption of a revised version of the 1972 Code pending publication of the 1990 ABA Code of Judicial Conduct. In Montana and Rhode Island the 1924 Canons of Judicial Ethics are still in effect. M. Peter Moser, *The 1990 ABA Code of Judicial Conduct: A Model for the Future*, 4 GEO J LEGAL ETHICS 731, 731 n.3 (1991). *See infra* part II.

22. 577 A.2d 351 (Me. 1990).

tions is traceable throughout two hundred years of American jurisprudence,[23] it was only seventy years ago that tenets of proper judicial conduct were set to paper for judges to read and follow. At that time, however, the approach to standards of conduct seemed to reflect an attitude that judges were first independent, and only secondarily accountable. This is reflected in the first attempt to establish model standards, the American Bar Association's Canons of Judicial Conduct, which were adopted by the ABA in 1924.[24] These thirty-six Canons were intended to be a guide to proper judicial behavior rather than an enforceable set of rules;[25] consequently, judges tended not to regard these hortatory standards as actually binding.[26] In addition, during most of the time the Canons were in effect state courts were poorly equipped to review a complaint that a judge had engaged in improper conduct, primarily because there were not yet any independent commissions empowered to review such a complaint. Only a few states established any procedure through which judicial conduct could be reviewed, and in the early years these procedures were invariably very formal and governed by the state's highest court or the chief executive.[27] Generally, judicial ethics were a secondary concern. One commentator concurred by remarking: "Most judges, like most lawyers, appeared to believe they had their ethics well in hand."[28]

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23. In support of the proposition that people's rights can be protected only by an independent and vigorous judiciary, the Supreme Judicial Court in *Matter of Ross* cited THE FEDERALIST No. 78 (Alexander Hamilton): "The complete independence of the courts of justice is peculiarly essential in a limited Constitution." Matter of Ross, 428 A.2d at 861 n.3. This sentence, however, occurs in the context of an argument that Article III judges should sit for life and "hold their offices *during good behaviour* . . . ." THE FEDERALIST No. 78, at 522 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The full argument is that a free government depends on judges who serve on the courts long enough to develop, through "long and laborious study," a competent knowledge of the laws, thereby avoiding "arbitrary discretion in the courts." *Id.* at 529. Good behavior presupposes that judges should regulate their decisions by the fundamental laws, that is, the law of the people as declared in the Constitution. *Id.* at 525. Publius concludes:

> [A] temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified to conduct it with utility and dignity.

Id. at 530.

24. The first thirty-four Canons were adopted by the ABA in 1924. Canons 35 and 36 were adopted in 1937. AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES ix (1957).

25. Jeffrey M. Shaman, *Judicial Ethics*, 2 GEO. J. LEGAL ETHICS 1, 3 (1988) [hereinafter Shaman].

26. *Id.* (quoting Robert B. McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 UTAH L. REV. 391, 391).

27. *See infra* text accompanying notes 45-48.

28. Andrew L. Kaufman, *Judicial Ethics: The Less-Often Asked Questions*, 64

In 1972 the American Bar Association modified the purely aspirational language of the original Canons by enacting the Model Code of Judicial Conduct.[29] The terms of the new Code reflected both the prior confusion of judges unsure of the extent to which the Canons governed their conduct and a growing consensus in the legal community that the public should know that the judiciary was bound to ethical standards.[30] Although the Canons of Judicial Ethics provided a starting place for the new Code, the ABA's Committee in charge of drafting the Model Code carefully examined scores of other sources, including the codes of judicial conduct of several states, bills introduced in Congress to regulate the conduct of federal judges, and commentators' opinions.[31] To combat the original Canons' primary deficiency, the Committee took the position that the Code should establish mandatory standards.[32] Since 1972, the Model Code has been adopted, in whole or in good part, by Maine, forty-six other states, and the District of Columbia.[33]

Canon 1 of the Code of Judicial Conduct is the most important section of the Code. Recognizing that "[a]n independent and honorable judiciary is indispensable to justice in our society,"[34] Canon 1 states that "[a] judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved."[35] This language indicates that judicial independence can be maintained only if a judge is willing to respect accepted standards of conduct; by observing these high standards, he holds himself accountable to the people, and respects the law they have created for the judge to administer.[36] Although "[i]t is axiomatic that an independent and vigorous judiciary is essential as a bulwark to protect the right of our citizens,"[37] the independent judiciary must work *within* a system that respects the people's laws, not outside of the system. Otherwise, administration of the laws becomes merely the exercise of a personal brand of justice, producing a result that an "independent judiciary" was in the first instance supposed to

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WASH. L. REV. 851, 852 (1989).

29. MODEL CODE OF JUDICIAL CONDUCT (1972).

30. E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 45-48 (1973).

31. *Id.* at 42-43.

32. *Id.* at 43.

33. *See supra* note 21. Further references to the "Code of Judicial Conduct" will be to the Maine Code of Judicial Conduct, adopted in 1974, which in pertinent part duplicates the language of the ABA Model Code of Judicial Conduct. *See supra* note 10.

34. Code of Judicial Conduct Canon 1.

35. *Id.*

36. *See supra* note 23.

37. Matter of Ross, 428 A.2d at 861.

avoid.[38] In short, accountability is not a product of judicial independence—it is the foundation upon which judicial independence rests.[39]

Two sections of the Code specifically call upon judges to maintain proper judicial demeanor to comply with the mandate of Canon 1. Canon 2A insists that "[a] judge . . . should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,"[40] so that he may avoid impropriety and the appearance of impropriety in all his activities.[41] Consonant with the obligation to perform the duties of the judicial office impartially and diligently,[42] Canon 3 A(3) requires a judge to "be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity . . . ."[43] If a judge departs from either Canon 2A or Canon 3 A(3) he conveys the impression that he is unconcerned with maintaining the integrity of the judicial system, which in turn weakens public confidence in the courts. Since the Model Code contains mandatory standards that have been adopted by the majority of states, it has become part of the substantive law for judges in those jurisdictions. However, no substantive provision can command the respect of a rule of law if there is no mechanism through which it can be enforced; the Code "[can]not reach full potential in the absence of an effective system of procedures and penalties in each jurisdiction that adopts the *Code*."[44]

At the time the 1924 Canons were adopted, no jurisdiction had established procedures to review allegations of judicial misconduct. Originally, judicial misconduct was dealt with primarily through formal and cumbersome procedures conducted outside the judiciary.[45]

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38. *See infra* part III for a discussion of Maine cases in which this conclusion is supported. *See also* Matter of Barrett, 512 A.2d 1030, 1034 (Me. 1986):

> The fault in Judge Barrett's course of purposeful conduct in *Elmer E.* and *Brittany P.* does not lie alone in the months and years of delay that resulted; rather, the principal fault lies in the fact that he determinedly administered his own personal brand of justice, in plain and direct violation of the standards governing a judge's performance of his high responsibilities.

