Judges as Lawyers

Deirdre M. Smith*

Abstract

The integrity of the American legal system and, thereby, of our democracy rests on the shoulders of the judiciary. It is widely understood that the roles of jurist and advocate are incompatible and that the fairness and legitimacy of our court systems require maintaining clear boundaries between those roles. Accordingly, an essential feature of every state's judicial conduct code is a prohibition on the practice of law by judges. However, many states have carved out exceptions to this prohibition to allow part-time judges sitting in low-level trial courts to supplement their modest judicial compensation by practicing law. The rationale for these exceptions neither cancels nor addresses the problems inherent in allowing judges to practice law. Rather, the real-world impact of the exceptions to the prohibition underscores the importance of the default restriction on law practice by judges. At a minimum, permitting the existence of lawyer-judges gives rise to potential conflicts and practical challenges. Other consequences are more unsettling, as when a person holding both roles uses their judicial authority to benefit a private client or to gain other personal advantage. Aside from the potential impact of the dual role in particular cases, such permission creates awkwardness and uncertainty for the attorneys, judges, and litigants with whom the lawyer-judges interact, thereby undermining public confidence in the courts in which they appear as attorneys and sit as judges. Conversely, full-time judges, who do not have their attention, interests, and responsibilities divided by maintaining a separate law practice, can immerse fully in their judicial role. States that continue to allow law practice by judges should amend their respective judicial codes of conduct and, as needed, restructure their judiciary to eliminate any reliance on part-time judges. Such long overdue reforms are essential to protecting our courts, the litigants who appear before them, and the integrity and fairness of our justice system.

Keywords judges, judicial ethics, professional ethics, access to justice, courts, court systems, part-time judges, court reform

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INTRODUCTION

The integrity of the American legal system rests on the shoulders of the judiciary. For this reason, every jurisdiction in the United States has enacted a rigorous set of regulations on judicial conduct that are strictly enforced.[1] One of the essential features of every state's judicial conduct code is a prohibition on the practice of law by judges, as the roles of jurist and advocate are widely understood to be incompatible.[2] Most states, however, have carved out exceptions to this prohibition and allow certain judges to maintain their law practice.[3] Such exemptions do not stem from reasoning that, in certain contexts, the incompatibility of roles is not present or less problematic. The rationale for them is purely practical: to enable the jurisdiction to maintain part-time judgeships, most commonly in low-level trial courts.[4] These jurisdictions maintain that such judges must be allowed to supplement their modest judicial compensation and that, for legally trained judges,[5] this means they must be able to practice law.[6] This necessity rationale, however, neither cancels nor addresses the problems inherent in allowing judges to practice law. Indeed, the real-world impact of the exceptions underscores the importance of the default restriction on such practice.

The complications that can result from allowing judges to practice law are exemplified in a minor guardianship case handled under my supervision in our law school's legal aid clinic. In a matter pending in a county probate court, we were appointed to represent the child's mother. The attorney for the guardianship petitioners, the child's paternal grandparents, was also a candidate for the office of probate judge for the court in which our case was pending.[7] The election took place a few months into the case, and the opposing attorney won.[8] Because he was now also the probate judge, and only one probate judge sits in each Maine county, our case had to be transferred to another county,[9] requiring additional

1. *See infra* notes 29–125 and accompanying text.

2. *See infra* notes 57–124 and accompanying text.

3. *See infra* notes 182–201 and accompanying text.

4. *See infra* notes 126–39, 182–91 and accompanying text.

5. Not all judges have law degrees. In fact, the U.S. judiciary consisted predominantly of laypeople in the Colonial Era, and the transition to a requirement for legally trained judges did not gain hold until the nineteenth century. Today, 32 states continue to permit non-lawyer judges in certain low-level courts. *See* Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1296–1301, 1311 (2022).

6. *See infra* notes 126–39, 182–91 and accompanying text.

7. Daniel Hartill, *Dubois Challenges Klein-Golden for Androscoggin County Judge of Probate*, SUN JOURNAL (Oct. 18, 2012), https://www.sunjournal.com/2012/10/18/dubois-challenges-klein-golden-androscoggin-county-judge-probate/ [https://perma.cc/7GE8-7ZJG].

8. *Michael L. Dubois*, BALLOTPEDIA (Aug. 15, 2023), https://ballotpedia.org/Michael_L._Dubois [https://perma.cc/YB76-CA8F].

9. Guardianship of Gabriel I.K. Johnson, 98 A.3d 1023, 1025 n.2 (Me. 2014); *see* ME. REV. STAT. ANN. tit. 18-C, § 1-303(3) (West 2023).

travel for all parties, including our low-income client, the witnesses, and her counsel.

The consequences of this person's double role, however, were not only financial and practical, but, as in other cases, went to the heart of judicial integrity. Although the opposing attorney was a sitting judge, he was able to maintain his law practice without restrictions and continued to represent the child's paternal grandparents in the matter for several months. During this time, as he acknowledged, he attended probate judge meetings with the judge who was presiding over our case, meetings at which matters of procedure and substantive law were discussed. The opposing attorney eventually withdrew from our case, shortly before the final testimonial hearing, and another attorney represented his former clients. Soon thereafter, in a separate matter but with significant implications for our client, this lawyer-judge entered his appearance as counsel for the child's father and filed a motion to reduce the parental rights of our client in the Maine District Court in the same county where he was sitting as probate judge.[10] Our client, the child's mother, lost her case in the guardianship matter in the probate court.[11]

Our client and her clinic counsel were distressed to have a sitting judge as the opposing counsel in the two cases. The clinic was distressed to be obliged to practice before a judge who was also our opposing counsel and who appeared as our adversary both in matters before another probate judge and also in matters before District Court judges in a courthouse just a few miles from the one where he sat as judge.[12] Given the exemption in place, however, there was no basis, not even a due process challenge, on which our client and her counsel could object to this lawyer-judge's participation in both cases.[13] Because he sat as a part-time judge in a county probate court, everything that he did was permissible under Maine law and the state's code of judicial conduct.[14]

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10. Guardianship of Gabriel I.K. Johnson, 98 A.3d at 1026. After this case resolved, the Maine Legislature enacted provisions to prevent the simultaneous litigation of matters involving children in the Probate and District Courts. *See* ME. REV. STAT. ANN. tit. 4, § 152(5-A).

11. Guardianship of Gabriel I.K. Johnson, 98 A.3d at 1027. The guardianship order was affirmed on appeal. *Id.* at 1030–31. The parties reached a negotiated agreement in the District Court matter, and the guardianship order was vacated by the Probate Court soon thereafter.

12. Another Maine attorney recounted a contentious case in which her opposing counsel was a sitting probate judge. She found it "awkward" and "uncomfortable" because she would be appearing before that judge, and she did not want to "anger him in a way that could affect a future client." Samantha Hogan, *Vulnerable People May Be at Risk in Maine's Part-Time Probate Courts*, THE MAINE MONITOR (June 4, 2023), https://themainemonitor.org/vulnerable-people-may-be-at-risk-in-maines-part-time-probate-courts/ [https://perma.cc/5RBW-2FCQ].

13. *In re* Estate of McCormick, 765 A.2d. 552, 558–59 (Me. 2001); *see infra* notes 295–96 and accompanying text.

14. *See* ME. REV. STAT. ANN. tit. 4, § 307 (West 2023) (establishing process for transfer of cases to other probate courts if a probate judge has a conflict of interest, including through their law practice); *see also* ME. CODE OF JUD. CONDUCT, Part II (Coverage and Effective Date) § 1(B)(2) (2015) (exempting Maine probate judges from the restriction on practicing law).

This Article will examine and critique the rules and laws that permit some judges to practice law.[15] Part I reviews the history, rationale, and enforcement of the broad prohibition on law practice by judges.[16] In Part II, I survey contemporary examples of exceptions to this prohibition in states where they exist.[17] I also discuss where and why states today continue to use part-time judges.[18] Specifically, I note that these judgeships are found almost exclusively in low-level trial courts, where geographic or case-type jurisdictions may be too limited to justify full-time judges. The litigants in these under-resourced courts are generally low-income, from marginalized communities, and appear without counsel.[19]

In Part III, I examine the impact of permitting persons to have dual roles as both sitting judge and practicing lawyer and provide examples of the issues that arise when lawyer-judges straddle both roles.[20] In addition to the myriad potential conflicts and practical challenges posed by the practice, many of its consequences are ethically unsettling, as when lawyer-judges use their judicial authority to benefit a private client or for other kinds of personal advantage.[21] Most broadly, lawyer-judges create unease and uncertainty for the attorneys, judges, and litigants with whom they interact, thereby undermining public confidence in the courts in which they appear as counsel and sit as judges.

The basic reason for a broad default restriction on the practice of law by judges is compelling: the clear boundary between the two roles preserves the integrity and legitimacy of our court systems.[22] The practical reasons offered for allowing exceptions to the restriction ignore that fundamental rationale, and efforts to mitigate the many problems that result from overriding it fall short of doing so. Permitting lawyer-judges exemplifies the diminished justice tolerated in low-level trial courts. Moreover, in fact, no state needs to have part-time judges. While limited jurisdiction courts may have offered advantages at one time, innovations in technology, transportation, and court organization over the past half century render their existence outdated and the traditional reasons for maintaining them obsolete.[23] Thus, the necessity rationale for permitting judges to practice law is without basis.

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15. The American Bar Association's *Model Code of Judicial Conduct* defines a judge as "anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative judiciary." MODEL CODE OF JUD. CONDUCT application I(B) (2020) [hereinafter MODEL CODE]. This Article will focus primarily on the practice of law by judges who preside in state and federal courts, rather than administrative agencies.

16. *See infra* notes 28–124 and accompanying text.

17. *See infra* notes 182–208 and accompanying text.

18. *See infra* notes 150–81 and accompanying text.

19. *See infra* notes 155–59 and accompanying text.

20. *See infra* notes 209–312 and accompanying text.

21. *See infra* notes 262–72 and accompanying text.

22. *See infra* notes 56–124 and accompanying text.

23. *See infra* notes 336–39 and accompanying text.

To maintain the well-reasoned boundary between the two roles, the practice of law by sitting judges must end. As I explain in Part IV, this will require action both by the legal profession and by policymakers in the individual states. Approaching the hundredth anniversary of its leadership position in promoting judicial ethics,[24] the American Bar Association ("ABA") should amend its *Model Code of Judicial Conduct* ("*Model Code*") to reverse its present sanction of the practice of law by certain categories of judges.[25] States that continue to allow such practice should amend their respective judicial codes of conduct and, as needed, restructure their judiciary to eliminate any reliance on part-time judges.[26] Such long overdue reforms are essential to protecting our courts, the litigants who appear before them, and the integrity of our justice system.

I. WHY PROHIBIT JUDGES FROM PRACTICING LAW?

Prohibitions on the practice of law have long been a core feature of American judicial ethics, pre-dating the earliest written rules or guidelines for judicial conduct. This Part will provide a brief history of the regulation of judges' "off-the-bench" activities, including the practice of law. It will also discuss the origins and rationale of the ABA's model judicial conduct provisions, including current Model Code Rule 3.10 prohibiting the practice of law by judges.[27] Finally, this Part will demonstrate states' commonly strict enforcement of this prohibition through their discipline of judges who violate it.

A. THE REGULATION OF JUDGES' CONDUCT

Regulating judicial conduct has long been regarded as essential to the protection of our democracy and its legal system. The U.S. Supreme Court observed:

> Courts, in our system, elaborate principles of law in the course of resolving disputes. The power and the prerogative of a court to perform this function rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order.[28]

The Court also noted that judicial codes of conduct "serve to maintain the integrity of the judiciary and the rule of law. . . . This is a vital state interest."[29] While the Court acknowledged that "[t]he concept of public confidence in judicial integrity does not easily reduce to precise definition, nor does it lend itself to

24. *See generally* CANONS OF JUD. ETHICS (1924) [hereinafter 1924 CANONS].
25. MODEL CODE application.
26. *See infra* notes 332–89 and accompanying text.
27. MODEL CODE R. 3.10.
28. Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).
29. Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 889 (2009).

proof by documentary record," it also stressed that the concept is "genuine and compelling."[30] That emphasis is reflected in the *Model Code* as well.

The Preamble to the current version of the *Model Code* reiterates those foundational values and the rationale for regulating judicial conduct:

> [1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.
>
> [2] Judges should maintain the dignity of judicial office at all times and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.[31]

Similarly, the 1990 edition of the *Model Code* ("*1990 Model Code*") emphasizes the importance of judges' adherence to ethical standards notwithstanding their independence:

> Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.[32]

A high value has always been placed on public confidence in the U.S. judiciary. The Judiciary Act of 1798 created the oath for federal judges, which included the pledge to carry out their judicial duties "faithfully and impartially."[33] In the early nineteenth century, Chief Justice John Marshall noted in an address: "A judge [] must 'observe the utmost fairness,' striving to be 'perfectly and completely independent, with nothing to influence or control him but God and his conscience.'"[34] Nevertheless, judges' conduct was not broadly and formally

30. Williams-Yulee v. Fla. Bar, 575 U.S. 443, 447 (2015).

31. MODEL CODE pmbl.

32. MODEL CODE OF JUD. CONDUCT, Canon 1, cmt. (1990) [hereinafter 1990 MODEL CODE].

33. Judiciary Act of 1789, ch. 20, § 8, 1 STAT. 73, 76 (codified as amended at 28 U.S.C. § 453 (2023)).

34. *Address of John Marshall*, *in* PROCEEDINGS AND DEBATES OF THE VIRGINIA STATE CONVENTION OF 1829–1830, 616 (1830), *quoted in* Williams-Yulee, 575 U.S. at 447.

regulated until the latter half of the twentieth century.[35] Prior to the advent of state judicial conduct commissions in the 1960s, the primary forms of discipline were impeachment, address, and recall.[36] However, because they were cumbersome and time-consuming procedures, they were rarely used.[37]

Calls for judicial conduct guidelines arose in the early twentieth century in response to a high-profile scandal. At the time, the only widely recognized "rule" of judicial conduct was that judges were to render impartial decisions, and there was no "body of literature dealing with judicial ethics" as such.[38] In the wake of the notorious "Black Sox" scandal regarding the Chicago baseball team, the bar raised questions about the appointment of a federal judge to serve as the new baseball commissioner.[39] The question was whether such a commissioner could remain on the bench.[40] The Committee on Judicial Ethics, overseen at the time by Chief Justice William Howard Taft, developed guidelines issued by the ABA in 1924 as the *Canons of Judicial Ethics* ("*1924 Canons*").[41]

The *1924 Canons,* considered to be the first U.S. judicial code of ethics, consisted of thirty-six provisions "that included both generalized, hortatory admonitions and specific rules of proscribed conduct."[42] Although some states adopted them as such, they were not drafted as a set of enforceable rules that could be a basis for judicial discipline.[43] Rather, they were intended to serve as a "guide and reminder to the judiciary and for the enlightenment of others."[44] The *1924 Canons* represented the ABA's initial venture into the realm of judicial conduct regulation, and it quickly established itself as the "driving force in judicial

35. STEVEN LUBET, BEYOND REPROACH: ETHICAL RESTRICTIONS ON THE EXTRAJUDICIAL ACTIVITIES OF STATE AND FEDERAL JUDGES vii (1984).

36. *Id.*

37. *Id.*

38. RAYMOND J. MCKOSKI, JUDGES IN STREET CLOTHES: ACTING ETHICALLY OFF-THE-BENCH 9 (2017). The expectation that judges would adhere to a standard of impartiality can be traced to the Roman Code of Justinian, which permitted a party to request recusal of a judge "under suspicion." M. Margaret McKeown, *Politics and Judicial Ethics: A Historical Perspective*, YALE L.J. FORUM 190, 191–92 (2021).

39. McKeown, *supra* note 38, at 192.

40. *Id.* Judge Kenesaw Mountain Landis ultimately relinquished his judicial appointment to serve as Commissioner rather than holding both positions. *Id.* at 192. *See also* MCKOSKI, *supra* note 38, at 10–12.

41. 1924 CANONS; ARTHUR GARWIN, DENNIS ALAN RENDLEMAN & MARY T. MCDERMOTT, ANNOTATED MODEL CODE OF JUD. CONDUCT 2 (3d ed. 2016); McKeown, *supra* note 38, at 193.

42. CHARLES GARDNER GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT vii (2009). In a 1969 Formal Ethics Opinion on the "personal, social and business activities of judges," the ABA Commission on Professional Ethics described the *1924 Canons* as follows:

> They are the American Bar Association's considered judgment of appropriate 'principles which should judge the personal practices of members of the judiciary and the administration of their office.' They are suggested as a 'proper guide and reminder for judges and as indicating what people have a right to expect from them.' Some courts have formally adopted them as law. In other courts they are simply statements of what responsible lawyers believe should be the standards of ethical propriety for their judges.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 322 (1969).

43. GEYH & HODES, *supra* note 42, at vii.

44. *Final Report and Proposed Canons of Judicial Ethics*, 9 A.B.A. J. 449, 449 (1923).

ethics," a role it has maintained for nearly one hundred years.[45] Its first code of ethics remained in place with only modest revisions for nearly fifty subsequent years.[46]

The 1960s marked the start of a new era for the regulation of judicial conduct with the increasing adoption of enforceable codes of conduct and the creation of judicial discipline commissions situated within state court systems.[47] In 1972, the ABA replaced the *1924 Canons* with the first *Model Code of Judicial Conduct* ("*1972 Model Code*").[48] The *1924 Canons* had been criticized as mere "moral posturing," "more hortatory than helpful in providing firm guidance for the solution of difficult questions."[49] By contrast, the *1972 Model Code* included not only a series of canons, but also specific rules to enforce them and, for certain rules, interpretive commentary.[50] It was "designed to be enforceable and was intended to preserve the integrity and independence of the judiciary."[51]

The *1972 Model Code* was revised and restructured by the ABA in 1990 and again in 2007, with amendments to each version, most recently in 2010.[52] By 2008, all states had adopted a code of judicial conduct based on one of the ABA's *Model Codes*, usually with some variations.[53] In 1973, the federal judiciary adopted a *Code of Judicial Conduct for U.S. Judges* for all federal courts below the U.S. Supreme Court.[54] Although it did so in response to ethics controversies involving Supreme Court Justices, those Justices, as has been widely reported and criticized in recent months, have only recently been subject to a code of conduct, the enforceability of which is uncertain and questionable.[55]

B. PROHIBITION OF THE PRACTICE OF LAW IN THE ABA JUDICIAL CANONS AND MODEL CODES OF JUDICIAL CONDUCT

Although judicial conduct has been subject to enforceable ethics rules only for the last half-century, practicing law while serving as a judge has long been seen

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45. MCKOSKI, *supra* note 38, at 7.

46. GEYH & HODES, *supra* note 42, at vii.

47. LUBET, *supra* note 35, at vii; CHARLES GARDNER GEYH, JAMES J. ALFINI & JAMES J. SAMPLE, JUDICIAL CONDUCT AND ETHICS, *Preface*, § 1.05 (6th ed. 2020).

48. MODEL CODE OF JUD. CONDUCT (1972) [hereinafter 1972 MODEL CODE]; GARWIN ET AL., *supra* note 41, at 2. The ABA also promulgated *Model Rules for Judicial Disciplinary Enforcement* in 1994. MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT (2018).

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

50. LISA L. MILORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE at 7 (1992).

51. 2011 MODEL CODE preface, at xi.

52. MODEL CODE preface, at x-xi.

53. GEYH ET AL., *supra* note 47, § 1.03.

54. CODE OF CONDUCT FOR U.S. JUDGES (2019); McKeown, *supra* note 38, at 195–96.

55. CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (2023). *See* GEYH ET AL., *supra* note 47, at § 1.03 n.20; Ann E. Marimow & Robert Barnes, *Deep Divide at Supreme Court Ethics Hearing, Despite Some GOP Calls for Action*, WASH. POST (May 2, 2023), https://www.washingtonpost.com/politics/2023/05/02/senate-supreme-court-ethics-hearing/ [https://perma.cc/T6ZL-XBVY].

as incompatible with the office and, even prior to the promulgation of judicial codes of conduct, restricted in most jurisdictions.[56] Such law practice is one of the many forms of off-the-bench conduct specifically limited by judicial ethics regulations.[57] General restrictions on extrajudicial activities are readily justified on several grounds. Major ones include maintaining public confidence in the fairness of the legal system and the impartiality of the judiciary, as well as ensuring that judges are not distracted from their role and function.[58] Such limitations also ensure that judges do not engage in the "collateral misuse of the judicial office" by taking advantage of their "position and title in order to advance" their own interests.[59]

The ABA included restrictions on the practice of law by judges in the *1924 Canons* and in each edition of the *Model Code*. The *1924 Canons* reflected the view that "the only way to maintain public confidence in the judicial system was to ensure that judges did nothing in their professional or personal lives to taint the ideal image of the neutral magistrate."[60] Canon 4 urged judges not only to avoid "impropriety and the appearance of impropriety" in their judicial duties but also to conduct their lives "beyond reproach."[61]

Canon 31, titled "Private Law Practice," was typical of the ambiguous and hortatory phrasing of the *1924 Canons*. It noted that states had taken somewhat different approaches to the prohibition on law practice by judges, depending on the type of court on which the judge sat, and it offered some bright lines to follow.[62] "In superior courts of general jurisdiction," Canon 31 provided, "[the practice of law] should never be permitted."[63] In language that was more descriptive than normative, however, it observed that some states permitted law practice by judges in their "inferior courts . . . because the county or municipality is not able to pay adequate living compensation for a competent judge."[64] The Canon cautioned that a judge in this situation "is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success."[65] It also provided that, where law practice by judges is permitted, a judge "should not practice in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy."[66] The fundamental incompatibility of the roles of

56. *See infra* notes 60–94 and accompanying text.
57. LUBET, *supra* note 35, at 21–22.
58. *Id.* at 5–6.
59. *Id.* at 6.
60. MCKOSKI, *supra* note 38, at 2.
61. 1924 CANONS Canon 4.
62. 1924 CANONS Canon 31.
63. 1924 CANONS Canon 31.
64. 1924 CANONS Canon 31.
65. 1924 CANONS Canon 31.
66. 1924 CANONS Canon 31. *But see* ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 161 (1936) (opining that "special judges" who serve when a "regular judge" is unable to act are not prohibited from

sitting judge and practicing lawyer is implicitly recognized here, as are the potential impacts of blurring the boundaries between them.

The origins and rationales of limitations on the practice of law such as those in the *1924 Canons* are described in a 1962 *Iowa Law Review* article analyzing restrictions on the extrajudicial activities of judges.[67] As noted by the unnamed author of the article, the "incompatibility rule," which prohibits a public officer from holding multiple "incompatible" offices, originated in common law.[68] The author also noted that the rule was traditionally applied to limit a judge from holding another office, such as sheriff, tax collector, city attorney, or mayor.[69] When the rule was replaced by statutory and constitutional limitations on judges' off-the-bench roles, nearly every jurisdiction included express prohibitions or limitations on the practice of law.[70] The restriction on practicing in their own court specifically ensured that a judge would not be put in the position of ruling on "his own acts performed in his capacity as an attorney or counselor at law."[71]

The author of the law review article offered several rationales for the long-standing prohibition of law practice by judges, for example:

> Any lawyer who works diligently on a case will probably develop at least a subconscious partiality in favor of the position he must argue for his client. There is always a danger that his partiality will extend beyond the immediate case to the general questions of law involved in the litigation. Clearly, a judge should not be allowed to subject himself to this risk.[72]

Another reason for the prohibition is the "inevitable influence [] judges have among the lawyers who practice before them, and among their colleagues," which could confer "an unfairly advantageous position" on the judge when in the role of attorney.[73] Such an advantage, the author noted, could also provide the lawyer-judge an edge in the competition for clients with other attorneys.[74] At the same time, because their lack of infallibility could be seen from their law practice, where they lost cases or chose unsuccessful strategies, respect for the lawyer-judge while in their judicial role could be diminished.[75] The author concluded that the "most persuasive" reason to prohibit the practice of law by judges

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practicing law in any court in the state, including the one in which "he at times presides[,]" but the judges should "refrain from acting in one capacity in any matter concerning which he has acted directly or indirectly in th[e] other and scrupulously avoid conduct whereby he utilizes or seems to utilize his judicial service to further his professional success").

67. Note, *Extrajudicial Activities of Judges*, 47 IOWA L. REV. 1026, 1042 (1962).

68. *Id.* at 1026 n.5.

69. *Id.*

70. *See id.* at 1027–28, 1035. Some of these statutes permitted practice in courts other than the one on which the judge sat or in other locations.

71. *Id.* at 1036.

72. *Id.* at 1037.

73. *Id.*

74. *Id.*

75. *Id.*

is "the fear that a judge might devote too much of his time to private practice and too little to the duties of his public office if he is allowed to maintain a practice" because "[t]he age-old problem of crowded court calendars places a premium on the amount of time a judge can devote to his judicial duties."[76]

Designed to be an enforceable set of rules, the *1972 Model Code* included language regarding the practice of law that was more direct than that of the *1924 Canons*. Canon 5 of the *1972 Model Code* stated: "A judge should regulate his extra-judicial activities to minimize the risk of conflict with his judicial duties."[77] Although phrased with precatory language, one of the enforceable rules that followed this canon, Rule F, "The Practice of Law," provided simply: "A judge should not practice law."[78] As has been observed, the prohibition was "so widely accepted and so little challenged" that, unlike most of the other rules, no commentary followed.[79] Professor Steven Lubet has summarized its status and rationale as follows:

> This rule is not controversial. It is axiomatic that a judge should not be permitted to appear as an advocate in his or her own court, as this would shatter the appearance of impartiality. Furthermore, the appearance by one judge as an advocate in the court of another unfailingly will give rise to charges of reciprocal favoritism.[80]

As discussed below in Part II, the *1972 Model Code* and the editions that followed included a carveout for certain judges. That exception, however, was located not in the prohibitory rule itself, as it had been in the *1924 Canons*, but in a separate provision addressing the applicability of that restriction to, among others, part-time judges.[81]

In the revised *Model Code* the ABA adopted in 1990, judges' extra-judicial activities were addressed in Canon 4, where the prohibition on the practice of law included explicitly prohibitory language as well as modest exceptions and commentary.[82] Canon 4(G) stated: "A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family."[83] The Commentary clarified that the prohibition extended only to a judge

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76. *Id.*

77. 1972 MODEL CODE Canon 5.

78. 1972 MODEL CODE Canon 5(F).

79. Steven Lubet, *Regulation of Judges' Business and Financial Activities*, 37 EMORY L.J. 1, 30 (1988); MILORD, *supra* note 50, at 125.

80. LUBET, *supra* note 35, at 22.

81. *See infra* notes 126–38 and accompanying text.

82. 1990 MODEL CODE Canon 4.

83. 1990 MODEL CODE Canon 4(G). In its "Terminology" section, the *1990 Model Code* defined "member of the judge's family" as "a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship." *Id.* at 68.

acting "in a representative capacity."[84] Even when acting on their own behalf in a legal matter, "the judge must not abuse the prestige of office to advance the interests of the judge or the judge's family."[85] The Commentary also noted certain limitations of the exception for assisting one's family: the judge could not receive compensation and must not "act as an advocate or negotiator" on behalf of the relative.[86]

In the current *Model Code*, extrajudicial activities are addressed in the rules following Canon 3, which states that a judge "shall conduct the judge's personal and extrajudicial activities to minimize the risk of conflict with the obligations of judicial office."[87] Among those is Rule 3.10, "Practice of Law," which is substantially similar to the language of the 1990 Model Code, but with clearer phrasing of the limited exception for assisting family members: "A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as the family member's lawyer in any forum." [88]

The ABA has never attempted to define "practice law" in its canons or model codes. The drafters evidently assumed that the term would be interpreted and applied in each jurisdiction in accordance with "common law development" reflected in the jurisdiction's "decisions, ethics opinions, and local practices."[89] The term has been interpreted to include legal work beyond appearing in court, such as drafting contracts, wills, and other documents.[90] Professor Lubet has urged that concerning the practice of law, "any ambiguity should be resolved against the permissibility of the activity."[91] He reasons that any form of legal work could be the subject of litigation at some point, and rendering "even non-litigation services" would create the appearance that the judge's "assistance was sought in order to exploit the judicial position."[92] For this reason, "an abundance of caution is justified in order to maintain public confidence" in the judiciary.[93]

Several other provisions in the *Model Code* indirectly address the practice of law by judges. Canon 1 generally requires judges to "uphold and promote the independence, integrity, and impartiality of the judiciary, and . . . avoid impropriety and the appearance of impropriety."[94] Several specific rules implicate the practice of law

84. 1990 MODEL CODE Canon 4(G), Commentary.
85. *Id.*
86. *Id.*
87. MODEL CODE Canon 3.
88. MODEL CODE R. 3.10 ("A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's families, but is prohibited from serving as the family members lawyer in any forum."). The revised language reflects the limitation on assistance for a family member that was noted in the commentary to 1990 *Model Code* Canon 4G.
89. GEYH ET AL., *supra* note 47, at § 7.09[1].
90. *Id.*
91. LUBET, *supra* note 35, at 22.
92. Lubet, *supra* note 79, at 33.
93. LUBET, *supra* note 35, at 22.
94. MODEL CODE Canon 1.

as well, such as Promoting Confidence in the Judiciary (Rule 1.2), Avoiding Abuse of the Prestige of Judicial Office (Rule 1.3), Giving Precedence to the Duties of Judicial Office (Rule 2.1), Impartiality and Fairness (Rule 2.2), External Influences on Judicial Conduct (Rule 2.4), Ex Parte Communications (Rule 2.9), Disqualification (Rule 2.11), Appointments to Governmental Positions (Rule 3.4), Appointments to Fiduciary Positions (Rule 3.8), Service as Arbitrator or Mediator (Rule 3.9), Financial, Business, or Remunerative Activities (3.11), and Compensation for Extra Judicial Activities (3.12).[95] Maintaining a law practice could cause a judge to violate the text or the spirit of any of these rules.

The ABA has issued few formal or informal opinions addressing judges practicing law and, as will be discussed in Part IV, those that do have largely concerned problems arising when part-time judges are allowed to do so.[96] A formal opinion addressing a *former* judge's improper promotion of his law practice underscored the importance of the broad prohibition on law practice by current judges.[97] Specifically, a former judge may not have the telephone to their law office answered with "Judge X's office," may not sign documents using the title of "Judge," may not include the title of "Judge" on a nameplate or letterhead, and may not encourage others to refer to them with that title.[98] The reasons for such restrictions are explained in Formal Opinion 95-391:

> We believe that the use of the title "Judge" in legal communications and pleadings, as well as on a law office nameplate or letterhead, is misleading insofar as it is likely to create an unjustified expectation about the results a lawyer can achieve and to exaggerate the influence the lawyer may be able to wield. In fact, there appears to be no reason for such use of the title other than to create such an expectation or to gain an unfair advantage over an opponent. Moreover, the use of judicial honorifics to refer to a lawyer may in fact give his client an unfair advantage over his opponents, particularly in the courtroom before a jury.[99]

Clearly, as will be discussed in Part III, the risks are far greater when *current* judges are permitted to practice law.

C. STATE AND FEDERAL RESTRICTIONS ON THE PRACTICE OF LAW BY JUDGES

Every U.S. jurisdiction prohibits the practice of law by full-time judges, regardless of whether the work is *pro bono* or compensated.[100] As noted earlier,

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95. MODEL CODE R. 1.2, 1.3, 2.1, 2.2, 2.4, 2.9, 2.11, 3.4, 3.8, 3.9, 3.11, 3.12.

96. *See infra* notes 214–35 and accompanying text. The ABA has also interpreted the prohibition on law practice to apply to federal administrative judges. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 86-1522 (1986).

97. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-391 (1995).

98. *Id*. at 1.

99. *Id*. at 2.

100. Lubet, *supra* note 79, at 30.

these longstanding prohibitions pre-date the judicial codes of conduct.[101] In addition to their place in the ethics codes adopted by each state and the federal courts, the prohibitions may appear in statutes[102] or state constitutions as well.[103] Some state laws go so far as to make the practice of law by a judge a misdemeanor or subject to a fine.[104] The practice of law by federal judges constitutes a "high

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101. GEYH ET AL., *supra* note 47, at § 7.09[1]. *See also* Note, *supra* note 67, at 1039; *see generally* Michael A. Rosenhouse, Annotation, *Validity and Application of State Statute Prohibiting Judge From Practicing* Law, 17 A.L.R.4th 829 (1982); B. Finberg, Annotation, *Propriety and Permissibility of Judge Engaging in Practice of Law*, 89 A.L.R.2d 886 (1963) ("Usually, by virtue of a constitutional or statutory provision, a judge of a court of record is prohibited from practicing law.").