39. *See supra* note 12.

40. Code of Judicial Conduct Canon 2A.

41. Code of Judicial Conduct Canon 2.

42. Code of Judicial Conduct Canon 3.

43. Code of Judicial Conduct Canon 3 A(3).

44. E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 43 (1973).

45. Edward J. Schoenbaum, *A Historical Look at Judicial Discipline*, 54 CHI.-KENT L. REV. 1, 1-13 (1977) [hereinafter Schoenbaum]. Apart from "action by a permanent judicial disciplinary commission" (the standard mechanism for judicial discipline) and "removal by judicial action" (the standard in Europe—a body of judges sits ad hoc to address possible judicial misconduct), Schoenbaum identifies six other traditional methods of judicial discipline. These are "executive action" (chief executive or monarch removes the judge); "address" (legislature formally requests that the executive remove the judge); "impeachment" (legislature commences quasi-criminal

The only available sanction was removal, which was and is today an inappropriate response to most instances of judicial misconduct.[46] In the 1940s and 1950s, a few states established procedures to deal somewhat more effectively with instances or allegations of judicial misconduct.[47] New York went so far as to establish a special Court on the Judiciary, but this court could address misconduct only through the sanction of removal, and in any event was convened only twice in its first fifteen years.[48] The first *permanent* commission to handle investigations into judicial misconduct was established in California in 1960 under the authority of a popularly enacted amendment to the California constitution.[49] Following California's lead, all fifty states and the District of Columbia now have a judicial conduct organization which has the power to investigate allegations of judicial misconduct.[50]

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proceedings against the judge); "recall" (judge removed by a special vote of the electorate); "defeat at election"; and "bar association action." "[These methods] have been replaced for a variety of reasons, including the unfair nature of their procedures, prohibitive cost, ineffectiveness, and the limited nature of grounds for removal." *Id.* at 1-2.

46. Impeachment and address are too cumbersome and too severe to be the only sanctions available for judicial discipline. They are so difficult to effect that the other branches might be hesitant to undertake them. Especially is this so, since they can lead only to the ultimate sanction of removal, which will not be warranted in the vast majority of discipline cases . . . .

Matter of Benoit, 487 A.2d at 1171; *see* Shaman, *supra* note 25, at 10 (penalty of removal is "draconian").

47. Schoenbaum, *supra* note 45, at 17-18.

48. *Id.* at 17. The New York Court on the Judiciary was established by constitutional amendment in 1947. The Court could be convened by its chief judge, a presiding justice of the appellate division of the supreme court, or by a majority of the executive committee of the state Bar Association. Before the court was convened, notice of the charges was sent to the governor, the president of the Senate, and the speaker of the state assembly. If a member of the Legislature preferred that the same charges be heard by the Legislature itself, the judge was obligated to respond to the Legislature only, and not to the special court. The court did not have its first meeting until 1959; its second meeting was in 1962. *Id.*

49. *Id.* at 20. *See* CAL. CONST. art. VI, § 8, which in 1976 changed the name of the organization from the Commission on Judicial Qualifications to the Commission on Judicial Performance.

50. Shaman, *supra* note 25, at 11. There are essentially two types of judicial conduct organizations: one-tier and two-tier. In the one-tier model, such as California and Maine have, a state commission is charged with investigating allegations of judicial misconduct. This body reports its findings to the state's highest court. In a two-tier system, such as the one in Illinois, the investigating commission reports to another "Courts Commission," which has the power to independently find facts and issue sanctions. Both commissions are independent of the state's judicial system. The decisions of the Courts Commission are generally not appealable to the state's supreme court. *See generally* Frank Greenberg, *The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting*, 54 CHI.-KENT L. REV. 69 (1977); John H. Gillis and Elaine Fieldman, *Michigan's Unitary System of Judicial Discipline: A Comparison with Illinois' Two-Tier Approach*, 54 CHI.-KENT L. REV. 117 (1977).

As judicial conduct organizations came to be established, concern was voiced in the judiciary that these organizations might unjustifiably curtail a judge's discretion and independence.[51] One writer cautioned: "While means of judicial discipline must be available to protect the citizenry from abuse by biased and arbitrary judges, those sanctions must never be applied to preclude a judge from deciding cases in accordance with his understanding of the law and the dictates of his own conscience."[52] In response to this concern, states have tailored the powers of their organizations to balance judicial independence and judicial discipline. States that have adopted the Model Code explicitly recognize this concern for decisional independence in Canon 1, which calls for the preservation of an independent judiciary.[53] In fact, the Code provides no means by which the authority of a judge to make judicial decisions can be curtailed. The Code is not to be used to review a judge's lawful adjudications, and no state judicial conduct organization is authorized to serve what is an essentially appellate role.[54]

Pursuant to its inherent power to regulate the judiciary provided by the Maine Constitution, the Supreme Judicial Court created the Committee on Judicial Responsibility and Disability (the Committee) in 1978.[55] Seven persons sit on the Committee, including two active or active retired members of the judiciary, two members of the Maine Bar, and three members of the public.[56] Each member of the Committee is appointed by the Supreme Judicial Court for a six-year term; the public member and the attorneys are appointed upon recommendation of the Governor.[57] The court also appoints a chairperson for the Committee and four alternates who serve whenever a seated member of the Committee must recuse himself or is otherwise unable to participate in Committee actions.[58]

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51. *See* Shaman, *supra* note 25, at 8.

52. Schoenbaum, *supra* note 45, at 23.

53. *See supra* notes 34-35 and accompanying text.

54. Jeffrey Shaman, Director of the Center for Judicial Conduct Organizations at the American Judicature Society, suggests that

> the judicial disciplinary process can strengthen judicial independence by bolstering the principle that judges should not be liable to reprisal merely because their decisions are wrong or out of favor. Admittedly, there is a risk that this principle will not be faithfully observed and that discipline will be used improperly to encroach upon judicial independence. Thus far, however, in the approximately twenty-five year history of modern judicial discipline, that risk has come to fruition on only a few occasions.