102. *See, e.g.*, 28 U.S.C. § 455 (addressing recusal by federal judges); IOWA CODE ANN. § 602.1604 (West 2023) ("While holding office, a supreme court justice, court of appeals judge, district judge, or district associate judge shall not practice as an attorney or counselor or give advice in relation to any action pending or about to be brought in any of the courts of the state."); MASS. GEN. LAWS ANN. ch. 211B, § 4 (West 2022) ("The justices of the trial court shall devote their entire time during business hours to their respective duties and shall not, directly or indirectly, engage in the practice of law."); MONT. CODE ANN. § 3-1-601 (West 2023) ("[A] justice or judge of a court of record or clerk of any court may not practice law in any court in this state or act as attorney, agent, or solicitor in the prosecution of any claim or application for lands, pensions, or patent rights or other proceedings before any department of the state or general government or any court of the United States during the justice's or judge's continuance in office.") (also prohibited from estate work); MISS. CODE. ANN. § 23-15-975 (West 2023) ("All such justices and judges [of the Supreme Court, Court of Appeals, and all circuit judges, chancellors, county court judges and family court judges] shall be full-time positions and such justices and judges shall not engage in the practice of law before any court, administrative agency or other judicial or quasi-judicial forum except as provided by law for finalizing pending cases after election to judicial office."); 8 R.I. GEN. LAWS ANN. § 8-3-1 (West 2023) ("A justice of the supreme court, of the superior court, and of the family court shall devote full time to his or her judicial duties. He or she shall not practice law while holding office nor shall he or she be a partner or associate of any person in the practice of law.").

103. *See, e.g.*, ARIZ. CONST. art. VI, § 28 ("No justice or judge of any court of record shall practice law during his continuance in office."); FLA. CONST. art. V, § 13(a) ("All justices and judges shall devote full time to their judicial duties. A justice or judge shall not engage in the practice of law or hold office in any political party."); HAW. CONST. art. VI, § 3 ("No justice or judge shall, during the term of office, engage in the practice of law, or run for or hold any other office or position of profit under the United States, the State or its political subdivisions."); KY. CONST. § 123 ("During his term of office, no justice of the Supreme Court or judge of the Court of Appeals, Circuit Court or District Court shall engage in the practice of law, or run for elective office other than judicial office, or hold any office in a political party or organization."); NEB. CONST. art. V, § 14 ("No judge of the Supreme or district courts shall act as attorney or counsellor at law in any manner whatsoever. No judge shall practice law in any court in any matter arising in or growing out of any proceedings in his own court."); N.Y. CONST. art. VI, § 20 ("A judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of a county court, judge of the surrogate's court, judge of the family court or judge of a court for the city of New York established pursuant to section fifteen of this article who is elected or appointed after the effective date of this article may not . . . engage in the practice of law, act as an arbitrator, referee or compensated mediator in any action or proceeding or matter or engage in the conduct of any other profession or business which interferes with the performance of his or her judicial duties."); WASH. CONST. art. IV, § 19 ("No judge of a court of record shall practice law in any court of this state during his continuance in office."); W. VA. CONST. art. VIII, § 7 ("No justice of the supreme court of appeals or judge of an intermediate appellate court or of a circuit court shall practice the profession of law during the term of his office."). Of course, judges must follow laws of general applicability, including constitutional provisions and anti-discrimination statutes. Some states repealed their constitutional provisions addressing judicial conduct, including a prohibition on the practice of law, when they enacted a judicial conduct code. *See, e.g.*, CALIF. CONST. art. VI, § 18 (amended Nov. 8, 1994, by Prop. 190. Res. Ch. 111, 1994) (operative Mar. 1, 1995); ARK. CONST. amend. LXXX, § 22.

104. ALA. CODE § 34-3-11 ("Any judge of a court of record in this state who practices law in any of the courts of this state, or of the United States, or who renders any professional services or gives any legal advice,

misdemeanor" and, therefore, a clear basis for impeachment.[105] Prior to the adoption of the codes of judicial conduct, some state supreme courts exercised their inherent supervisory authority to hold that even in the absence of a specific statutory or constitutional prohibition, law practice is incompatible with holding judicial office.[106]

In 1939, the Criminal Court of Appeals of Oklahoma, applying both statutory and case law, held that a judge may not practice law and noted that one of the aims of such prohibitions is to "separate the judge personally, as well as officially, from all that manner of life so calculated to destroy impartiality of judgment and balance of temper which may, and does sometimes, influence the lawyer."[107] The prohibition, it noted, recognizes that "the known official position of the judge, and the general confidence reposed in the judge by the masses, is such as to make his words and actions of far greater weight than the words of men occupying a merely private or professional situation."[108]

Given the universality of the prohibition on the practice of law and the emphatic language often used to describe its rationale, it is unsurprising that violations of such restrictions are considered serious breaches of ethics and a basis for removal from office[109] or other disciplinary action.[110] Such disciplinary actions include a public reprimand if the judge left the judicial position before the misconduct investigation concluded and, therefore, could not be removed.[111] Courts have imposed discipline for violations by respected jurists and have done so even

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must on conviction be fined in such sum as the jury or court trying the same may assess, not less than $100 nor more than $1,000."); MISS. CODE. ANN. § 9-1-25 (West 2023) (violation is high misdemeanor and basis for removal from office); NEB. REV. STAT. ANN. § 7-111 (West 2023) (violation is a Class V misdemeanor).

105. 28 U.S.C. § 454 (2023) ("Any justice or judge appointed under the authority of the United States who engages in the practice of law is guilty of a high misdemeanor.").

106. *See, e.g.*, Bassi v. Langloss, 174 N.E.2d 190, 194–95 (Ill. 1961) ("[T]he practice of law by an attorney during his tenure as county judge, in or out of court, directly or indirectly, is incompatible with his judicial responsibilities and duties and contrary to public policy."); Perry v. Bush, 35 So. 225, 226 (Fla. 1903) ("The line of demarkation [sic] between cases where such appearance might be proper or improper would often be so nebulous that the only safe course to pursue to insure the occupancy by the judiciary of a position above suspicion or reproach is to forbid such appearance in toto.").

107. Dickson v. State, 94 P.2d 258, 261 (Okla. Crim. App. 1939) (applying 5 OKLA. ST. ANN. § 1).

108. *Id.*

109. *See, e.g.*, *In re* Turner, 76 So.3d 898, 910 (Fla. 2011) (other charges contributed to removal); *In re* Henson, 913 So.2d 579, 594 (Fla. 2005); Jud. Discipline & Disability Comm. v. Thompson, 16 S.W.3d 212, 226 (Ark. 2000); Miss. Comm'n on Jud. Perf. v. Jenkins, 725 So.2d 162, 170 (Miss. 1998); Matter of Moynihan, 604 N.E.2d 136, 137 (N.Y. Ct. App. 1992); Harris v. State Comm'n on Judicial Conduct, 437 N. E.2d 1125, 1126 (N.Y. Ct. App. 1982) (removal order was also based on finding that part-time judge allowed other part-time judges of same court to appear before him); Matter of Intemann, 540 N.E.2d 236, 236–38 (N.Y. 1989).

110. *See, e.g.*, Ohio State Bar Ass'n v. Gibson, 377 N.E.2d 751, 752 (1978) (public reprimand); *In re* Van Susteren, 262 N.W.2d 133, 140 (Wis. 1978) (public reprimand); *In re* Hammons, 484 N.W.2d 401, 402 (Mich. 1992) (public censure).

111. *See, e.g.*, *In re* Grenz, 534 N.W.2d. 816, 821 (N.D. 1995) (public censure of former judge who had been not re-elected); *In re* Fleischman, 933 P.2d 563, 570 (Ariz. 1997) (noting that "public censure may not be adequate, it is nevertheless the sanction left to us under the circumstances" because the judge had left office and therefore could not be suspended or removed from office, and imposing the sanction of public censure "in terms as firm and clear as the court can express").

in the absence of evidence that the practice of law had a specific adverse impact on a judge's exercise of their judicial functions.[112] In some cases, however, the findings revealed that the judge intentionally used the judicial position to gain an advantage as an advocate.[113]

Courts and commissions of judicial conduct or ethics generally interpret the phrase "practice law" broadly, as Professor Lubet has urged.[114] For example, the Supreme Court of Arizona has interpreted legal practice to consist of "those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries," even if the activity, such as engaging in contract negotiations, is also performed by non-lawyers.[115] Similarly, the Alabama Judiciary Inquiry Commission issued an advisory opinion stating that a judge may not engage in "paralegal[-]type" work for another attorney.[116]

The prohibition on law practice by judges has been the basis for discipline even where the judge received no compensation for performing legal work. As observed by the Wisconsin Supreme Court, the point of the prohibition is to avoid eroding public confidence in the impartiality of the judiciary, a risk that would remain even if the legal services were rendered on a gratuitous basis.[117] The prohibition can also serve as a basis for motions to disqualify attorneys in specific cases. The Court of Criminal Appeals of Tennessee held that failure to raise such an argument earlier would not result in a waiver, reasoning: "To allow a sitting judge to participate in a trial or otherwise continue to represent a defendant in blatant violation of [the prohibition on law practice by judges] would be inherently prejudicial to the judicial process."[118]

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112. *In re* Fleischman, 933 P.2d at 570 ("Acceptable judicial performance by a judge . . . does not excuse or mitigate blatant violations of the Code.").

113. *See, e.g.*, *Jenkins*, 725 So.2d at 167 (finding that the judge "used his unique position as a judge" for the benefit of a business, including acting on its behalf in lease negotiations).

114. *See, e.g.*, *In re* Grenz, 534 N.W.2d. at 820 (N.D. 1995) ("Although it is not easy to define acting as an attorney or counselor at law under all circumstances, the drafting of legal instruments on behalf of others meets the definition" even if it was done in judge's capacity as a board member and he did not receive any personal financial gain); *In re* Chow, Stipulation and Order of Admonishment, No. 95-2066-F-59 (Wash. 1996) (judge briefly appeared at motion in family matter involving his sister-in-law).

115. *In re* Fleischman, 933 P.2d at 567–68.

116. Ala. Jud. Inq. Comm'n Jud. Ethics, Op. 92-459, 1992 WL 12659974, at *2.

117. The court reasoned:

> "To hold that rendering legal services on a gratuitous basis is not a violation would serve to promote the consequences which the code seeks to avoid; the act of giving legal advice will erode the public confidence in the judiciary as effectively without the passage of remuneration as it will with remuneration."

In re Van Susteren, 262 N.W.2d 133, 140 (Wis. 1978); *see also In re* Schwerzmann, 408 N.Y.S.2d 187, 188 (N.Y. Ct. Jud. 1978) (ordering surrogate judge to cease providing free legal help to individuals because "[t]he practice of a judicial officer making himself available on a regular and continuing basis to provide information, advice or guidance in legal matters and holding himself out as being so available is one that is neither appropriate nor proper for a judicial officer to engage in").

118. State v. Lipford, 67 S.W.3d 79, 84 (Tenn. Crim. App. 2001) (reversing trial court's ruling denying a motion to disqualify a defense attorney who was a full-time municipal court judge where the judge's representation violated state judicial conduct code prohibition on practicing law).

The existence of a strict and broad prohibition on the practice of law can give rise to questions and difficulties for attorneys who transition from the role of lawyer to judge, as such persons must ensure they completely sever ties with former clients and firms[119] or face discipline for the failure to do so.[120] Unlike simple retirement from law practice, in these cases there is no "rule of completion."[121] This means that soon-to-be-judges must withdraw entirely from all legal matters in which they have a role, regardless of the status of the matter, and that care must be taken when a judge receives fees for work performed as an attorney.[122] Some states grant newly elected judges a "wind up" period of time to complete or transfer open cases,[123] but such grace periods are strictly limited and enforced.[124]

II. WHY ALLOW JUDGES TO PRACTICE LAW?

Although judicial ethics restrictions have historically and uniformly prohibited the practice of law by judges, many jurisdictions have also carved out exceptions to such prohibitions, as reflected in the ABA's current and prior model codes. As discussed in this Part, such exceptions are commonly based only on practical reasons relating to judges' compensation: because judges who serve on a part-time basis or who are otherwise receiving only modest compensation for their judicial work must be able to make a living, they are permitted to maintain a law practice on the side. However, as also discussed in this Part, the driving force behind such exceptions is the reliance on and perpetuation of the existence of part-time judges; and this usually occurs in court systems where, due to a court's limited geographic or subject matter jurisdiction, there is either not enough work or insufficient resources to maintain a full-time position. While some jurisdictions impose modest or obvious limitations on these judges' practices, such as not

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119. GEYH ET AL., *supra* note 47, at § 7.09[3]; Cynthia Gray, *So You're Going to Be a Judge*, 52 COURT REV. 80, 83 (2016); Lubet, *supra* note 79, at 34; Candice Goldstein, *Becoming a Judge: Problems with Leaving a Law Practice*, 69 JUDICATOR 89, 89–90 (1984).

120. *See, e.g.*, Jud. Discipline & Disability Comm'n v. Thompson, 16 S.W.3d 212, 227 (Ark. 2000) (removing circuit court judge for continuing to work on a personal injury matter until its completion after assuming judicial office); *In re* Piper, 534 P.2d 159, 166–167 (Or. 1975) (reprimanding circuit court judge for continuing to work on estate matters for several years after assuming judicial office).

121. GEYH ET AL., *supra* note 47, at § 7.09[3].

122. *See, e.g.*, Vt. Jud. Ethics Comm'n, Op. No. 2728-18 (2016) (discussing when a newly appointed judge may be able to receive fees he earned from client accounts after taking office). Lubet, *supra* note 79, at 34. This can be especially complicated when the matter was the subject of a contingent fee arrangement or other delayed compensation. Goldstein, *supra* note 119, at 914.

123. *See, e.g.*, TENN. CODE ANN. § 17-1-105 (West 2023) ("A newly elected or appointed judge or chancellor can practice law only in an effort to wind up the judge or chancellor's practice, ceasing to practice as soon as reasonably possible and in no event longer than one hundred eighty (180) days after assuming office.").

124. *See, e.g.*, Miss. Comm'n on Jud. Performance v. Watts, 324 So. 3d 796, 799 (Miss. 2021) (publicly reprimanding and fining county court judge for continuing to practice law after the 6-month wind-up period permitted under state law, which is "an absolute."); State v. Lipford, 67 S.W.3d 79, 83 (holding that judicial conduct code prohibits new judges from continuing to represent client more than 180 days after assuming the bench under notwithstanding state statute that appears to allow judges to represent existing clients).

appearing as counsel in one's own court, most allow them to practice law quite freely.

A. THE ABA *MODEL CODE'S* CARVEOUT FOR PART-TIME JUDGES

From the time the ABA stepped into the role of crafting written standards for judicial ethics, it has acknowledged that many jurisdictions permit certain judges to practice law and included language exempting those judges from the long-standing and general prohibition on law practice by judges.[125] The exemption is based on a necessity rationale, commonly where a judge's inadequate compensation reflects the jurisdiction's policy decision not to allocate more resources to the judge's court.[126] This scenario is reflected in the language of the *1924 Canons,* which suggests that allowing an "inferior court" judge to practice law could be tolerated where the judge's pay was inadequate to serve as their sole source of compensation.[127]

As noted above, Canon 5(F) in the *1972 Model Code* included a clearer restriction on the practice of law, but it also maintained a carveout for part-time judges.[128] Rather than include the exception in the code provision itself, the ABA created a separate provision to address the applicability of the code.[129] In "Compliance with the Code of Judicial Conduct," the *1972 Model Code* stated that part-time or temporary judges would be exempt from certain rules, including Canon 5(F).[130]

The 1990 and 2007 *Model Codes* also included exemptions for part-time judges.[131] Noting at the beginning that its provisions "apply to all full-time judges,"[132] the current *Model Code* then sets out four categories of judges other than full-time judges. One is Retired Judges Subject to Recall. The other three are categories of part-time judges.[133] The first is a Continuing Part-Time Judge, that is, one who serves repeatedly on a part-time basis either by a continuing appointment or by election.[134] Next is the Periodic Part-Time Judge, who serves under repeated but separate appointments for "each limited period of service or for each matter."[135] Finally, a Pro Tempore Part-Time Judge is defined as one "who serves or expects to serve once or only sporadically on a part-time basis under a separate

125. *See* 1924 CANONS Canon 31.
126. 1924 CANONS Canon 31.
127. 1924 CANONS Canon 31.
128. *See* 1972 MODEL CODE Canon 5(F).
129. 1972 MODEL CODE Canon 5(F).
130. 1972 MODEL CODE Canon 5(F).
131. *See* MODEL CODE OF JUD. CONDUCT Application III, IV, V (2007) [hereinafter 2007 MODEL CODE]; 1990 MODEL CODE Application C, D, E.
132. MODEL CODE Application I(A).
133. MODEL CODE Application II-V.
134. MODEL CODE Application III.
135. MODEL CODE Application IV.

appointment for each period of service or for each case heard."[136] The Application section then lists the rules of judicial conduct from which judges in each category are exempt, either while actively serving as judge or "at any time."[137] While the prohibition on the practice of law continues to apply to Retired Judges Subject to Recall, each of these three part-time judge categories is exempt "at any time" from Rule 3.10, "Practice of Law."[138]

There are some limitations on the practice of law by part-time judges in the *Model Code*, but they are modest and fairly obvious. One such prohibition applies to persons defined as Continuing or Periodic Part-Time Judges. The rule here stipulates that such persons may not practice law in any court either where they serve as judge or where the court is subject to the appellate jurisdiction of the court on which they serve, and that they "shall not act as a lawyer in a proceeding in which [they have] served as a judge or in any proceeding relating thereto."[139] No limitation of that kind, however, is imposed on Pro Tempore Part-Time Judges.