Jeffrey M. Shaman, *State Judicial Conduct Organizations*, 76 KY. L.J. 811, 858 (1987-88).

55. *See supra* note 7.

56. Establishment of Committee on Judicial Responsibility and Disability, Me. Rptr., 385-388 A.2d LX.

57. *Id.*

58. Amendment of Order Establishing Committee on Judicial Responsibility and

Pursuant to authority granted by the court, the Committee receives complaints addressing the conduct of Maine judges.[59] Upon receiving a complaint, the Committee first examines whether or not the complaint falls within its jurisdiction.[60] If it does not, the complaint is dismissed and the complainant and the judge who was the subject of the complaint are notified of this decision. This procedure is also followed if it is determined that the complaint is unfounded or provides insufficient cause for proceeding on the matter.[61]

In addition, the Committee may seek the informal correction of a judge's conduct by bringing the conduct to the attention of the Chief Justice or another appropriate official of the judicial department. Such a recommendation "shall not necessarily preclude further action on the complaint."[62] If the Committee's investigation of a complaint leads it to conclude that the matter is within its authority and provides sufficient cause to merit further attention, the complaint is referred to the judge and a response from him is requested.[63] After the response is examined, either a majority of the Committee or the judge himself can request a hearing before the Committee.[64]

Disability, Me. Rptr., 479-487 A.2d XXXIX.

59. Establishment of Committee on Judicial Responsibility and Disability, Me. Rptr., 385-388 A.2d LXI.

60. *Rules of the Committee on Judicial Responsibility and Disability, reprinted in* MAINE RULES OF COURT at 522 (1991) [hereinafter *Rules*], Rule 1B. The Committee may also initiate an investigation of a matter within its authority on its own motion. *Id.* at Rule 1C.

61. *Id.* Rules 1B(ii)-(iii).

62. Amendment of Order Establishing Committee on Judicial Responsibility and Disability, Me. Rptr., 434-440 A.2d XXXVI.

63. *Rules, supra* note 60, Rule 1B(iii).

64. *Id.* Rule 2. Rule 2 extends to the judge various procedural safeguards, such as the right to have counsel present, the right to cross-examine witnesses, and due notice containing a statement of alleged misconduct including reference to any section of the Code of Judicial Conduct alleged to have been violated.

One of the thornier issues in the law of judicial discipline is the extent to which judges should be afforded traditional procedural safeguards when brought before a judicial conduct organization hearing. In Maine, the Committee is an investigating agency, not an adjudicatory one. One judge investigated by the Committee argued a denial of due process in that there were combined in the Committee investigative, adjudicative, and prosecutorial responsibilities. This challenge was dismissed by the Supreme Judicial Court, which held that since the court independently finds facts and draws conclusions of law, the Committee does not adjudicate—it merely files the official allegations against the judge in its report. Matter of Ross, 428 A.2d at 860-61.

The Supreme Judicial Court has compared the Committee to an investigatory agency similar to a grand jury in criminal proceedings. *Id.* at 860. A minority of courts characterize judicial disciplinary proceedings as "quasi-criminal," thus requiring the extension of due process protections available to criminal defendants. Jeffrey M. Shaman, *State Judicial Conduct Organizations*, 76 KY. L.J. 811, 836 (1987-88). However,

> [t]he most logical and enlightened approach to this question has been taken

The Committee's Rules instruct it to make findings of fact and draw conclusions of law.[65] In doing so, after the hearing the Committee must decide whether it is satisfied by a preponderance of the evidence that the judge has violated the Code of Judicial Conduct and that the violation is of such a serious nature as to warrant formal disciplinary action.[66] If the Committee indeed finds that serious misconduct has occurred, it reports its conclusions to the Supreme Judicial Court.[67] "The report of the Committee is nothing more than a charging document containing the Committee's allegations concerning the conduct of the [judge]. The burden is on the Committee to prove those allegations before the full Court."[68] The court then makes de novo findings of fact and conclusions of law; none of the factual findings in the report is given any deference.[69]

III. *Ross, Kellam,* and *Cox*: Judicial Demeanor Analyzed

Since its establishment in 1978 the Maine Committee has charged four judges with inappropriate judicial demeanor violative of the Code of Judicial Conduct and reported the matters to the Supreme Judicial Court. In three of these cases,[70] *Matter of Ross*,[71] *Matter of Kellam*,[72] and *Matter of Cox*,[73] the court determined that the respective judges' conduct violated the Code, that the Committee was authorized to bring the matter to the attention of the court, and

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by the Supreme Court of Washington. This court has held that, even though a judicial disciplinary proceeding is not criminal in nature, certain due process protections are required because of the potentially severe consequences to a judge. These include, according to the Washington high court, the right 1) to notice of the charge and the nature and the cause of the accusation in writing; 2) to notice, by name, of the person or persons who brought the complaint; 3) to appear and to defend in person or by counsel; 4) to testify on his own behalf; 5) to confront witnesses face to face; 6) to subpoena witnesses in his own behalf; 7) to be apprised of the intention to make the matter public; 8) to appear and to argue orally the merits of the holding of a pubic hearing; 9) to prepare and to present a defense; 10) to have a hearing within a reasonable time; and 11) to appeal.

Id. (citing Matter of Deming, 736 P.2d 639, 650 (Wash. 1987)).

In Maine, a hearing before the Committee will be open to the public if the judge so requests. Even if the judge does not request a public hearing, one will take place if a majority of the Committee requests it. Amendment of Order Establishing Committee on Judicial Responsibility and Disability, Me. Rptr., 467-478 A.2d XXIX.

65. *Rules, supra* note 60, Rule 2I.

66. *Id.* Rule 2H.

67. *Id.* Rule 2I.

68. Matter of Ross, 428 A.2d at 860.

69. Matter of Benoit, 487 A.2d at 1161 n.1.

70. The fourth case was Matter of Hart, 577 A.2d 351 (Me. 1990). *See infra* part IV.

71. 428 A.2d 858 (Me. 1981).

72. 503 A.2d 1308 (Me. 1986).

73. 532 A.2d 1017 (Me. 1987).

that this attention was warranted in light of the need to ensure that accountability would not be sacrificed in the name of judicial independence.

In *Matter of Ross*, Judge Ross of the Maine District Court was held to have violated Canon 3 A(3) of the Code of Judicial Conduct by "us[ing] abusive, intemperate, and vulgar language against persons before him."[74] In one instance, the judge responded angrily to a defendant who, outside the courtroom, had referred to the judge with a vulgar epithet. Remarking that "the Court did not relish the idea of being called a 'dink,' " the judge cautioned that "the Court could really be a 'dink,' " and promptly doubled the forfeiture that had been imposed on the defendant just a few minutes before.[75] On another occasion, allegations of sexual child abuse against a father had necessitated a protective custody hearing. Although there were only allegations against the father, the judge reproached him for his conduct in "language that he would understand loud and clear."[76] "[Judge Ross'] final remark was a French 'patois' which [he] translated . . . knowing[] that [the father] would get the message. . . . What emerges clearly is that the [judge] suggested to the individual before him that he should masturbate rather than sexually abuse his children."[77] The Supreme Judicial Court reiterated that this was a custody hearing; no charges against the individual were actually pending.[78]

Defending himself against the charge stemming from the second of these episodes, Judge Ross argued that the way in which he spoke to the individual was proper because of the need "to address him in such language that he would understand loud and clear."[79] The court strongly rejected the idea that a party's lack of education has any bearing on how he deserves to be treated in court, arguing that a judge must be accountable to all persons equally—otherwise, the people would feel as if "equal justice under law" were nothing more than a term of art. Addressing the premise that a judge should act in a way that reflects his status as the people's chosen conduit

74. Matter of Ross, 428 A.2d at 865.

75. *Id.* The defendant had admitted to possessing a usable amount of marijuana, a civil violation. Judge Ross imposed a forfeiture of $100. Outside the courtroom, the defendant vented his displeasure with the judge. A court officer reported the defendant's statements to the judge, including the words "f—ing dink." The judge recalled the defendant into the courtroom, whereupon he doubled the forfeiture. *Id.* at 862. The Supreme Judicial Court found that the increase in the forfeiture amounted to an illegal summary procedure in response to a criminal contempt not seen or heard by the judge, which must be prosecuted on notice and after hearing. Acting in this way, the judge "willfully disregarded the requirements of the law." *Id.*

76. *Id.* at 865. In his response to the Committee, Judge Ross remarked that the defendant "does not hold a Ph.D. in English." *Id.*

77. *Id.* at 865-66.

78. *Id.* at 866.

79. *Id.* at 865.

through which the law is administered, the court reminded the judge that when he "presides in court, he personifies the law, he represents the sovereign administering justice and his conduct must be worthy of the majesty and honor of that position. Language such as the [judge] used in both these cases degrades and diminishes the law . . . ."[80]

In *Ross* the court concluded that intemperate demeanor manifests the administration of a personal brand of justice.[81] Subsequently, in *Kellam*, the court observed that nonjudicial courtroom demeanor can directly and substantially interfere with the administration of justice.[82] District Court Judge Kellam was charged with violating the Code of Judicial Conduct through his pattern of impatient, undignified, and discourteous conduct, which took among its many forms brusqueness to litigants seeking the court's protection, telling witnesses he was not going to pay any attention to them, and ordering social workers to leave his courtroom in the course of a public proceeding.[83] Such conduct, said the court, amounted to the judge administering his own brand of justice, for the result of his actions was a denial of the opportunity to be fully heard in court.[84]

Judge Kellam defended his conduct by arguing that the need for administrative efficiency and the problems presented by litigants appearing in court without an attorney demanded the sort of behavior described above. The court rejected this notion, remarking that no desire to be "helpful, accommodating, and efficient"[85] can justify behavior that "creates the impression of judicial arrogance and indifference."[86] By saying so, the court reiterated two principles of judicial conduct initially advanced in *Ross*. First, a goal of administrative efficacy or ease, or a sincere belief that an action would better

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80. *Id.* at 866.

81. *Id.*

82. Matter of Kellam, 503 A.2d at 1311 ("We determine that, in the conduct reported herein, a reasonable person would find a lack of patience, dignity and courtesy in Judge Kellam's actions and would have reason to doubt that he was being accorded the 'full right to be heard according to the law.' ").

83. Illustrative of Judge Kellam's rudeness are his comments to persons seeking protection from abuse orders. To a husband who testified concerning death threats from his wife he remarked that "You're here, aren't you? She didn't kill you yet." To a wife petitioning for protection from abuse he asked "He hasn't changed since he met you, why did you marry him?" and "Why do you want me to do something about it now?" . . .

. . . He recessed hearings at inopportune times and occasionally expressed reluctance to hear the case at all. His interruption of witnesses and litigants in small claims cases sometimes prevented any understandable presentation of the facts. This conduct and the effect on the lay litigants was observed and testified to by third parties present in the courtroom at the time.

Id. at 1310.

84. Matter of Ross, 428 A.2d at 866.

85. Matter of Kellam, 503 A.2d at 1311.

86. *Id.* at 1312.

secure justice for all parties, cannot justify departures from the Code of Judicial Conduct, which establishes minimum standards of conduct and propriety.[87] Second, even the mere impression of judicial impropriety can lead an affected individual to doubt that judges are in fact accountable to the people they serve.[88] The admonition by the *Kellam* court raises a further question: What if the judge's conduct involves a lack of judgment not related to a matter pending before him? Or, in the alternative, what if this conduct occurs outside of the courtroom, perhaps in the privacy of the judge's chambers?

In *Matter of Cox*[89] the court concluded that qualifiers such as these cannot be used to distinguish between suitable judicial conduct and misconduct. District Court Judge Cox, displeased with the manner in which the police had handled his son's recent motor vehicle violation, called into his chambers the attorney representing his son and a police captain of the arresting police force. The police captain appeared regularly in the judge's court, managing his department's cases that were heard there. The judge expressed his irritation at the department's arrest of his son by shouting and swearing at the police captain. He went on to suggest that he might be unable to remain impartial in matters to be heard in court that morning involving the police captain's department.[90]

The court found that Judge Cox violated Canons 1, 2A, 2B, and 3 A(3) of the Code of Judicial Conduct.[91] The court particularly addressed the violation of Canon 2B, which forbids a judge from allowing his family relationships to influence his judicial conduct or judgment.[92] The judge did not in fact demonstrate any partiality in matters thereafter concerning the police department, nor did he take other steps to affect the aftermath of his son's arrest. However, the damage had been done, and the court was careful to note that the fact that persons outside the judge's chambers could hear the exchange was immaterial.[93] Canon 2 requires that a judge "conduct himself *at all times* in a manner that promotes confidence in the integrity and impartiality of the judiciary. . . . The Code's standard of conduct therefore applies to any incident or conversation, public

87. *See* Matter of Ross, 428 A.2d at 861: "[A]ny differences in style must always result in justice administered according to law and must be in accord with minimum standards of propriety. To establish such minimum standards of conduct and propriety, we promulgated the Code of Judicial Conduct in 1974."