In 2010, the ABA amended the *Model Code's* Application provision to further limit the rules from which part-time judges would be exempt, largely those relating to judicial campaigns.[140] Other changes made at that time underscore the inherent tension in maintaining the exemption from the prohibition on the practice of law for certain judges. Significantly, the 2010 amendments also limited the exception permitting part-time judges to serve as fiduciaries in order to restrict them from assuming such a role in matters that could come before their own court.[141] The report recommending this change reasoned that permitting judges to serve as fiduciaries in those matters "does not serve the public properly—specifically with respect to ensuring the public's confidence of the impartiality of the courts."[142] Permitting part-time judges to serve in such roles, the report notes, "invites two potential harms," namely, frequent disqualification and "the

136. MODEL CODE Application V.

137. MODEL CODE Application II–V.

138. MODEL CODE Application II–V. However, Retired Judges Subject to Recall are exempt from the restrictions on serving as an arbitrator, mediator (except when serving a judge), or a fiduciary. *Id.* at II.

139. MODEL CODE Application III(B), IV(B).

140. MODEL CODE Appendix B, ABA Standing Comm. on Ethics and Prof'l Responsibility, Report to the House of Delegates Regarding Application Section (August 2020) (printed in 2020 edition of MODEL CODE at 75–79). The amendments also ensured that part-time judges would no longer be exempt from Rule 1.2, "Promoting Confidence in the Judiciary," or from Rule 3.6, "Affiliation with Discriminatory Organizations." *Id.* at 77–79.

141. MODEL CODE Application III, IV, R. 3.8(A).

142. MODEL CODE Appendix B, at 83. An exception is made for all judges to serve as a fiduciary for a family member. *Id.*

potential for calling into question the impartiality of a judge hearing a matter in which a fellow judge is a participant."[143]

The 2010 amendments also tightened the exemption for part-time judges from Rule 3.11, "Financial, Business or Remunerative Activities."[144] Here the report noted that, unlike full-time judges, part-time judges "have a need to engage in such activities . . . in order to support themselves and their families," but they should nonetheless be restricted from any such activities that would, *inter alia*, "interfere with the proper performance of judicial duties," "lead to frequent disqualification of the judge," "involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves," or result in a violation of any other provision of the *Model Code*.[145]

Although the practice of law by any judge presents the same potential harms and concerns noted in the above-quoted passages from the report, the 2010 Application section retained in full the exemption of part-time judges from the prohibition in Rule 3.10.[146] Further, while the *Model Code* also removed the exemption for part-time judges from Rule 2.10, which prohibits making public statements about matters "pending or impending in any court,"[147] the ABA amended a comment to that rule to clarify that judges who are permitted to practice law *may* make "appropriate public statements with respect to matters in which he or she represents a client."[148] The clarifying comment was thus intended to further *protect* part-time judges engaging in the practice of law. Explaining the various proposed amendments, the report stated that "the Code's provisions must be applied in recognition of judges' legitimate interests," and that "the rule of reason and the particular circumstances surrounding judges' activities work in concert" with the *Model Cod*e "to provide guidance in this regard."[149]

B. WHY JURISDICTIONS HAVE PART-TIME JUDGES

The existence of an exception to the prohibition of the practice of law for part-time judges and the corresponding need to manage that exception raises the question of why jurisdictions have part-time judges in the first place. As noted, the *Model Code* recognizes several categories of part-time judges. Such judges sit in a variety of state or local courts, with some jurisdictions having none at all. Most part-time judges

143. MODEL CODE Appendix B, at 83 (emphasis added).
144. MODEL CODE Appendix B, at 84.
145. MODEL CODE Appendix B, at 84 (emphasis added).
146. MODEL CODE Application III-V.
147. MODEL CODE Appendix B, at 82.
148. MODEL CODE Appendix B, at 82.
149. MODEL CODE Appendix B, at 81–82.

sit only in limited jurisdiction or low-level trial courts such as municipal,[150] county,[151] magistrate,[152] or probate courts[153]—those historically referred to, including in the *1924 Canons*, as "inferior courts,".[154] Many of these courts are locally funded in whole or in part,[155] are not part of a unified statewide judicial

150. *See, e.g.*, *Alabama Appellate Courts*, ALA. JUD. SYS., https://judicial.alabama.gov/Appellate/JudgeQualification [https://perma.cc/372K-7A86] (last visited Nov. 10, 2023); ALASKA CODE JUD. CONDUCT Application; *Judiciary of Colorado*, WIKIPEDIA, https://en.wikipedia.org/wiki/Judiciary_of_Colorado [https://perma.cc/6LGS-CF3T] (last visited Nov. 10, 2023); Robert Boczkiewicz, *Circuit court judge from southern Colorado stepping down from position, moving to parttime judge*, THE PUEBLO CHIEFTAIN (Jan. 29, 2021), https://www.chieftain.com/story/news/2021/01/29/colorado-circuit-court-judge-carlos-f-lucero-stepping-down-moving-parttime/4318325001/ [https://perma.cc/E88M-YF54]; *Liberty County's Judicial System*, LIBERTY CNTY., https://www.libertyco.com/local/Liberty.aspx [https://perma.cc/TJV6-UAR8] (last visited Nov. 10, 2023); Robert Lee Long, *Judges may be part time law says*, DESOTO TIMES-TRIBUNE (Aug. 4, 2007), https://www.desototimes.com/news/judges-may-be-part-time-law-says/article_afeacefe-ee71-5b4e-8713-2b8123d1443a.html [https://perma.cc/YYG5-XPHG]; *New Jersey Judiciary – A guide to the Judicial Process*, N.J. CTS., https://www.njcourts.gov/sites/default/files/forms/12246_guide_judicial_process.pdf [https://perma.cc/W2UE-PHZR] (last visited Nov. 10, 2023); N.M. CODE JUD. CONDUCT, 21-004; N.D. CODE JUD. CONDUCT, Compliance with the Code of Judicial Conduct; OHIO REV. CODE ANN. §141.04 (2023); OHIO REV. CODE ANN. §1901.10 (2023); OHIO CODE JUD. CONDUCT Application; *Judicial Salary Chart*, THE S.C. OF OHIO & THE OHIO JUD. BRANCH, https://www.supremecourt.ohio.gov/judges/judicial-salary-chart/ [https://perma.cc/8HT7-R6RS] (last visited Nov. 10, 2023); *Clerk of Court Manual*, S.C. JUD. BRANCH, https://www.sccourts.org/clerkOfCourtManual/indexIntro.cfm [https://perma.cc/D8FP-LAR3] (last visited Nov. 10, 2023); *Advisory Opinions*, S.C. JUD. BRANCH, https://www.sccourts.org/advisoryOpinions/ [https://perma.cc/GA7L-HRYS] (last visited Nov. 10, 2023); TEX. CODE JUD. CONDUCT Canon 6 Compliance; WIS. CODE JUD. CONDUCT § 60.07; *About the Circuit Courts*, WYO. JUD. BRANCH, https://www.courts.state.wy.us/circuit-courts/about-the-circuit-courts/ [https://perma.cc/XA6A-QA5M] (last visited Nov. 10, 2023); *see also* GORDON M. GRILLER, YOLANDE E. WILLIAMS, RUSSELL R. BROWN III & DANIEL J. HALL, NAT'L. CTR. FOR STATE CT., MISSOURI MUNICIPAL COURTS: BEST PRACTICE RECOMMENDATIONS 3 n.7 (2015) (noting that only the largest cities in Missouri have full-time Municipal Court judges).

151. *See, e.g.*, Colo. Jud. Ethics, Op. 2007-06 (2007).

152. *See, e.g.*, *Liberty County's Judicial System*, *supra* note 150; *Clerk of Court Manual*, *supra* note 150; W. VA. CODE JUD. CONDUCT Application III, cmt. 1; *Magistrate Courts - Trial Courts of Limited Jurisdiction*, W. VA. JUD., http://www.courtswv.gov/lower-courts/magistrate-courts.html [https://perma.cc/8YG3-NX38] (last visited Nov. 10, 2023).

153. *See, e.g.*, *Liberty County's Judicial System*, *supra* note 150; ME. CODE JUD. CONDUCT Coverage § 1; N.M. CODE JUD. CONDUCT § 21-004; *Clerk of Court Manual*, *supra* note 150; Mike Frett, *Probate judge candidates make their case*, SAINT ALBANS MESSENGER (Nov. 1, 2018), https://www.samessenger.com/archive/probate-judge-candidates-make-their-case/article_cc71e2dd-90b1-5808-9e62-cbc342505f31.html [https://perma.cc/YK74-AE9H].

154. 1924 CANONS Canon 31 (noting that the practice of law by judges in "inferior courts" is permitted in several states); ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 55 (1931) (concluding that there is no impropriety in the practice of law by police court and juvenile court judges because they preside over "inferior courts"); *see, e.g.*, *Authority and Jurisdiction*, ARK. JUD. DISCIPLINE & DISABILITY COMM'N, https://www.jddc.arkansas.gov/about-the-commission/authority-jurisdiction/ [https://perma.cc/M48Y-RKWW] (last visited Nov. 10, 2023); *District Courts*, ARK. JUD., https://www.arcourts.gov/courts/district-courts [https://perma.cc/SKB7-LEUE] (last visited Nov. 10, 2023) ("Local district courts are served by part-time judges who may also engage in the practice of law"); GA. CODE OF JUD. CONDUCT Application commentary (2021) (municipal, magistrate, probate, and juvenile courts).

155. *See, e.g.*, Georgia, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, Utah, Washington, Wisconsin, Wyoming. *See generally State Court Structures*, NAT'L CTR. FOR STATE CTS., https://cspbr.azurewebsites.net/ [https://perma.cc/U8G2-C9YG] (last visited Nov. 11, 2023).

system,[156] and are not courts of record.[157] The litigants in such courts are overwhelmingly low-income, from marginalized communities, and too often lack attorney representation.[158] Yet the matters heard, including criminal, family, juvenile, probate, and consumer law cases, are consequential (as, of course, *any* court matter is[159]).

Most part-time judges are best classified as "continuing part-time," where their position is part-time because there is not enough work to justify maintaining a full-time judge.[160] Thus, caseloads are modest when a court hears only narrow categories of cases, when the population of its geographic jurisdiction is small, or both. For example, Tennessee permits county judges to practice law (other than in their own court) in only five counties, due to their low populations.[161] The rural states of Vermont and Maine maintain countywide probate courts, with one judge per court regardless of the population of the county, which results in part-time judicial positions throughout the state.[162] In states that maintain municipal courts, judges in such courts are often permitted to practice law because, given a municipality's population and the court's limited subject-matter jurisdiction, many need only sit occasionally.[163]

At one time, Michigan had both full- and part-time county probate courts and took a similar population-based approach as Tennessee.[164] The populations in the northern counties were "too small in population to support a full-time probate judge."[165] For that reason, the judges in that region were permitted to practice law while those in the southern counties were not. This arrangement survived an equal protection challenge brought by a probate judge in a southern county when an appeals court concluded that "the Legislature was justified in allowing those

156. *See, e.g.*, STATE OF ME. OFF. OF POL'Y AND LEGAL ANALYSIS, REPORT OF THE COMMISSION TO CREATE A PLAN TO INCORPORATE THE PROBATE COURTS INTO THE JUDICIAL BRANCH, 1st Sess. at 10 (2021) [hereinafter 2021 ME. COMM'N REP.]; N.M. CODE, *supra* note 153; TIT. 8. R.I. GEN LAWS ANN. § 8-9-4 (2023).

157. *See, e.g.*, Oklahoma, Utah; *Court*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "court of record" as "[a] court that is required to keep a record of its proceedings. The court's records are presumed accurate and cannot be collaterally impeached.").

158. *See, e.g.*, Anna E. Carpenter, Colleen F. Shanahan, Jessica K. Steinberg & Alyx Mark, *Judges in Lawyerless Courts*, 110 GEO. L.J. 509, 511–13 (2022) (describing the litigants in most contemporary civil trial courts).

159. *See generally* Justin Weinstein-Tull, *Traffic Courts*, 112 CAL. L. REV. (forthcoming 2024) (on file at SSRN) (describing how the outcomes in traffic courts can have a significant impact on people's lives).

160. *See infra* notes 161–71 and accompanying text.

161. TENN. CODE ANN. § 16-16-106 (2023). However, the size of such counties varies widely, so it is not clear what the basis for selecting these counties is.

162. ME. CONST. art. VI, § 6; VT. STAT. ANN. tit. 4, § 272 (2023).

163. *See, e.g.*, OHIO REV. CODE ANN. § 1901.08 (2023) (designating several specific municipal courts as part-time due to population size); OHIO REV. CODE ANN. 1901.11 (2023) (setting compensation for part-time judges and disqualifying them from practicing law "only as to matters pending or originating in the courts in which they serve during their terms of office").

164. Green v. Hart, 205 N.W.2d 306, 310 (Mich. Ct. App. 1973).

165. *Id.*

probate judges in the less populated counties the privilege of practicing law in addition to their judicial duties."[166]

Court systems featuring trial courts covering only a single municipality or with specific case types not justifying full-time judges were commonplace during the first hundred and fifty years after the country's founding.[167] Transportation and communication were severely limited before the age of highways, public transportation, phones, fax machines, and the internet, and it was important for citizens to have a courthouse nearby.[168] Those courts were locally controlled and locally funded, and that remains true for many such courts today.[169] With little or no funding from state coffers, local jurisdictions sustain their courts by using the limited resources provided for them and by paying small judicial salaries.[170] As discussed further in Part IV, many states have transitioned to statewide court systems of general jurisdiction trial courts, but local and specialized courts persist in several states to this day.[171]

In addition to maintaining these "continuing part-time" judicial positions, several states permit practicing lawyers to sit as "judges pro tempore" or as some other kind of temporary, substitute judge on a limited basis.[172] Hawaii's Supreme Court assumed that the constitutional provision barring the practice of law by judges did not apply to "per diem" judges.[173] Not all states employ lawyers as temporary judges to address gaps in coverage. Other states may use retired judges, paid on a *per diem* basis, for this purpose.[174] As discussed in Part IV, although these judicial positions do not always create the same problems as part-time judges who serve continuously, states should eliminate these positions as well or at least restrict them from the practice of law.

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166. *Id.* The court noted that a judge in the plaintiff's situation has the option to "either resign his judgeship and continue private practice or wind up the private practice and be compensated as a full-time probate judge." *Id.* at 310–11. As discussed *infra* at notes 344–47 and accompanying text, Michigan has eliminated all but one part-time probate judge.

167. LARRY BERKSON & SUSAN CARBON, COURT UNIFICATION: HISTORY, POLITICS, AND IMPLEMENTATION 17 (1978).

168. *Id.*

169. *See State Court Structures, supra* note 155 (describing structure, jurisdiction, and funding sources for all levels of courts in most states).

170. *Id.*; MODEL CODE Appendix B, at 84; 1924 CANONS Canon 31; *see also* BERKSON & CARBON, *supra* note 167, at 22–23, 40, 84 (noting legislative resistance to lower court consolidation because it would result in an increase in judicial compensation).

171. *State Court Structures, supra* note 155.

172. *See, e.g.*, Arizona (pro tempore judges serve up to 6 months), California (Temporary Judge), Idaho (Pro Tempore Judges); Kansas (Temporary and Pro Tempore Judges); Kentucky (Pro Tempore Judges and Special Justices), Montana (Pro Tempore Judges), Oregon (Pro Tempore Judges), Rhode Island (Pro Tempore Judges), Virginia (Substitute Judges).

173. *In re* Ferguson, 846 P.2d 894, 898–99 (Haw. 1993). The court described several "practical concerns" that guided their interpretation, including whether there would be a sufficiently large pool of retired attorneys to meet the need for per diem judges and the fact that the "practice of law affords a degree of financial security" exceeding that for service as a per diem judge. *Id.* at 899–900. They also saw a benefit of providing younger attorneys some "background needed to decide whether to pursue a judicial career." *Id.* at 900.

174. *See, e.g.*, ME. REV. STAT. ANN. tit. 4, §§ 104, 157-B (2023) (describing "Active Retired" judges).