88. *See supra* text accompanying notes 40-44.

89. Matter of Cox, 532 A.2d 1017 (Me. 1987).

90. *Id.* at 1017-18.

91. *Id.* at 1020.

92. *Id.* at 1019. *See supra* note 14 for the text of Canon 2B.

93. *Id.*

or private, that could constitute or create the appearance of impropriety."[94]

The court's interpretation of the Code in *Cox* is important because it demonstrates a willingness to hold judges to high standards of conduct outside the courtroom. The extension of the standards of conduct to any incident that could constitute impropriety goes beyond actions involving specifically judicial matters. The court is building here upon Canon 2, which demands judicious conduct in all the judge's activities, instead of Canon 3, which governs the duties of the judicial office. Thus, a judge can be found to have committed an impropriety even if his conduct is unrelated to a matter over which he is presiding, and even if the conduct takes place in private. To conclude otherwise would send a message to a judge that he needs to be concerned only with earning the public's trust when he sits on the bench within the public's eye. To say that a judge personifies the law only in an open court would reject the original premise that judges take their power from the people and are ultimately answerable to them.

One theme present in *Ross*, *Kellam*, and *Cox* is that the judge who fails to respect the dignity and integrity of those with whom he interacts cannot reasonably be expected to show the necessary respect for the laws he is to apply fairly and equally. Taken together, these cases conscientiously reflect the imperative of judicial accountability. However, in Maine's most recent judicial discipline matter, *Matter of Hart*,[95] the court turned its back on its progeny, raising the troubling possibility that these cases may lose much of their precedential authority.

IV. *MATTER OF HART*

A. Background

In *Matter of Hart*, the Committee charged Sagadahoc County Probate Judge Ronald Hart with violating a number of sections of the Code of Judicial Conduct, among them Canons 1, 2A, and 3 A(3).[96] The Supreme Judicial Court is an independent finder of facts in judicial discipline proceedings. In order to determine whether or not the *Hart* court reached "the appropriate legal conclusions, any analysis should begin with a review of the findings of fact."[97]

At issue in the case was Judge Hart's handling of a particular

94. *Id.*

95. Matter of Hart, 577 A.2d 351 (Me. 1990).

96. *Id.*

97. Matter of Ross, 428 A.2d at 860 ("[I]n [these] original proceeding[s] before the Supreme Judicial Court the Court would not be functioning as an appellate tribunal, would give no deference to the purported findings and conclusions of the Committee and would independently find the facts and reach the appropriate legal conclusions.").

matter with an attorney. The attorney had called the judge to request an expedited hearing on a motion for appointment of an interim trustee. The original trustee had died, and the attorney sought to have her client receive the appointment, pursuant to the client's instructions.[98]

The attorney called Judge Hart on August 12, 1988, to tell him that she would be filing a motion for appointment of an interim trustee. Having learned that Judge Hart recused himself in 1980 from different proceedings involving the decedent's estate out of which the trust arose, she asked if he would again be recusing himself.[99] Judge Hart indicated to her that he would not recuse himself unless there were cause to do so.[100]

Later that day, the attorney called the probate judge in Androscoggin County. She indicated to him that her client wanted a successor trustee appointed as soon as possible, and she asked if he could be available for a hearing if Judge Hart recused himself. He indicated that he would be available.[101] The Androscoggin County probate judge testified a year later before the Committee that the attorney had indicated to him that Hart might indeed have a conflict of interest.[102]

On August 16, 1988, the attorney filed two petitions with the Register of Probate in Sagadahoc County, which were received the next day. One was a "Verified Petition for Appointment of Interim Trustee and for Order Securing the Documents and Assets of the Trust" and the other was a "Petition for Transfer of Trust to Adjoining County."[103] In her cover letter, she asked the Register to "kindly bring these to the immediate attention of Judge Hart," adding that "[s]hould Judge Hart disqualify himself and grant the Petition for Transfer, Judge Raymond is available for a prompt hearing and immediate action on the Petition for Interim Trustee. Kindly advise if you or Judge Hart has any question."[104]

At this point, the attorney was aware that another party in the matter had filed a "Petition for Temporary and Permanent Appointment of Successor Trustee," and that Judge Hart had scheduled a hearing on this petition for September 6, 1988. All attorneys involved were asked to be present before the court.[105] In her cover letter of August 16th, however, the attorney also asked that her peti-

98. Matter of Hart, 577 A.2d at 352.
99. *Id.* at 352 n.4.
100. *Id.* at 352.
101. *Id.*
102. Appendix to Report to the Supreme Judicial Court Recommending Disciplinary Action, at A-356, Matter of Hart, 577 A.2d 351 (Me. 1990) (JUD-89-1) [hereinafter Record].
103. *Id.* at A-43 to A-48.
104. *Id.* at A-690.
105. *Id.* at A-689 to A-690.

tions be heard on an expedited basis. As she put it: "[T]he expense of securing the trust property at the rate of twenty-two ($22.00) dollars per *hour* and the facts set forth in the attached petitions will justify a preliminary hearing and action on the same prior to the September 6, 1988 hearing."[106] When she called the Register to check on the status of her petitions, she learned that Judge Hart had no plans to hear her petition at any time before the September 6 hearing.[107]

On August 19, the attorney called the Androscoggin County probate judge and told him that Judge Hart was unavailable until September 6. She asked him if he would hold an immediate hearing on the matter. He said that he would, and he agreed to meet with all parties involved on August 22. This judge then called the Register of Probate in Sagadahoc County to ascertain the status of the trust. Judge Hart called him back soon thereafter to discuss these recent developments.[108]

After this conversation, Judge Hart arranged a conference call with the attorneys representing parties in the case. After addressing the appointment of an interim trustee, Judge Hart then turned to the conduct of the attorney.[109] He testified:

> After I paused, I then said, "Ms. Farry, I'd like you to appear before me on September 6 at 8:30 in the morning to tell me why you lied to Judge Raymond." . . . [T]here was another pause, and she responded, "What do you mean by that?" . . . I said, "You think very carefully about what I've asked and be prepared to explain it to me when you come in on September 6."[110]

The attorney, Ms. Farry, recalled in her testimony that Judge Hart told her:

> "Ms. Farry, I want you to appear here on September 6—or to appear in this courtroom on September 6—to explain your lying and highly unethical conduct." . . . I believe I asked him what he meant by lying. . . . [H]e said, "Think about it and be here—just be here on September 6."[111]

Soon after the conference call, the attorney received phone calls from the other two attorneys in the matter, who expressed their concern about what they had heard during the conference call.[112] She also drafted a letter to Judge Hart and Judge Raymond in which she tried to explain her conduct.[113]

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106. *Id.* at A-690.
107. *Id.* at A-249 to A-250.
108. Matter of Hart, 577 A.2d at 352-53.
109. *Id.* at 353.
110. Record at A-208.
111. *Id.* at A-256 to A-257.
112. *Id.* at A-259 to A-260.
113. *Id.* at A-328 to A-329.