While part-time judges are overwhelmingly found in state and local courts, a small number sit in federal courts. Congress authorized part-time magistrate judges under the Federal Magistrates Act,[175] although it "specified a strong preference for a system of full-time magistrates."[176] As noted by the Judicial Conference: "Where there is insufficient judicial business to make a full-time magistrate judge position 'feasible or desirable' at given locations, the Act authorizes the Judicial Conference to establish part-time magistrate judge positions."[177] The Act permits such judges to practice law,[178] but the Judicial Conference imposes substantial limitations.[179] While most magistrates' positions were part-time when the Magistrates Act was enacted in 1968,[180] the federal courts have largely phased out the use of part-time magistrate judges.[181]

C. STATES ALLOW THEIR PART-TIME JUDGES TO PRACTICE LAW

This subpart reviews the specific conditions under which some individual states maintain part-time judges and grant exemptions from the general prohibition on the practice of law by judges. It also describes the various extents and forms of those exemptions. As will be seen, such exemptions commonly represent solutions to the problems of inadequate compensation to judges serving in "inferior" courts. In view of what are generally recognized as the broadly and profoundly undesirable impacts of judges practicing law, alternative solutions to those problems should be sought and implemented by the relevant responsible legislatures.

States that continue to rely on part-time judges to sit in limited jurisdiction courts usually permit such judges to practice law. Such permission is granted under exceptions to the state's statutory and constitutional provisions as well as

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175. 28 U.S.C. § 633(a)(3) (authorizing appointment of part-time magistrate judges where the Director concludes, based on a survey of the judicial district, that "the employment of a full-time magistrate judge would not be feasible or desirable").

176. PETER G. MCCABE, A GUIDE TO THE FEDERAL MAGISTRATE JUDGES SYSTEM 6 (2016); *see* 28 U.S.C. § 633(a)(3) (describing the aim of the judicial district survey process as "creating and maintaining a system of full-time United States magistrate judges").

177. JUD. CONF., GUIDE TO JUD. POLICIES AND PROCEDURES, Vol. III, Ch. X, Part C(3)(J), *quoted in* Dembowski v. N.J. Transit Rail Operations, Inc., 221 F. Supp.2d 504, 507 (D. N.J. 2002).

178. 28 U.S.C. § 632(b) provides:

> (b) Part-time United States magistrates shall render such service as judicial officers as is required by law. While so serving they may engage in the practice of law, but may not serve as counsel in any criminal action in any court of the United States, nor act in any capacity that is, under such regulations as the conference may establish, inconsistent with the proper discharge of their office.

179. *See Dembowski*, 221 F. Supp.2d at 508.

180. MCCABE, *supra* note 176, at 7 (noting that in 1970 there were 82 full-time and 449 part-time magistrate judges).

181. As of September 2022, the Conference had authorized only twenty-five part-time positions. *Status of Magistrate Judge Positions and Appointments — Judicial Business 2022*, U.S. CTS. (Nov. 8, 2023), https://www.uscourts.gov/statistics-reports/status-magistrate-judge-positions-and-appointments-judicial-business-2022 [https://perma.cc/97V3-P4H2]. There are also two combination clerk/magistrate judge positions. *Id.*

to judicial codes generally prohibiting such practice by judges.[182] Exemptions to the prohibition on legal practice for part-time judges are inextricably linked to their judicial compensation, as often such compensation "alone is clearly inadequate to provide a decent standard of living."[183] The Illinois Supreme Court observed that so long as a judge's "remuneration is generally deemed adequate," there is no basis to "compel[] deviation from propriety, or sanction of, a practice incongruous with the judicial office."[184] Where there is inadequate compensation, exemptions permitting "deviation from propriety" ensure that individuals will pursue these posts notwithstanding the meager pay: in short, they have a necessity rationale.[185] Thus, due to *legislative* policy determinations about the structure of and resources provided to lower courts, the jurisdiction's *judicial* branch or other judicial conduct regulators reason that judges in the jurisdiction's courts must be permitted to practice law.[186] The problem of judges practicing law stems from the problem of having part-time judges, and that is a problem resulting from the existing structure of some court systems and from the limited financial resources provided to some courts.

While it is not always easy to determine the extent to which a particular state or local court relies on part-time judges, judicial conduct codes in forty-five states include some kind of carveout for part-time judges, including judges *pro tempore*, hearing officers, and referees.[187] One would assume from such stated exceptions that the state's judiciary could, or in fact does, feature some part-time judicial positions. The exemptions generally appear in the "application" section of a

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182. For purposes of this Article, all under-compensated judges are referred to as part-time, even if there is no published specific reference to the number of hours or days that the judge is expected to attend to their judicial duties.

183. Note, *supra* note 67, at 1037. For example, the median salary for Maine's part-time probate judges in 2021 was $36,200, with one judge paid only $25,000. The lowest salary for a full-time judge in Maine is more than $145,000. Hogan, *supra* note 12.

184. Schnackenberg v. Towle, 123 N.E.2d 817, 819 (Ill. 1954).

185. *See, e.g.*, Jud. Ethics Advisory Panel of Okla., Ethics Op. 2000-3, 10 P.3d 897, 897–98 (Okla. 2000) ("It is clear that the Canons make a distinction for part-time judges since they ordinarily would need other income for their livelihood. . . . Obviously it would be almost impossible to find qualified attorneys to fill in as judges if they were prohibited from practicing law; this would of course, deprive the municipal court of a valuable asset."); *see also* Davis v. Sexton, 177 S.E.2d 524, 525–26 (Va. Ct. App. 1970) (noting that the state legislature had enacted laws permitting law practice by judges in "courts not of record," who receive "inadequate salaries," and therefore courts may not restrict the appearance of municipal courts judges as attorneys).

186. In at least one state, the jurisdiction of conduct organizations does not extend to special judges or judges of limited jurisdiction, such as elected probate judges, who are subject to a separate disciplinary system administered by the state supreme court. CONN. CODE OF PROB. JUD. CONDUCT (enforced by the Council on Probate Judicial Conduct); *see also* GEYH ET AL., *supra* note 47, at § 11.04.

187. Those states are Alabama, Alaska, Arkansas, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and West Virginia. Only the conduct codes of Delaware, District of Columbia, Illinois, Massachusetts, Michigan, and North Carolina have no express exception for the prohibition on the practice of law by judges.

state's code of judicial conduct, reflecting their appearance in the *Model Code*. Some states modify the *Model Code* text to change the reference to a generic "part-time" judge and, instead, indicate the specific judges to whom the exception would apply. For example, the only judges permitted to practice law under the *Maine Code of Judicial Conduct* are those sitting in the state's county-based probate courts, who are always part-time.[188] Other states adopt the generic language of the *Model Code* but address the specific judicial positions affected in their judicial code's elaborating comments.[189] The remaining states simply adopt the generic carveout language of the *Model Code* for part-time judges without specifying which, if any, courts actually feature part-time judges.[190]

Jurisdictions that permit part-time judges to practice law generally, but not universally, impose some limitations on their practice. Most commonly, such limitations also track the language of the *Model Code* and prohibit judges from appearing in their own court.[191] That language, however, still provides significant latitude in the practice of law by judges. For example, in Maine, where each probate judge is the only judge in their county-based court, as a practical matter, they could not appear as counsel in that court without appearing before themselves. However, as the example provided in the Introduction demonstrates, Maine imposes no restrictions on such judges' practice before other probate judges or in other courts in the same county in which they sit.[192] Connecticut's part-time probate judges are prohibited from appearing as counsel in other probate courts only in contested probate matters.[193] In some states, restrictions on the practice of law by judges give even more latitude than suggested in the *Model Code*. For example, using precatory rather than prohibitory language, Alabama's *Canons of Judicial Ethics* states only that a part-time judge "*[s]hould* not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto."[194]

By contrast, some states go further than the *Model Code* in restricting the practice of law by part-time judges. They do this by imposing limitations either on practicing in courts other than their own, or on practicing in certain geographic

188. *See* ME. CODE JUD. CONDUCT, Coverage & Effective Date § I(B) (2015) (exempting probate judges from several provisions of the code, including those prohibiting the practice of law).

189. *See, e.g.*, GA. CODE OF JUD. CONDUCT Application commentary (2023).

190. *See, e.g.*, ARK. CODE OF JUD. CONDUCT Application (2016).

191. *See, e.g.*, GA. CODE OF JUD. CONDUCT Application (A); IND. CODE OF JUD. CONDUCT Application (III)(B); KAN. R. REL. JUD. CONDUCT Application (IV)(B); NEV. CODE OF JUD. CONDUCT Application (III)(C).

192. ME. CODE JUD. CONDUCT Coverage & Effective Date § I(B)(1); *In re* Estate of McCormick, 765 A.2d 552, 558 n.4 (Me. 2001).

193. CONN. GEN. STAT. § 45a-25 (2023). This limitation does not appear in the applicable code of conduct, which only restricts such judges from acting "as an attorney in the court to which he or she was elected, notwithstanding the fact that another judge has been cited in to hear the matter." CONN. CODE OF PROB. JUD. CONDUCT R. 3.10.

194. ALA. CANONS OF JUD. ETHICS, Compliance with the Canons of Judicial Ethics (A)(2) (emphasis added).

areas, or on practicing for certain types of matters. For example, in New Jersey, "surrogates" (the equivalent of probate judges) may not practice law:

> in any estate or trust matter, including the preparation of wills, trust documents, or any other probate documents, in or out of court. Furthermore, a surrogate or deputy surrogate shall not practice law in any criminal, quasi-criminal or penal matter, whether judicial or administrative in nature, in that county, nor in the Superior Court, Chancery Division, Probate Part in any county.[195]

New York imposes the following restrictions on all part-time judges:

> [Part-time judges] shall not practice law in the court on which the judge serves, or in any other court in the county in which his or her court is located, before a judge who is permitted to practice law, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.[196]

In Colorado, judges may not practice law "with respect to any controversies which will or appear likely to come before the court on which the judge serves or in any court of the same or comparable jurisdiction within the same judicial district on which the judge serves."[197] Michigan prohibits magistrates from practicing law in the district in which they serve.[198] Arkansas prohibits part-time judges from appearing in criminal matters in the county in which they serve.[199] Some states impose statutory limitations on the practice of law by part-time judges in certain courts while permitting such practice by part-time judges sitting in other courts.[200]

These restrictions on the exemption reflect the jurisdictions' acknowledgment of the thorniness of judges practicing law; they, therefore, limit such work to instances where the chances of an appearance of impropriety are assumed to be at least somewhat lower. The courts before which these judges appear as attorneys may, nevertheless, express wariness about the judges' practice of law; and, where a policy decision was previously made to permit such practice, questions can

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195. N.J. CT. R. 1:15-1(c).

196. N.Y. COMP. CODES R. & REGS. tit. 22, § 100.6(B)(2) (2015).

197. COLO. CODE OF JUD. CONDUCT Application (III)(C).

198. MICH. COMP. LAWS SERV. § 600.8525 (2023) ("An attorney at law who is a magistrate shall be prohibited from the practice of law in the district court for the district in which the attorney serves. A person who is appointed as a magistrate in the thirty-sixth district shall not engage in the practice of law while he or she is a magistrate."); *see also In re* Hammons, 484 N.W.2d 401, 401 (Mich. 1992) (censuring 36th District magistrate for "blatant disregard of the prohibition against private practice" by providing *pro bono* legal assistance to a relative).

199. ARK. CODE OF JUD. CONDUCT Application (III)(B).

200. *See, e.g.*, VT. STAT. ANN. tit. 4, § 26 (2023) ("Half-time Superior judges, magistrates, and hearing officers shall not engage in the active practice of law for remuneration."). Vermont does not restrict its part-time probate judges from practicing law. VT. STAT. ANN. tit. 4, § 272 (2023).

arise regarding who—the judiciary or the legislature—has the authority to impose limitations on that practice.[201]

The necessity rationale advanced by states for permitting their part-time judges to practice law—that is, to enable them to make a sufficient living so that such positions can be filled—can be contrasted with the conditions and rationales for other exceptions to the prohibition on the practice of law by judges. As noted earlier, the *Model Code* and state codes that follow it permit judges to act *pro se*, a scenario that would occur only rarely.[202] Rule 3.10 states that judges may "give legal advice and draft or review documents for" members of their family so long as they do so without compensation.[203] The "law practice" permitted under such exception is extremely limited, particularly given that the Rule clarifies that a judge may not serve as a family member's lawyer "in any forum."[204] The Comment to the Rule also notes that a judge may not use "the prestige of office" to advance their own or a relative's interests.[205]

Some jurisdictions also allow judges to practice law when a judge takes a leave of absence from the bench to participate as a judge advocate in a branch of the armed forces.[206] Most states allow a judge to practice law under those conditions because such work is regarded as part of their duty to their country and *because they are on leave*.[207] Unlike judges practicing law in a low-level court, judges' legal practice in a military setting occurs in a different geographic location and court system from where they preside as a judge. In the latter cases, a judge will not encounter the same litigants and attorneys through their dual roles as both judge (in their civilian life) and attorney (limited to their military life).[208] These narrow exceptions ensure that judges use their legal training only in contexts where there is little to no risk of any of the hazards described in the next Part.

III. BAD BOUNDARIES: THE IMPACT OF JUDGES PRACTICING LAW

Allowing blurred boundaries between being a judge and being an attorney is deeply problematic. The exceptions to the general and customarily absolute prohibition on judges practicing law give rise to an entire category of ethical

201. *See, e.g.*, 1971 N.Y. Op. Atty. Gen. No. 180 (1971); Davis v. Sexton, 177 S.E.2d 524, 526 (Va. Ct. App. 1970) (holding that Circuit Court judge could not restrict part-time Municipal Court judge from practicing criminal law in the Circuit Court). *Cf.* State v. Lipford, 67 S.W.3d 79, 83 (Tenn. Crim. App. 2001) (noting that any statute granting an exception to the prohibition on the practice of law by judges would "usurp the role of the courts in exercising the judicial power of the state" and be unconstitutional).

202. MODEL CODE R. 3.10.

203. MODEL CODE R. 3.10.

204. MODEL CODE R. 3.10.

205. MODEL CODE R. 3.10 cmt.

206. MCKOSKI, *supra* note 38, at 94.

207. *Id.* Alaska may be one exception to this approach as it prohibits judges from participating in any practice of law while a judge advocate if such practice resembles services provided by civilian attorneys. *Id.*

208. For an in-depth analysis of the question of whether sitting judges can engage in the practice of law while on military orders outside of their court's jurisdiction, including a survey of states' approaches, see Conn. Comm. Jud. Ethics, Informal Ethics Op. 2023-03 (2023).

problems, questions, and issues that must be navigated by the judges themselves and by courts and judicial discipline systems. Exemptions for certain categories of judges allow curious scenarios that look and feel improper to the participants and especially to the litigants. However, these scenarios are too often beyond the reach of discipline systems because the judges' actions appear to be authorized by the carveout in the applicable judicial conduct code.

This Part describes the implicit wariness and explicit criticisms of the practice of carving out exceptions for part-time judges reflected in canons, codes, and opinions issued from courts and bar organizations. It indicates the fundamental inconsistency involved in maintaining an impartial judiciary on the one hand and, on the other hand, permitting persons who serve as judges to represent, advocate for, and offer legal services to particular parties. It discusses both the specific ethical concerns that are raised when persons occupy the dual roles of judge and lawyer and the range of undesirable impacts such blurred boundaries have for courts, litigants, the judge-lawyers themselves, and the integrity of our justice system.

The challenges of policing the blurred boundaries stem from the difficulty of squaring particular exceptions to the general prohibition on the practice of law with other provisions in a judicial code of conduct.[209] Most fundamentally, such carveouts implicate the prohibition on the "appearance of impropriety" at the core of all judicial conduct regulation. As observed in one state ethics advisory opinion: "In our society, a part-time judge is a full-time judge in the eyes of the public."[210] Aside from the ethical problems entailed by their dual roles, the fact that lawyer-judges cannot devote themselves fully to their judicial position has multiple adverse practical impacts. Not least significantly and notwithstanding the fact that they oversee matters having profound impacts on people's lives, their part-time status reinforces the view that their courts are indeed "inferior" and, therefore, deserving of fewer resources and less respect.

A. ALLOWING PART-TIME JUDGES TO PRACTICE LAW IS THE SUBJECT OF EXTENSIVE CRITICISM

In light of the longstanding general prohibition on the practice of law by judges, the exceptions for part-time judges have been, for the most part, merely tolerated, including in states that have enacted such exceptions.[211] Members of the bar, judiciary, and other commentators have long criticized the practice, even where they have not disputed the need to attract individuals to the part-time judicial

209. *See infra* notes 297–306 and accompanying text.

210. Me. Comm. on Jud. Ethics, Advisory Op. 09-2 (2009) (concluding that a part-time probate judge may not serve as an expert witness).

211. *See, e.g.*, Long, *supra* note 150; Joe Pichirallo, *Substitute Judges in Virginia: Lawyers in Controversial Role*, WASH. POST (Nov. 25, 1979), https://www.washingtonpost.com/archive/politics/1979/11/25/substitute-judges-in-virginia-lawyers-in-controversial-role/0b314661-b992-4b4f-8636-dad88cd46d81/ [https://perma.cc/H5NK-ESB7].

positions.[212] As described in Part II, the exceptions permitting such dual roles arise from the existing design of court systems and from inadequate resources allocated for judicial compensation. The policymakers who permit the perpetuation of court structures that rely on part-time judges are not responsible for policing the exceptions. This is a combined situation and resulting dynamic that elicits continuous criticism from the courts and bar.

Despite the ABA's continued allowance of exemptions for part-time judges in its own canons and codes, it has long disfavored them and has strictly construed such exceptions to the prohibition. While its ethics opinions aim to assist lawyer-judges as they navigate the ethical minefield presented by their dual roles, ABA opinions consistently reflect an overall wariness of permitting such practice.[213] Some opinions given through conduct codes and disciplinary committees implicitly reflect the ABA's frustration with the impact of legislative decisions about court funding and structures on the courts' regulation of judicial conduct.[214] In a 1931 opinion, the ABA Committee on Professional Ethics and Grievances ("ABA Committee") stated that, in a rural community with few eligible attorneys for such appointments, a police judge and a juvenile court judge could accept court appointments to represent indigent criminal defendants.[215] Given that these judges presided over "inferior courts," the ABA Committee concluded that accepting such appointments was allowed under Canon 31 the *1924 Canons*.[216] In that opinion, however, it also cautioned that such practice was "subject to the limitation that the inferior judge so practicing shall scrupulously avoid conduct 'whereby he utilizes or seems to utilize his judicial position to further his professional success.'"[217]

The narrowness of the exemption recognized in Canon 31 was underscored in a 1935 Formal Opinion by the ABA Committee. The Opinion concludes that a judge *pro tempore* cannot appear in the court in which they occasionally preside, even where a statute allows such appearance provided it is not in a matter in which the judge was previously involved.[218] The Committee reasoned that the state's statutory language offered no justification because, as the Opinion states strongly, "[a] legislature cannot by enacting a statute render ethical that which is inherently unethical."[219] The Opinion elaborated: "Standards of professional conduct are not matters of legislative determination. They derive from the expressed views of the majority of the profession and ultimate acceptance of those views by

212. *See infra* notes 213–51 and accompanying text.
213. *See infra* notes 215–35 and accompanying text.
214. *Id.*
215. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 55 (1931).
216. *Id.*
217. *Id.*
218. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 142 (1935).
219. *Id.*

the courts."[220] It also rejected as justification the "meager" compensation for judges *pro tempore* notwithstanding Canon 31's acceptance of such justification.[221] "With every benefit," the Opinion noted, "there is a corresponding burden. If one is not willing to undertake the burden, he should not accept the benefit of the office."[222]

In Formal Opinion 161, issued a year later, the ABA Committee took a somewhat gentler tone with respect to the practice of law by temporary judges.[223] It stated that the Committee assumed the drafters of Canon 31 did not have the "situation of a special or *pro tem* judge" in mind and noted that such temporary judges receive little to no compensation and sit only occasionally.[224] The Opinion accordingly concluded that such a lawyer-judge can practice law in "the court over which he at time presides" so long as he does not act in one capacity in any matter in which he directly or indirectly acted in the other and "scrupulously avoid[s]" conduct in which he appears to use his "judicial service to further his professional conduct."[225] The ABA nonetheless took the opportunity to observe that "Canon [31] recognizes that one who assumes to act as judge on one day and as advocate the next in the same judicial system is confronted with inherent difficulties that ought to be avoided and deprecates the employment of such a system." [226]

The ABA Committee elaborated on the risks of permitting judges to practice law in a 1942 formal opinion in which it concluded that it would be improper for a part-time city judge to represent defendants in matters that could come before other judges of the court.[227] The Committee reasoned:

> It is the duty of the judge to rule on questions of law and evidence in misdemeanor cases and examinations in felony cases. That duty calls for impartial and uninfluenced judgment, regardless of the effect on those immediately involved or others who may, directly or indirectly, be affected. Discharge of that duty might be greatly interfered with if the judge, in another capacity, were permitted to hold himself out to employment by those who are to be, or

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220. *Id.* As discussed earlier, many states have enacted statutory and constitutional limitations on judicial conduct, including the practice of law. *See supra* Part I.C. Here, the ABA objected to a legislative override of a court's restrictive, rather than permissible, ethics rule. *See supra* ABA Comm. on Prof'l Ethics and Grievances, note 218.

221. *See supra* ABA Comm. on Prof'l Ethics and Grievances, note 218.

222. *Id.*

223. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 161 (1936)*; see also* ABA Comm. on Prof'l Ethics, Informal Op. C-759 (1964) (stating that language in Opinion 161 "in effect overruled" language in Opinion 142 broadly prohibiting the practice of law by part-time judges).

224. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 161 (1936). "Pro tem" is a shorthand for "pro tempore." *Pro Tem*, BLACK'S LAW DICTIONARY (11th ed. 2019).

225. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 161 (1936).

226. *Id.*; *see also* ABA Comm. on Prof'l Ethics, Informal Op. 639 (1963) (following Opinion 136 and reaching the same conclusion on a similar question while also stating that the temporary judges can be appointed to serve no longer than is necessary as opposed to the entire unfinished term of the judge being replaced).

227. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 242 (1942).

> who may be, brought to trial in felony cases, even though he did not conduct the examination. His private interests as a lawyer in building up his clientele, his duty as such zealously to espouse the cause of his private clients and to defend against charges of crime brought by law-enforcement agencies of which he is a part, might prevent, or even destroy, that unbiased judicial judgment which is so essential in the administration of justice.[228]

In a 1964 opinion, the ABA again emphasized that even where a part-time judge could practice law under the exception, "[o]f course, the admonitions of Canon 31 and Opinion 161 should be scrupulously observed."[229]

The exemption allowing part-time judges to practice law included in the *1972 Model Code* was considered by at least some commentators to be "regrettable, but perhaps still necessary."[230] In a 1974 Informal Opinion regarding the practice of law in the evenings and on weekends by a county probate judge, the ABA Committee made clear that, if the person "is considered to be a full-time judge," it would be "patently clear" that such practice would be prohibited under Canon 5 (F) of the *1972 Model Code*.[231] Even if the judge were not technically full-time "due to some quirk of statute or case law of which we have not been appraised [sic]," the practice of law could run afoul of other provisions of the *Model Code*, such as Canon 2 (Avoiding Impropriety or the Appearance Thereof) on the importance of avoiding business dealings with lawyers or others who may come before their court.[232] The Informal Opinion continued:

> [I]t is virtually impossible for a probate judge to continue to practice law within the jurisdiction served by him as a judge or in opposition to counsel who appear before him from time to time without violation of the spirit and intent of the Code of Judicial Conduct, even were he considered a part-time judge under [state] law.[233]

The Committee also noted that, while Canon 5 acknowledges that the prohibition on the practice of law may lead to "temporary hardship in jurisdictions where judicial salaries are inadequate and judges are presently supplementing their income through commercial activities[,]" the proper remedy for such hardship is "to secure adequate judicial salaries."[234] The ABA Committee concluded the Informal Opinion by urging the jurisdiction "to encourage by all appropriate means that an adequate salary be paid to the probate judge so that he need not

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228. *Id.*

229. ABA Comm. on Prof'l Ethics, Informal Op. C-759 (1964).

230. *See, e.g.*, Robert B. McKay, *Judges, the Code of Judicial Conduct, and Nonjudicial Activities*, 1972 UTAH L. REV. 391, 400 (1972).

231. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1294 (1974).

232. *Id.*

233. *Id.*

234. *Id.*

seek supplemental income by the practice of law or other extra-judicial activity."[235]

As demonstrated by criticism arising in the jurisdictions that permit it, the ABA's concerns over the practice of law by judges are not merely academic but, in fact, are shared by those on the bench and in the bar who must contend with having lawyer-judges in their midst. The official comment to the *Arkansas Code of Judicial Conduct* regarding private practice by part-time judges includes a note of caution that summarizes many widespread central concerns over the dual roles:

> Because the position of the judge is paramount to the judge's private law practice, the judge should be particularly sensitive to conflicts that may arise when the judge presides over matters involving particular attorneys and then, in his or her private law practice, appears in adversary proceedings in a court of general jurisdiction opposing the same attorneys who appear before the judge. Opposing counsel may be hampered in vigorous advocacy against an attorney who wears judicial robes and presides over cases involving that counsel. The primacy of judicial service and the obligation to avoid even the appearance of impropriety mandate caution in accepting civil cases in disputed matters.[236]

Substantial unease about the practice of law by part-time judges among those overseeing judicial ethics and discipline is revealed in the similar cautionary language that appears in relevant state ethics opinions cited herein in jurisdictions that permit the practice.

The practice of law by Maine's elected part-time probate judges has long been the target of extensive criticism, and the themes raised in that debate are consistent with the broader questions considered here.[237] Nearly every study of the Maine probate courts during the last half-century has outlined the negative implications of permitting probate judges to practice law part-time, including in other probate courts.[238] Attorneys and others note the practical problems and actual or apparent conflicts of interest that can be unsettling for the opposing litigants and

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235. *Id.*

236. ARK. CODE OF JUD. CONDUCT Application III, cmt. 3A.

237. *See e.g.*, *In re* Estate of McCormick, 765 A.2d 552, 559 n.4 (Me. 2001); ME. CODE JUD. CONDUCT, ADVISORY COMMITTEE'S INTRODUCTORY NOTE TO 2015 AMENDMENT (last updated Sept. 28, 2023).

238. *See* 2021 ME. COMM'N REP.; FAM. DIV. TASK FORCE, FINAL REPORT TO THE JUSTICES OF THE MAINE SUPREME JUDICIAL COURT (2014); ME. PROB. L. REVISION COMM'N, REPORT TO THE LEGISLATURE AND RECOMMENDATIONS CONCERNING PROBATE COURT STRUCTURE 8–10; COMM'N TO STUDY FAM. MATTERS IN CT., FINAL REPORT TO THE 112TH LEGISLATURE 11 (1986); COMM. FOR THE STUDY ON CT. STRUCTURE IN RELATION TO PROB. AND FAM. L. MATTERS, REPORT TO THE JUDICIAL COUNCIL 4–6 (1985); THE INST. OF JUD. ADMIN., THE DESIRABILITY OF INTEGRATING ACTIVITIES OF THE PROBATE COURTS OF MAINE INTO THE SUPERIOR COURT 13 (1969) [hereinafter IJA REPORT]; BUREAU OF PUB. ADMIN., UNIV. OF ME., REPORT OF THE PRELIMINARY ANALYSIS OF THE FEASIBILITY OF A PROBATE DISTRICT COURT SYSTEM FOR MAINE 21–25 (1967) [hereinafter BPA REPORT]. The BPA Report noted in its report: "One attorney interviewed, expressed dissatisfaction with the existing system because he discovered that the opposing attorney in a contested will case was a prominent judge of probate from an adjoining county." BPA REPORT at 23.

the other counsel.[239] One such report concluded that the practice of law by probate judges was a "point of serious complaint," that it raised "the serious appearance of impropriety," and that it "should no longer be permitted to continue."[240] Many of the problems that can arise from the state's current system were brought to light in a recent series of judicial discipline and related matters involving a Maine probate judge.[241] During the oral argument on one such matter in 2015, Maine Supreme Judicial Court Associate Justice Joseph Jabar asked counsel on both sides the same question: "Aren't all these problems inherent in having elected probate judges and allowing them to practice?" And attorneys on both sides answered, "Yes."[242]

Testifying in favor of probate court reform in Connecticut before the state's General Assembly in 2005, Yale Professor John H. Langbein noted, among what he called the "Five Core Failings" of the existing system, "the corruption that inheres in having lawyers sit as judges part-time, while they continue to practice law."[243] He went on to describe the "rampant conflict-of-interest and cronyism" that occur when probate judges or their law partners are permitted to practice before other probate judges. Explaining the "danger of favoritism" inherent in such circumstances, he wrote: "I am reluctant to rule against you or your partner, because I know that you could rule unfavorably against the case that my partner or I am handling before you."[244] Comparably, Connecticut Superior Court Judge Carl J. Schuman, writing of the experience of presiding over a pretrial conference in a matter in which one of the attorneys, referred to as "A.B.," was a sitting probate judge in a different town in the state, described the following exchange:

> During our discussions, opposing counsel, for his own strategic reasons, actually cites the probate judge's opinion in a different case, referring to the "well-reasoned decision of the eminent Judge A.B." A.B. then asks to review the decision. He does and, not to be outsmarted, remarks: "That judge didn't know what he was doing."[245]

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239. *See In re* Estate of McCormick, 765 A.2d at 559 n.4; *see also* Peter L. Murray, *Maine's Overdue Judicial Reforms*, 62 ME. L. REV. 631, 640–41 (2010) (noting potential for "serious scandal" from permitting probate judges to practice law).

240. COMM'N FOR THE STUDY ON CT. STRUCTURE IN REL. TO PROB. AND FAM. L. MATTERS, REP. TO THE JUD. COUNCIL 4–6 (1985).

241. *See In re* Nadeau, 178 A.3d 495, 500 (Me. 2018); *In re* Nadeau, 170 A.3d 255, 260 (Me. 2017); *Matter of* Nadeau, 168 A.3d 746, 762 (Me. 2017); *In re* Nadeau, 144 A.3d 1161, 1175 (Me. 2016); *see also* LeGrand v. York Cty. Judge of Prob., 168 A.3d 783, 795 (Me. 2017) (affirming judgment for defendant Robert Nadeau in class action lawsuit brought by litigants whose cases were delayed when, as probate judge, he imposed changes in the court schedule to protest the county's rejection of his request for a pay raise).

242. Judy Harrison, *High Court Considers Ethical Problems of Probate Court Judges*, BANGOR DAILY NEWS (Nov. 4, 2015), https://www.bangordailynews.com/2015/11/04/news/high-court-considers-ethical-problems-of-probate-court-judges/ [https://perma.cc/4ZKE-638L].

243. John H. Langbein, The Scandal of Connecticut's Probate Courts, Statement Before Conn. Legislature Comm. (Oct. 2005).

244. *Id.*

245. Carl J. Schuman, *Sitting on the Bench: My Adventures in a Connecticut Court*, 104 JUDICATURE 73, 73–74 (2020).

Although intended as a humorous anecdote, the description effectively conveys the inherent awkwardness of such situations.

In 2001, the *Tennessee Bar Journal* published an article titled "The Impossible Balance: A Tennessee Judge Makes the Case for Abolishing State's Part-Time Judgeships." [246] Its author, James L. Cotton, a part-time Tennessee Sessions Court judge, summarized the reasons for his view that the state should do away with such positions: "It's about public perception of our Tennessee system of justice. It's about restoring public confidence in the independence and neutrality of judges. It's about encouraging the integrity of judges. Even more fundamentally, it's about preserving public belief in and acceptance of the rule of law."[247]

Drawing in part from his own experience, Cotton continued: "The ethical and personal dilemmas uniquely encountered by part-time judges, who are juxtaposing a private law practice with sitting as general sessions judges, are of endless variety."[248] He went on to offer several examples representing "just a handful of the infinite and unimaginable ethical problems that constantly rear up on part-time judges who practice law, threatening both their private law practice and their judicial reputation."[249] Squarely confronting the necessity rationale for permitting part-time judges to practice law, he wrote:

> The very fact that there are two sets of ethical rules, one for full-time judges and one specially carved out for part-time judges, although understood by the bar as technically necessary, is in reality an exercise in the parsing of ethics that is indistinguishable by the public, and assures that part-time judges are doomed to suffer public perception problems.[250]

Notwithstanding these and other criticisms from their respective state benches and bars—criticisms that stress how the existence and appearance of lawyer-judges diminishes respect for their courts—Maine, Connecticut, and Tennessee continue to have at least some part-time judges who practice law.[251]

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246. Judge James L. Cotton Jr., *The Impossible Balance: A Tennessee Judge Makes the Case for Abolishing State's Part-Time Judgeships*, 37 TENN. BAR. J. 12 (2001).

247. *Id*. at 13.

248. *Id*.

249. *Id*.

250. *Id*. at 14.

251. *See infra* notes 356–58, 364–75 and accompanying text. Maine has enacted no reforms to its probate court system, while Connecticut reduced the number of part-time probate judges. Tennessee continues to designate Sessions Court Judges in certain counties as part-time and they are permitted to practice law, TENN. CODE ANN. § 16-15-5002(b) (2023), but the state has recently enacted reforms to transition some judicial positions to full-time. A provision added to § 16-15-5002 in 2018 permits the legislative bodies of smaller counties to adopt a resolution to require that county's Sessions Judge to "devote full time to the duties of such office and shall be prohibited from the practice of law or any other employment which conflicts with the performance of their duties as judge." 2018 TENN. LAWS PUB. Ch. 921 (S.B. 2370) *enacting* TENN. CODE ANN. § 16-15-5002(c) (2023). At least two counties have taken this step. Meg Dickens, *State Approves Full-Time General Sessions Judge*, THE TOMAHAWK (Oct. 4, 2022), https://www.thetomahawk.com/news/article_367c5023-c072-5e04-ad3d-b6566fbd2073.html [https://perma.cc/LXC4-D525].