On Friday, August 26, 1988, the attorney filed two documents in the Sagadahoc County Probate Court. One was a "Notice of Removal" of the appointment proceedings to the Sagadahoc County Superior Court pursuant to Maine Rule of Probate Procedure 71A.[114] The second was a "Notice of Dismissal" of her petition to transfer the matter to the Androscoggin County Probate Court.[115] The following business day, the Sagadahoc County Register of Probate transferred the file to Superior Court pursuant to the "Notice of Removal."[116] Although the "Notice of Dismissal" purported to be voluntary pursuant to Maine Rule of Probate Procedure 41(a)(2),[117] Judge Hart treated the earlier petition to transfer as a probate proceeding rather than a civil proceeding,[118] and entered the following order on the bottom of the "Notice of Dismissal":

> 8/26/88
> Attorney Farry to be personally present before this Court, Tuesday, (8:30 a.m.) Sept. 6, 1988 to discuss further proceedings pursuant to 41(a)(1) M.[R.]P.P.
> /s/ Ronald A. Hart, Judge[119]

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114. Matter of Hart, 577 A.2d at 353. Me. R. Prob. P. 71A provides: "Any party to a civil proceeding may . . . remove the proceeding to the Superior Court in the county in which the Probate Court where the proceeding was commenced sits." *See also* ME. REV. STAT. ANN. tit. 18-A, § 7-201(a) (West 1989) ("The court has jurisdiction concurrent with the Superior Court of proceedings initiated by interested parties concerning the internal affairs of trusts.").

115. Matter of Hart, 577 A.2d at 353.

116. *Id.*

117. Me. R. Prob. P. 41(a) provides:

> **(a) Voluntary Dismissal; Effect Thereof.**
> (1) *Probate Proceedings.* No probate proceeding may be dismissed at the instance of the applicant or petitioner save upon the order of the court and upon such terms or conditions, including notice of a proposed dismissal to all interested persons, as the court deems proper. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.
> (2) *Civil Proceedings.* Rule 41(a) of the Maine Rules of Civil Procedure governs procedure in civil proceedings in the Probate Courts.

Compare Me. R. Prob. P. 41(a) *with* Me. R. Civ. P. 41(a), to which this Probate Rule refers: "[A]n action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . ."

118. Matter of Hart, 577 A.2d at 353.

119. Record at A-111. Judge Hart wrote this order to the attorney on her "Notice of Dismissal" of the motion to transfer the matter to the Androscoggin County Probate Court. The attorney had classified the appointment proceedings as a civil proceeding. The Probate Court has jurisdiction concurrent with the Superior Court of proceedings initiated by interested parties concerning the internal affairs of trusts, ME. REV. STAT. ANN. tit. 18-A, § 7-201 (West 1989); all proceedings in which the two courts have concurrent jurisdiction are "civil proceedings." Me. R. Prob. P. 2(b).

Rule 41(a) of the Civil Rules governs the procedure in civil proceedings in the probate courts. Me. R. Prob. P. 41(a)(2). Thus, the attorney thought her motion could be dismissed at any time—without order of the court—upon the filing of a notice of dismissal. *See* Me. R. Civ. P. 41(a)(1).

On the 6th of September, the attorney appeared as directed before Judge Hart in his chambers. In addition to the judge and the attorney, the Register of Probate and a court reporter were present. The proceeding began at 10:05 and lasted until 11:43, and was recorded in its entirety.[120] The transcript begins as follows:

> JUDGE HART: The next matter on the court's docket this morning is . . . Docket No. 84-223. Appearing in this court this morning is Attorney Rita M. Farry, . . . from Portland, Maine. Also present in the courtroom this morning is . . . the register of probate, and I am Judge Ronald A. Hart of the probate court.[121]

Throughout the proceeding, no one spoke except Judge Hart.[122] With exaggerated care and deliberation, he related his version of the attorney's conduct. Referring to himself as "the Court," the judge formally marked exhibits and entered them into the record on his own motions.[123] At one point he stated: "[The Court] . . . felt her conduct was [as] contemptuous, contumacious, insubordinate, obstructionist, and egregious as I have ever seen in the 20 years I have been here."[124] Noting that "[t]his court is of the opinion that Attorney Farry did practice gross fraud and deceit lying to [Judge Raymond]," he found probable violations of Rules 3.7(e)(1)(i), 3.1(e), 3.2(f)(4), 3.2(f)(3), 3.1(a), and 3.2(c)(2) of the Maine Bar Rules.[125]

Before he concluded the proceeding, Judge Hart addressed the fact that the attorney had filed a complaint with the Committee on Judicial Responsibility and Disability on August 30;[126] he noted that she had sent him a copy of the complaint.[127] He suggested that her removal of the proceeding to the Superior Court and her "intimidating complaint made to the Committee on Judicial Responsibility"[128] might have been an effort to avoid appearing before him.

> It may be noted that counsel unhappy with the decisions of [a court] . . . do not normally file complaints of judicial misconduct

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Judge Hart treated the appointment proceedings as a purely "probate" (and not a "civil") matter. Claiming authority under Me. R. Prob. P. 41(a)(1), in which probate proceedings may not be dismissed except upon order of the court, he entered the order reproduced in the text accompanying this note. As the Committee pointed out, however, the matter had been removed to Superior Court pursuant to Me. R. Civ. P. 71A, so there was no longer anything upon which the "Notice of Dismissal" could operate. Matter of Hart, 577 A.2d at 354. The court held that Judge Hart committed no ethical impropriety by conditioning his consent to the notice of dismissal upon the attorney's September 6 appearance. *See infra* note 134.

120. Matter of Hart, 577 A.2d at 353.
121. Record at A-633.
122. Matter of Hart, 577 A.2d at 353.
123. Record at A-642 to A-655.
124. *Id.* at A-651.
125. Matter of Hart, 577 A.2d at 353.
126. Record at A-652.
127. *Id.* at A-23 to A-28.
128. *Id.* at A-652.

> pending the resolution of the cases pending before this court and removed to the Sagadahoc County Superior Court before formal judgments are entered of a final nature, but Attorney Farry, for some unknown reason in her haste to obtain retribution against Judge Hart, felt for whatever reason that she had to act contrary to the majority of practitioners that practice competently and respectfully before the courts of this state. This court by statute has a seal and is a court of record. It has, pursuant to 4 M.R.S.A. 201, authority to punish for contempt of its authority.[129]

Judge Hart then concluded the proceeding by ordering the reporter to prepare a transcript, which would be filed with the Board of Overseers of the Bar.[130] The proceeding as transcribed spanned twenty-eight pages of recorded text.[131]

B. The Court Responds

After investigating the complaint filed by the attorney and holding a hearing on the matter, the Committee on Judicial Responsibility and Disability made its official report to the Supreme Judicial Court on December 1, 1989.[132] In its report, the Committee referred two charges to the court. Briefly stated, the charges were (1) that Judge Hart improperly ordered the attorney to appear before him for hearing by deliberately making a false statement on the face of the order, and (2) that his conduct at the hearing was unfair, undignified, and discourteous.[133] This Note will discuss the court's treatment of the second charge, which concerns nonjudicial demeanor and implicates Canons 1, 2A, and 3 A(3).[134]

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129. *Id.* at A-653.

130. Matter of Hart, 577 A.2d at 353-54.

131. Record at A-631 to A-661. The court reporter testified before the Committee that a transcript of this length would ordinarily be taken in one third of the time it in fact took during the September 6 proceeding. *Id.* at A-413 to A-415.

132. Matter of Hart, 577 A.2d at 351.

133. *Id.* at 352.

134. The theory of the Committee's first charge was that Judge Hart's order requiring the attorney to appear before him on September 6 was improper because the order was allegedly pretextual. *Id.* at 354. The order was allegedly pretextual because of:

> Judge Hart['s] misuse [of] his judicial office by deliberately entering a false order of the court, dated August 26, 1988, knowing at the time that it was false, by ordering the same attorney to appear before him to discuss issues that he then knew were not in controversy and in proceedings that had already been removed to the Superior Court and were no longer within his jurisdiction.

Record at A-8. Thus, according to the Committee, Judge Hart arguably entered the false order because he feared he might not have authority to express to the attorney his displeasure with her actions. In his testimony before the Committee, the Judge agreed that there were no longer any substantive issues to discuss with respect to the trust. Matter of Hart, 577 A.2d at 354.

In its opinion, the court ignored the gravamen of the Committee's charge. Without

In its report to the Supreme Judicial Court, the Committee charged that Judge Hart "failed to be courteous, patient, and dignified toward a person appearing before him in his judicial capacity, and failed to maintain the decorum that is required of a judge in judicial proceedings."[135] The position in which the attorney was placed was exacerbated by the fact that she had no opportunity at the September 6 hearing to explain her actions and had received no meaningful notice concerning which of her actions were to be called into question at the hearing. Such conduct, if confirmed as true by the court in its capacity as an original finder of facts, would clearly be violative of the law of judicial conduct as established in prior Maine cases and the Code. In earlier opinions the court had clearly stated that judges should hold themselves to the highest levels of dignified conduct, even if they believe that nonjudicial demeanor is justified by external considerations and even if they sincerely believe they are advancing the administration of justice.[136] In *Hart*, however, notwithstanding that it found all the allegations to be true, the court declared that Judge Hart had not committed any ethical violation warranting sanction by the court.[137]

Within the space of a single paragraph the court dismissed the second charge. The court granted that Judge Hart's conduct "may have resulted in discourtesy or unfairness,"[138] but held that "it does not rise to the level of seriousness contemplated by the rules governing judicial misconduct."[139] The court ignored its earlier admonitions that a judge is obliged to conduct his affairs, whether in court

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addressing whether Judge Hart abused his judicial power by entering an allegedly pretextual order, the court held that Judge Hart "committed no ethical impropriety by conditioning his consent to the 'Notice of Dismissal' on attorney Farry appearing on September 6 to discuss her conduct in the proceedings." *Id.*

The court came to this conclusion after "[n]oting the authority conferred upon [Judge Hart] by the Code of Judicial Conduct, as well as that provided by Me.R. Prob. P. 41(a)(1)." *Id.* The court remarked that Code of Judicial Conduct Canon 3 B(3), which states that "[a] judge should take or initiate appropriate disciplinary measures against a lawyer for unprofessional conduct of which the judge may become aware," gave Judge Hart "explicit authority to require attorney Farry to appear before him . . . ." Matter of Hart, 577 A.2d at 354. Nowhere does the Code suggest, however, that Canon 3 B(3) is a "supercanon" which authorizes a judge to do whatever he feels he must do to discipline a lawyer even if it results in an abuse of the judicial office. *See supra* notes 17-18. With this reading of the Code the court has concluded that the type of proceeding at issue in Charge 2 is "an appropriate disciplinary measure," and that the filing of an order that attempts to assert jurisdiction over a matter that is no longer before a court is justifiable. *But see* Matter of Ross, 428 A.2d at 867 ("[U]nder no circumstances may a desire for simplicity permit the entry of a false judgment.").

135. Record at A-8 to A-9.

136. *See supra* notes 74-88 and accompanying text.

137. Matter of Hart, 577 A.2d at 355.

138. *Id.*

139. *Id.*

or away from it, in a manner that is thoroughly dignified so that he may maintain the public's faith in the judiciary. The precedential authority of *Ross*, *Kellam*, and *Cox* suggests that when an allegation of discourtesy or unfairness is demonstrated to be true, there is a violation not only of the Code of Judicial Conduct but also of the very foundation upon which it rests—judicial accountability.

Instead, the court concluded that Judge Hart's actions did not "rise to the level of seriousness contemplated by the rule governing judicial misconduct . . . [and] emphasize[d] the following facts."[140] First, the court noted that the incident occurred in a "private setting" with only a few people present.[141] *Cox*, on the other hand, said that the distinction between a public and private setting was irrelevant.[142] Poor judicial conduct cannot be excused by any in-chambers expectation of privacy.