B. SPECIFIC ETHICAL CONCERNS RAISED

As Maine Supreme Court Justice Jabar observed in the oral argument cited above,[252] allowing judges to practice law is both complicated to navigate and difficult to police. In addition to the logistical problems it can create, such as the need to reassign or transfer cases to other courts as in the Maine case described earlier, it also raises a host of ethical questions. Prominent among them, to be discussed below, is the opportunity it presents for lawyer-judges to misuse the powers of their judicial office, or the status thereby conferred, to gain an advantage for their law practice generally or for a specific client. No less significant, also described below, are questions of conflict of interest, which can involve judges presiding over cases involving their own current clients, clients of their law firm, or a lawyer with whom they share an office. Conflicts can occur when a lawyer-judge presides over a matter involving someone who is also an opposing party in a case in which the lawyer-judge is an attorney. Similarly, ethical questions arise regarding whether a judge's law partner or members of their firm can practice in the same court where the judge sits. Because the dual roles can facilitate ethical lapses unlikely to occur where the practice remains totally prohibited, part-time judges may find themselves facing discipline as a judge, attorney, or both for actions that create an appearance of impropriety or other misconduct.[253]

In jurisdictions where the practice of law by judges is allowed, the management of the problems inherent in such dual roles is left to case-by-case assessments, first by the judges themselves informally, and then, if reported, by judicial conduct authorities. It is often difficult for a judge or formal authorities to determine if a particular action constitutes an appearance of impropriety, or a potential compromise of impartiality, or some other conduct violation. As the U.S. Supreme Court has observed: "The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply *underscore the need for objective rules*. Otherwise, there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case."[254]

The general concerns about part-time judges practicing law, noted in the preceding Section III.A, often shape the arguments and discussions found in ethics advisory opinions and discipline opinions where one or more of the above-mentioned limitations came into play in a particular case. The American Judicature

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252. *See In re* Nadeau, 178 A.3d 495, 498–99 (Me. 2018).

253. *See, e.g.*, Miss. Comm. on Jud. Perf. v. Atkinson, 645 So. 2d 1331, 1337–40 (Miss. 1994) (Lee, J., dissenting) (criticizing the majority opinion's analysis of misconduct by a judge *pro tempore* who represented a criminal defendant in a bond reduction hearing when he had set the original bond under the judicial canons rather than under the rules of professional conduct applicable to attorneys given that the respondent's misconduct occurred in his role as attorney, not judge); *see generally Misconduct of Judicial Officer as Grounds For Discipline*, 7 AM. JUR. 2D ATT'YS. AT LAW § 79; *Misconduct in Capacity as Judge as Basis For Disciplinary Action Against Attorney*, 57 A.L.R.3d 1150 (1974).

254. Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868, 883 (2009) (emphasis added).

Society's ("The Society") 1999 *Ethics Guide for Part-Time Lawyer Judges* ("*Ethics Guide*") provides a lengthy catalog of the myriad opportunities—the "endless variety" described by Tennessee Judge Cotton—for ethical breaches and conflicts when someone has such dual roles.[255] Because the issues cannot all be anticipated or addressed in a state's judicial code, the need often arises for fact-specific ethics advisory opinions[256] or for guidance provided through disciplinary opinions. Dozens of examples of discipline or advisory opinions are listed in the Society's *Ethics Guide*.[257]

In some disciplinary cases, the lawyer-judge is found to have committed an ethical violation by failing to maintain clear boundaries between their two roles, or by misusing their judicial office to gain an advantage for their law practice generally or for a specific client.[258] For example, discipline or ethics advisory opinions may involve a lawyer-judge appearing to use their judicial position to market their law practice.[259] In one such case, an Iowa part-time magistrate was publicly reprimanded for abusing "the prestige of judicial office to advance [their] personal or economic interests" by publishing phonebook advertisements for his law practice that referred to his position as an "Iowa Judicial Magistrate" and included a photograph of him wearing his judicial robe.[260] In a particularly

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255. CYNTHIA GRAY & NANCY BIRO, AN ETHICS GUIDE FOR PART-TIME LAWYER JUDGES (1999). The American Judicature Society ceased to be a separate entity in 2014, when its board of directors dissolved the organization. *History*, AM. JUDICATURE SOC'Y, https://americanjudicaturesociety.org/about-us/history/ [https://perma.cc/RL9X-EV7S] (last visited Nov. 17, 2023). Its Center for Judicial Ethics was transferred to the National Center for State Courts. *Center for Judicial Ethics moves to National Center for State Courts*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/newsroom/news-releases/2014/center-for-judicial-ethics-moves-to-national-center-for-state-courts [https://perma.cc/DC8S-J7X2] (last visited Nov. 27, 2023).

256. *See, e.g.*, S.C. Advisory Comm. on Standards of Jud. Conduct, Op. No. 6-2023 (2023) (concluding that a part-time municipal judge can serve as a city attorney for a different municipality).

257. GRAY & BIRO, *supra* note 255, at 115–18.

258. *See, e.g.*, Justin Trombly, *Part-Time Caledonia Judge Sanctioned for Abusing Position To Help Private Cases*, VT DIGGER (Jan. 5, 2021), http://vtdigger.org/2021/01/05/part-time-caledonia-judge-sanctioned-for-abusing-position-to-help-private-cases/ [https://perma.cc/2LBT-E5C5].

259. *See, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1473 (1981) (part-time judge who practices law should not have his office telephone answered with "Judge X's office, may I help you" and should not conduct judicial duties from same office he uses for his law practice); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1196 (1971) (concluding that a part-time judge cannot list his Municipal Judge title on his law firm letterhead). *Cf.* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-391 (1995) ("We believe that the use of the title 'Judge' in legal communications and pleadings, as well as on a law office nameplate or letterhead, is misleading insofar as it is likely to create an unjustified expectation about the results a lawyer can achieve and to exaggerate the influence the lawyer may be able to wield. In fact, there appears to be no reason for such use of the title other than to create such an expectation or to gain an unfair advantage over an opponent.").

260. *In re* Meldrum, 834 N.W.2d. 650, 651, 654 (Iowa 2013). A part-time judge on the U.S. Court of Military Commission Review was the subject of a motion to disqualify in part because he allegedly engaged in misconduct by "exploiting [his] status as a federal judge . . . [to] recruit[] clients to [his] law firm" when his law firm posted on its website under his profile: "[T]he Obama administration appointed him to preside in trials involving the detainees at Guantanamo Naval Base in Cuba." The judge was apparently unaware that the firm had done this, ensured that text was immediately removed from the website, and denied the motion. United States v. Mohammad, 391 F. Supp.3d 1066, 1069, 1075 (U.S. Ct. of Military Comm'n Rev. 2019).

striking example of a blurring of the dual roles, an Ohio County Court judge maintained his private law practice in the courthouse annex for twenty-five years, using the courtroom as his law office, placing signage for his practice outside and within the courthouse, and occasionally interrupting and delaying court proceedings to talk with his clients.[261]

Numerous examples of lawyer-judges using their judicial positions to benefit private clients can be found in discipline opinions. A part-time Mississippi Municipal Court judge used his authority as a judge to run a criminal history check on the opposing party's current husband in a child custody case in which he represented a party.[262] He also contacted the court clerks and directed their handling of the case and "berated" and "cursed" other court clerks involved in the matter.[263] A New York Town Justice and Acting Village Justice was removed from office when, among other misconduct, he "seriously abused his judicial authority" by attempting to "cause the police to instigate a criminal complaint against a person for the benefit of a friend and client of [the lawyer-judge's] private practice."[264] A New Jersey municipal court judge was reprimanded by the state's Supreme Court when he intervened on behalf of a client in a pending municipal court matter by, among other things, phoning the court clerk and the presiding judge about the matter at home in the evening.[265] In issuing a public reprimand of the lawyer-judge, the Court noted:

> Part-time municipal court judges such as respondent, who maintain private practices, must be particularly circumspect. They must at all times keep separate their dual functions as judge and attorney. Zeal for a client is a proper motivation for a part-time municipal court judge in his capacity as an attorney. But such zeal can never be used by a judge as justification for using his judicial office to promote his client's interests.[266]

Even if a lawyer-judge does not overtly attempt to use their judicial position to gain an advantage for a private client, any demonstration of their status can have

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261. Ohio State Bar Ass'n v. Dye, 572 N.E.2d 666, 667 (Ohio 1991). The respondent resigned his judicial position after the county bar association filed a complaint against him. Apparently the county was aware of the lawyer-judge's use of court facilities and employees for his private practice, but it is not clear why his conduct went unchallenged by anyone else for so long. *See also* Public Censure of Giuliani (Conn. Council on Probate Conduct, Mar. 7, 2008) *cited in* GEYH ET AL., *supra* note 47, at § 6.06 (probate judge publicly censured for using the resources and facilities of the probate court for the benefit of his private law practice).

262. Miss. Comm'n on Jud. Perf. v. Gunter, 797 So.2d 988, 989 (Miss. 2001).

263. *Id.*

264. *In re* Romano, 712 N.E.2d 1216 (N.Y. Ct. App. 1999).

265. *In re* Santini, 597 A.2d 1388, 1389–90, 1392 (N.J. 1991). New Jersey prohibits municipal court judges from practice in criminal or quasi-criminal matters. *Id.* at 1390.

266. *Id.* at 1392; *see also In re* Matter of Murray, 458 A.2d 116, 119 (N.J. 1983) (issuing identical caution in another judicial discipline case involving a municipal court judge who interceded on behalf of a client by contacting the presiding judge in the matter); Commission Decision, Matter of Hutchinson, No. 96-2405-F-65, 1998 WL 63034 at *2 (Wash. Comm'n Jud. Conduct 1998) (finding no conduct violation in an appearance in bail hearing but nonetheless cautioning part-time judge: "So long as Respondent continues to practice law while serving as a part-time judge he is advised to clearly delineate his role when appearing as a lawyer").

an impact on their performance as an attorney. A newspaper article about the use of judges *pro tempore* in Virginia described an occasion when "[a] Fairfax County judge, his black robes swaying loosely as he walked, recently strode straight from his courtroom to the prosecutor's office to cut a deal for one of his private clients. 'I asked him to at least take off his robes first,' recalled the shocked prosecutor."[267] Of course, members of the practicing bar are usually aware of who among their peers also sits as a judge, even without such brazen displays.

Occasionally, a lawyer-judge is found to have exercised both roles in the same case.[268] For example, a New York Village Court Justice was admonished by the state Commission on Judicial Conduct for representing an alleged rape victim and her family (whom he knew prior to the start of the case through membership at the same country club) after he had presided over several proceedings in the criminal matter, which included issuing an arrest warrant, issuing a protection order on behalf of the victim, and setting bail for the defendant.[269] Seven months after the case was transferred to another court as a matter of procedure, the justice was contacted by the victim's family, and he began representing her in several related matters, including sending the defendant's family a letter threatening legal action if the family did not cease harassing the victim and calling the presiding judges to inform them of the alleged conduct by the defendant's family.[270] An Indiana attorney was disbarred when, as a judge *pro tempore*, he intentionally ruled on four matters in which he or his law partners had appeared as counsel, with outcomes that were highly favorable to the firm's clients.[271] A Connecticut probate judge was publicly censured for acting as an attorney with regard to estate matters at the same time that he was the judge responsible for the administration of those estates.[272]

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267. Pichirallo, *supra* note 211.

268. *See* GRAY & BIRO, *supra* note 255, at 48–53; *see, e.g.*, *In re* Friday, 208 S.E.2d 535 (S.C. 1974) (reprimanding attorney for representing criminal defendant in matters on which he had, in his role as part-time magistrate, set bail or issued warrants). Model Rule of Professional Conduct 1.12(a) provides that "a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge . . . unless all parties to the proceeding give informed consent, confirmed in writing." MODEL RULES OF PROF'L CONDUCT [hereinafter MODEL RULES] R. 12.1(a) (2023). A comment to the rule specifies that the prohibition applies to "lawyers who serve as part-time judges." MODEL RULES R. 12 cmt. 1.

269. *In re* Fleming (N.Y.S. Comm'n on Jud. Conduct 2013).

270. *Id.*; *see also In re* Steven Michels, 75 P.3d 950, 957–58 (Wash. 2003) (part-time municipal court judge suspended and censured after he was found to have participated in criminal matters as both a defense attorney and judge); *In re* McInnis, 258 S.E.2d 91, 92 (S.C. 1979) (attorney reprimanded for participating and allowing his law partners to participate in criminal matters before him in his role as part-time City Recorder, considered to be a judicial position).

271. *Matter of* Tabak, 362 N.E.2d 475, 476–77 (Ind. 1977). The lawyer-judge was found to have violated both the *Indiana Code of Professional Conduct* for attorneys and the *Indiana Code of Judicial Conduct*. *Id.*

272. Public Censure of Giuliani (Conn. Council on Probate Conduct, Mar. 7, 2008) *cited in* GEYH ET AL., *supra* note 47, at § 6.06.

Myriad actual or potential conflicts can arise when judges practice law, each of which must be managed carefully. The bulk of the *Ethics Guide* addresses the range of conflict scenarios, which can involve, for example, judges presiding over cases involving their own current clients[273] or clients of their law firm or someone with whom they share an office.[274] Conflicts can occur when a lawyer-judge presides over a matter involving someone who is also an opposing party in a case in which the lawyer-judge is an attorney.[275]

Problems can also arise when lawyer-judges appear before each other in court.[276] Some states permit judges to appear in the same court (or in a court of equal level) on which they serve, whereas others, as noted above, prohibit it.[277] A New York part-time judge was removed from office based on the finding that he appeared as counsel in matters in the same city court and that he permitted other part-time judges of the same court "to appear before him."[278] Similarly, questions

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273. GRAY & BIRO, *supra* note 255, at 24–43; *see, e.g.*, *In re* Bruhn 1 (N.Y. State Comm'n on Jud. Conduct 1987); *In re* Zafiratos, 486 P.2d 550, 551–52 (Or. 1971) (reprimanding attorney for, in role as municipal court judge, presiding over matter involving current client).

274. GRAY & BIRO, *supra* note 255, at 24–43; *see, e.g.*, *In re* Bruhn 1 (N.Y. State Comm'n on Jud. Conduct 1987); Ala. Disciplinary Comm'n, RO-2008-02 Part-time Judges; Part-time Assistant District Attorneys and Imputed Disqualification, Advisory Op. 2008-02 (Ala. 2008) ("[A] partner or associate of a part-time municipal court judge may not represent a client in municipal court regardless of whether their law partner has or may have had any involvement as a part-time municipal court judge"); Ethics Comm. of Miss. State Bar, Ethics Op. 149 (Miss. 1988) (describing which courts the part-time judge and his law partners may or may not appear in); S.C. Advisory Comm. on Standards of Jud. Conduct, Ethics Advisory Op. 04-2023, (S.C. 2023) (concluding that a part-time municipal judge may not serve where his firm represents the City in a pending civil matter); S.C. Bar, Ethics Advisory Op. 01-08 (S.C. 2001) (noting "split in views" in other states on the question of whether a part-time judge's firm is prohibited from appearing in the same court where the judge sits, even if not before the judge, concluding that it is permissible and overruling prior ethics opinion to the contrary).

275. *See* GRAY & BIRO, *supra* note 255, at 24–43; *see, e.g.*, *In re* Zafiratos, 486 P.2d at 551–52 (reprimanding attorney who represented clients in civil matters against individuals he had, in his role as a municipal court judge, found guilty of a traffic charge arising from the same collision).

276. *See, e.g.*, Kay S. v. Mark S., 142 P.3d 249, 252–53, 255–58 (Ariz. Ct. App. 2006) (vacating family matter judgment when an "appearance of impropriety" was created when one party was represented by an attorney who was also the "preferred pro tempore" judge in the courts); Haw. Comm'n on Jud. Conduct, Formal Advisory Op. 01-15, (Haw. 2015) (providing guidance for navigating when a part-time judge appears before a presiding judge of the same court); Ind. Comm'n on Jud. Qualifications, Advisory Op. 1-00, 2000 WL 35917437 (Ind. 2000) (describing limitations on practice by part-time judges in the courts in which they serve); Colo. Jud. Ethics Advisory Bd., Jud. Ethics Op. 07-06 (Colo. 2007) (concluding that a part-time judge may not sit as a judge on an ongoing basis in criminal matters and appear as an attorney before the same court in only civil matters); Ariz. Jud. Ethics Advisory Comm., Advisory Op. 92-16 (Ariz. 1993) (concluding that judge *pro tempore* and his law firm may not appear in the same court where the judge serves); N.Y. Advisory Comm. on Jud. Ethics, Jud. Ethics Op. 89-12 (N.Y. 1989) ("Because his mere presence in the courtroom may give rise to an appearance of an impropriety, the attorney-judge must stay away from any courtroom within the same county, presided over by a part-time lawyer-judge, whenever a client of his firm is a party and attorneys from his firm are in appearance representing that party.").