Second, the court noted that the judge did not raise his voice or use undignified language.[143] Neither was necessary to find a violation in *Kellam*—what the judge said in that matter was more important than how he said it.[144] The court necessarily has concluded that a one-hundred-minute berating of an attorney is acceptable judicial procedure.

Third, the opinion remarked that no pattern of misconduct was established here.[145] However, once was enough in *Cox*.[146] One might conclude from this remark that a pattern of misconduct must be established before the court will find an ethical violation, no matter how serious the one-time breach of trust might be.

Finally, the court said that the judge had an obligation to address instances of "perceived attorney misconduct."[147] This is irrelevant, of course, since the issue in the case was the *manner* in which the judge proceeded. The court's statement suggests as well that a judge can act in any way he pleases as long as he can justify his action by a perceived need to control what happens in his courtroom. This fourth assertion by the court is extremely troubling for it implies that a judge is free to violate the Code when "necessary," allowing the judge to evade the Rules at will and routinely escape the full obligation of accountability.

V. *HART*'S AFTERMATH: LOSING SIGHT OF JUDICIAL ACCOUNTABILITY

Apart from the departure from precedent manifested in *Hart*, the

140. *Id.*
141. *Id.*
142. *See supra* notes 91-94 and accompanying text.
143. Matter of Hart, 577 A.2d at 355.
144. *See supra* notes 82-86 and accompanying text.
145. Matter of Hart, 577 A.2d at 355.
146. *See supra* notes 89-90 and accompanying text.
147. Matter of Hart, 577 A.2d at 355.

decision has two important ramifications. First, the court sent a message to the Committee which might discourage it from vigorously investigating allegations of judicial misconduct in the future. The court concluded its opinion with what amounted to a rebuke: "In conclusion, we note that the Rules governing judicial misconduct confer upon the Committee the authority to prosecute only those instances of judicial misconduct that exceed in *seriousness the mistakes and frailties of the ordinary judge.*"[148]

The court cited no authority for this interpretation of the Rules, and in fact there is no Rule which authorizes only the type of prosecutions suggested by the court. If anything, the Committee Rules explicitly contemplate that any investigation which does proceed to a hearing before the Committee will be referred to the court only if the misconduct is deemed to be of a "serious nature."[149]

Committee Rule 2(H)(i) is the Rule that comes closest to expressing the standard implied in the court's admonition: "After hearing a matter, the Committee shall decide whether it is satisfied by a preponderance of the evidence that . . . the judge has violated the Code of Judicial Conduct and that the violation is of such a serious nature as to warrant formal disciplinary action . . . ."[150] The Committee does not have the power to proceed on a complaint that is "unfounded or frivolous or otherwise provides insufficient cause for proceeding,"[151] and has been granted the power to contact a judge "to seek informal correction of any judicial conduct or practice which the Committee determines may create an appearance of judicial misconduct."[152]

Thus, had the Committee not sincerely believed that Judge Hart's misconduct was sufficiently serious to merit further investigation and a referral to the court, it would not have completed the investigation, proceeded through hearing, and reported the matter to the court. Although the court is an independent finder of fact in judicial discipline proceedings, it should have accorded more respect to the findings of the Committee, who in good faith and after due deliberation referred this "sufficiently serious" matter to its attention. One commentator has noted that state judicial conduct organizations err on the side of leniency, which helps judges maintain their independence and ensures that judicial discipline proceedings will be referred only if the ethical violations are sufficiently serious.[153]

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148. *Id.* (emphasis supplied).

149. *Rules, supra* note 60, Rule 2(H)(i).

150. *Id.*

151. *Id.* at Rule 1B(iii).

152. Amendment of Order Establishing Committee on Judicial Responsibility and Disability, Me. Rptr., 434-440 A.2d XXXVI.

153. Although the system tries to strike a perfect balance between fairness to judges and enforcement of standards, it errs on the side of leniency. Judges may be warned to abide by "high standards of conduct" and to lead lives

Second, the court also appeared to indicate that it will be willing to condemn an instance of judicial misconduct only if the misconduct is particularly egregious or insubordinate. This attitude is at odds with the purpose of the Code of Judicial Conduct, which is to promote the integrity and independence of the judiciary by ensuring that judges observe high standards of conduct. To say that Judge Hart "committed no ethical violations warranting sanction"[154] implies that there were violations of the Code in this case but they simply were not important enough to address by a formal sanction. A worse message could not be sent by the court to Maine's citizens. The disposition in this case lost sight of the premise that judges hold their offices through the grace of the people, and it is to the people that judges must be accountable.[155] By allowing a judge to escape even an admonition that his conduct was improper, the court tells the public that there are some ethical violations that simply do not call judicial accountability into question. This notion—that judges can administer their own brand of justice—severely damages the confidence people have in the most important officer of the courts. To prevent further damage, the Supreme Judicial Court must reaffirm in its next judicial discipline decision the principles of judicial accountability it once considered so important to the fundamental concept of government under law.

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above reproach, but these and other goals are unenforceable because too much enforcement would impair both judicial discretion and judges' privacy rights. Accordingly, those who enforce the lofty goals apply a sense of reasonableness in determining whether a judge engaged in misconduct. The gray areas make for stimulating discussions in a law school setting but generally are avoided by the Commission.

Gerald Stern, *Is Judicial Discipline in New York State a Threat to Judicial Independence?*, 7 PACE L. REV. 291, 386-87 (1987).

154. Matter of Hart, 577 A.2d at 355.

155. The purpose of sanctions in cases of judicial discipline, as in cases of lawyer discipline, is not vengeance or retribution. Those concepts have no place in a disciplinary system designed to assure the orderly administration of justice in the public interest. Any sanction must be designed to preserve the integrity and independence of the judiciary and to restore and reaffirm the public confidence in the administration of justice. Any sanction must be designed to announce publicly our recognition that there has been misconduct; it must be sufficient to deter the individual being sanctioned from engaging in such conduct and to prevent others from engaging in similar misconduct in the future. Thus, we discipline a judge to instruct the public and all judges, ourselves included, of the importance of the function performed by judges in a free society. We discipline a judge to reassure the public that judicial misconduct is neither permitted nor condoned. We discipline a judge to reassure the public that the judiciary of this state is dedicated to the principle that ours is a government of laws and not of men.

Matter of Ross, 428 A.2d at 858, 868-69 (Me. 1981).