277. *See* GRAY & BIRO, *supra* note 255, at 54–65. *Cf.* S.C. Advisory Comm. on Standards of Jud. Conduct, Ethics Advisory Op. 05-2023 (S.C. 2023) (concluding that part-time probate judge may provide estate-planning services for clients in the same county where the judge serves because the prohibition extends only to practice before the same court, not in the same county).

278. *See, e.g.*, Harris v. State Comm'n on Jud. Conduct, 437 N.E.2d 1125, 1126 (N.Y. 1982). *Cf. In re* Lynne D. McCormick, 1993 WL 832125 at *3 (N.Y. Comm'n on Jud. Conduct 1993) (admonishing part-time

arise regarding whether a judge's law partner or members of their firm can practice in the same court where the judge sits.[279] The outcomes of such discipline or ethics advisory opinions vary and can turn on how an authority identifies what constitutes the "same court."[280]

The problems inherent in part-time judges of the same type of court appearing before each other are explained nicely by a Maine probate judge who, *sua sponte*, disqualified and recused himself from a matter in which another sitting probate judge appeared as counsel and had submitted an affidavit in support of a motion.[281] Citing the state's judicial conduct code restriction on ruling in a case in which his impartiality might reasonably be questioned, he wrote:

> When an attorney who is also an acting probate judge appears before me in a contested proceeding, I believe it raises the intimation of an appearance of impropriety as delineated within Canon 1 of the [Maine] Code of Judicial Conduct. In the course of serving their terms, probate judges may attend meetings and seminars together to become better informed in their roles and to improve the workings of the probate courts. They may also confer with one another electronically regarding probate matters. It would be unrealistic to suppose that a probate judge appearing as an attorney in a contested matter in a probate court does not bring into existence a tension that could appear to compromise the impartiality of the presiding probate judge. [282]

Of course, lawyer-judges can also abuse their position to the *disadvantage* of other lawyer-judges, such as when they have crossed paths previously as adversaries.[283]

Criminal cases often generate specific concerns about part-time judges practicing either as defense counsel, including for indigent clients, or as prosecutors.[284]

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town court judge for work as a legal secretary for an attorney who appeared in matters before other judges of the court).

279. *See* GRAY & BIRO, *supra* note 255, at 65–68; *see, e.g.*, *In re* Bruhn 1 (N.Y. State Comm'n on Jud. Conduct 1987).

280. *See* GRAY & BIRO, *supra* note 255, at 57–58; *see, e.g.*, Schnackenberg v. Towle, 123 N.E.2d 817, 820 (Ill. 1954) (interpreting "own court" broadly to prohibit county circuit court judges from appearing in circuit courts throughout the state).

281. *In re* Estate of Eleanor G. Potter, Ord. of Recusal, Docket No. 2014-0544 (Cumb. Cnty. Prob. Ct. 2016) *citing* ME. CODE JUD. CONDUCT Canon 2, R. 2.11(A).

282. *Id*. The Maine Probate Judges Assembly adopted a "nonbinding resolution" in the 1990s "recommending" that probate judges not appear before other probate judges in contested matters (but permitting the judges' law partners to do so). HON. JAMES E. MITCHELL & PHILIP C. HUNT, ME. PROB. PROC. § 1442 (2012). However, as our clinic's experience demonstrates, Maine's probate judges continue to appear before other judges.

283. For example, a New York discipline matter resulted in the removal of a Village Court Judge who ruled on a motion before him to retaliate against a Town Court Justice, who was the attorney in the case, because of a ruling the Town Court Judge made in a case involving the Village Court Judge. *In re* Schiff, 635 N.E.2d 286, 287–88 (N.Y. 1994).

284. *See* GRAY & BIRO, *supra* note 255, at 69–81; *see, e.g.*, Tex. Comm'n on Jud. Ethics, Op. No. 132, Part-Time Judge Representation of Clients (Tex. 1989) (concluding that a part-time judge may represent criminal defendants); Jud. Qualifications Comm'n of Ga., Op. 107, 1988 WL 1599695 (Ga. 1988) (concluding that it would be inappropriate for part-time judges to engage in the "regular or exclusive representation" of criminal defendants but declining to issue a blanket prohibition).

The Supreme Court of Nebraska rejected an appeal by a criminal defendant who argued that his attorney should have been disqualified from representing him because he was also a substitute county judge in the same county where his case was heard.[285] The court noted that while lawyers who serve as "prosecutors or judicial officers should not be appointed as defense counsel," it was excusable in that situation because there were not enough local attorneys available for appointment.[286] The National Center for State Courts recommended that Missouri disallow its part-time municipal court judges from serving as part-time prosecutors based on "observations and interviews" that revealed that such judge-prosecutors "have difficulty effectively and ethically balancing these roles."[287]

While the incidents described in discipline opinions and media reports may not represent the norm of conduct by lawyer-judges, and full-time judges can also misuse their authority, these examples nonetheless reveal both the significant potential for highly inappropriate actions by such dual-role judges and the powerful incentives to blur the boundaries between their two roles. It should also be noted that the disciplinary cases cited here describe misconduct that was known, reported, *and* the subject of public discipline.[288] Misconduct by lawyer-judges, however, is not always easy to uncover, such as when they seek an advantage for their client from their judicial position, and attorneys are reluctant to report misconduct by judges before whom they appear regularly.

Further, because of the exception carved out for part-time judges, in some matters there can be no finding of misconduct or disqualification even where concerns are raised about potential conflicts. For example, the Hawaii Supreme Court dismissed, as of "academic interest only," the concern that "an attorney could be arguing bitterly against another attorney one day, only to face his opponent as a judge the next" because "in practice, per diem judges are expressly precluded from practicing law before the court they serve."[289] Perhaps Hawaii law practice differs from that in other states, but many attorneys practice in multiple courts. As noted earlier in the example from our law school clinic's experience, Maine's restriction on a lawyer-judge's practice did not prevent the judge in question from appearing in another nearby court.

Parties raising constitutional challenges in cases where an opposing counsel is also a sitting judge have generally been unsuccessful.[290] The U.S. District Court for the District of New Jersey rejected such a constitutional challenge, dismissing the "hypothetical and speculative concerns" raised by the plaintiff in its motion to

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285. State v. Wagner, 177 N.W.2d 743, 743 (Neb. 1970).

286. *Id.* As this case suggests, inadequate pay for indigent defense work in some jurisdictions may also be used to rationalize allowing judges to practice law. *See id.*

287. GRILLER ET AL., *supra* note 150, at 14–15.

288. *See* GEYH ET AL., *supra* note 47, at § 11.12 (describing high degree of confidentiality in judicial conduct proceedings).

289. *In re* Ferguson, 846 P.2d 894, 900 (Haw. 1993).

290. *See, e.g.*, *In re* Estate of McCormick, 765 A.2d 552, 558 (Me. 2001).

disqualify an attorney for the defendant who was also a magistrate judge.[291] While the plaintiff argued that the trial court might be influenced by the fact that counsel for the defendant was also a federal judge, the Court concluded that the attorney's "general relationship with the court as a part-time magistrate judge does not create a personalized bias" under the standards of conduct for federal judges.[292] It added that there was no basis for concern that jurors would place additional weight on the word of the attorney-magistrate (assuming they learned of his dual roles) because jurors are instructed that "statement[s] made by lawyers are not evidence."[293]

In a 2001 opinion, the Maine Supreme Judicial Court rejected a due process challenge in a probate appeal where the appellant's opposing party was represented by a sitting probate judge.[294] The Court noted that the appellant had argued that:

> an unfair advantage inures to the litigant represented by a judge, with a correlative disadvantage to the adverse party, when, as here, a probate judge with years of service on the bench appears as a lawyer before another probate judge who is comparatively new to the bench and who may someday appear before the advocate-judge now before him.[295]

While the Court "underst[ood] [the appellant's] concern," it nonetheless held: "[W]e do not believe the situation rises to the level of a constitutional due process deprivation in the circumstances of this case."[296]

Defenders of the carveouts for part-time judges offer arguments based on the existence of ethics rules and on their case-by-case application. Prominent among the rules cited are those that, among other things, prohibit conduct by judges that implicates "the appearance of impropriety"[297] and those that require recusal "in any proceeding in which the judge's impartiality might reasonably be questioned."[298] Such rules, it is argued, provide adequate backstops against potential ethical breaches arising from the practice of law by part-time judges.[299] It is true that such provisions in codes of judicial conduct can provide a basis for discipline against part-time judges who fail to keep their two roles separate[300] and for ethics advisory opinions imposing restrictions on the practice by part-time judges.[301]

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291. Dembowski v. N.J. Transit Rail Operations, Inc., 221 F. Supp. 2d 504, 510–12 (D.N.J. 2002).

292. *Id.* at 512.

293. *Id.*

294. *In re* Estate of McCormick, 765 A.2d at 558.

295. *Id.*

296. *Id.*

297. MODEL CODE R. 1.2.

298. MODEL CODE R. 2.11(A).

299. *See, e.g.*, *In re* Ferguson, 846 P.2d 894, 901 (Haw. 1993); Davis v Sexton, 177 S.E.2d 524, 526 (Va. 1970). *Cf. In re* Estate of Eleanor G. Potter, Ord. of Recusal, Docket No. 2014-0544 (Cumb. Cty. Prob. Ct. 2016).

300. *See, e.g.*, *In re* Tabak, 362 N.E.2d 475, 477 (Ind. 1977).

301. *See, e.g.*, Ark. Jud. Ethics Advisory Comm., Advisory Op. 97-04 (1997) (concluding that a part-time municipal court judge cannot represent the city he serves as a judge); Ga. Jud. Qualifications Comm'n, Op. No.

The broad prohibition against the practice of law by judges, however, is based both on concerns about the *appearance* of impropriety and also on *reasonable questions* about a judge's impartiality that are raised by such practice. A stark and unresolvable internal inconsistency is involved in exceptions for such practice by part-time judges based solely on practical and financial considerations. As Judge Cotton explains: "In the final instance, the judiciary, to truly and wholly serve the ends of justice, must not only be fair and neutral—just as importantly, it must *appear* to be fair and neutral."[302]

When a judge is permitted to practice law, an individual who has been granted the enormous power of a jurist is also an advocate with the professional obligations of an attorney. Numerous provisions in the *Model Code* that indirectly limit the practice of law cannot be reconciled with carveouts for part-time judges.[303] Indeed, a number of state carveouts include specific exemptions from some of these provisions, particularly from those based on Rules 3.4 (Appointment to Government Positions), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as an Arbitrator or Mediator), and 3.11 (Financial, Business, or Remunerative Activities), while violations of others are implicitly tolerated.[304] In some states, part-time judges are specifically exempted from financial reporting requirements[305] and judges *pro tempore* from Rules 1.2 (Promoting Confidence in the Judiciary) and 2.4 (External Influences on Judicial Conduct), except while serving in their judicial role.[306] Exemptions and accommodations of these kinds

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107 (1988) ("[T]he regular or exclusive representation of [criminal] defendants by a judge, one of whose responsibilities include the issuance of criminal warrants or the trial of criminal cases, might destroy the appearance of impartiality and integrity essential to the administration of justice and, therefore, be inappropriate."). An ABA Informal Ethics opinion concluded that it would be a violation of the canon to avoid the "appearance of impropriety" for a part-time judge to list his municipal court judge title on his law firm letterhead. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1196 (1971).

302. Cotton, *supra* note 246, at 14. The inconsistency has been remarked upon by other commentators. For example, the National Center for State Courts noted that, while the range of conflicts of interest that arise when part-time judges are permitted to practice law can, in theory, be "responsibly managed" through the institution of special conflict rules for such judges, "it takes a constant, concerted, principled effort to do so and *even in situations where the potential conflicts are effectively balanced*, *the appearance of impropriety remains in the public mind*." GRILLER ET AL., *supra* note 150, at 14 (emphasis added).

303. *See supra* note 95 and accompanying text (listing numerous other *Model Code* provisions that are or can be implicated if not directly violated when a judge is fulfilling their obligations as an attorney and maintaining a for-profit law practice).

304. *See, e.g.*, ALA. CANONS OF JUD. ETHICS, Compliance with the Canons of Jud. Ethics (A)(1) (1980) (exempting part-time judges from provisions that limit or prohibit judges from serving as a fiduciary or arbitrator); N.Y. CODE OF JUD. CONDUCT § 100.6(B)(1) (1996).

305. *See, e.g.*, GA. CODE OF JUD. CONDUCT Application (A)(1) (1994); N.M. CODE OF JUD. CONDUCT R. 21-004 Application (B)(1)(b) (2012); N.D. CODE OF JUD. CONDUCT, Compliance with the Code of Jud. Conduct (A)(1) (2012); WYO. CODE OF JUD. CONDUCT Application (II)(A)(2) (2009).

306. *See, e.g.*, ARIZ. CODE OF JUD. CONDUCT Application (D)(1)(a) (2021); IND. CODE OF JUD. CONDUCT Application (V) (1993) (also exempting judges *pro tempore* from the prohibition on affiliations with discriminatory organizations, among several other provisions); WASH. CODE OF JUD. CONDUCT Application (III)(A) (2011) (same).

undermine the integrity of a judicial code of conduct and, by extension, the integrity of the judiciary itself.

C. OTHER IMPACTS OF PART-TIME JUDGES ON COURTS AND LITIGANTS

Maintaining a part-time judiciary whose judges have divided professional identities can have consequences beyond the ethical breaches by individual judges who do not properly navigate the blurred boundaries between their roles or the awkward moments for the other lawyers who appear before or argue against them. A court with part-time judges denies litigants the opportunity to have their cases presided over by a professional judge. Instead, their case is heard by someone who is not immersed in their judicial role and has professional interests beyond doing justice as a public servant. Former Maine Supreme Court Justice Ellen Gorman observed: "When you are not devoting all of your time to being a judge, it is hard to maintain the level of professionalism and education of law that is necessary for the position."[307] If the only judge for a court is part-time, the court itself is effectively part-time, and a judge may not be available to address urgent matters.[308] The opportunities for conflict described above can affect litigants by requiring their case to be delayed or, as occurred in the Maine case described in the Introduction, transferred to another location. Transfers to courts in other towns or even other counties impose added inconveniences, disruption, and costs on all the parties who are then obliged to litigate further from home and before a new judge unfamiliar with the prior proceedings. The practice of maintaining part-time judges serves all parties poorly and diminishes the effectiveness and authority of the judiciary.

As noted repeatedly in this article, part-time judges are permitted to practice law because the pay is low in their jurisdictions. Beyond the meagerness of their pay, such judges are rarely granted the same respect as full-time professional judges. Their lower status may be reflected in the shabby condition of the courtrooms in which they preside or in failures to provide robes when they assume their positions.[309] Also, because part-time judges are also practicing attorneys, the state judiciary may not include them in judicial education programs, having concluded, as Justice Gorman had noted, that it would be inappropriate "to train them alongside other judges."[310]

As discussed earlier, part-time judges are not sitting on courts of general jurisdiction or on appeals courts. Rather, they overwhelmingly preside in municipal, probate, traffic, and other "inferior" trial courts where the litigants are, by and

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307. Hogan, *supra* note 12.

308. This scenario is one reason New Hampshire enacted a unified court system to merge the probate, family, and district courts into a general jurisdiction Circuit Court. REP. OF THE JUD. INNOVATION COMM'N 15 (N. H. 2011).

309. *See* Hogan, *supra* note 12.

310. *Id*.

large, from marginalized populations and appearing without attorneys.[311] Staffing these evidently "devalued" courts[312] with part-time judges reflects an overall lack of concern about the quality of the judiciary in them and a policy choice to maintain certain categories of courts with diminished standards of justice for those who must appear before them.

IV. BETTER BOUNDARIES: JUDGES SHOULD NOT PRACTICE LAW

Allowing judges to practice law is incompatible with the values of an independent and impartial judiciary and gives rise to a host of significant problems and challenges. One would be hard-pressed to find a defender of allowing judges to practice law that offers a reason other than a purported need to permit certain categories of judges to seek additional compensation. Aside, perhaps, from those presently directly benefiting from it, few, if any, in the legal profession maintain that having judges who are part-time and practice law constitutes a *positive* feature of any court system.[313] Jurisdictions permit judges to practice when they undercompensate their positions. Usually, this undercompensation occurs because such judges sit only part-time; and they are part-time because, given the way the court system in which they preside is structured, there is insufficient work to justify a full-time judicial position. The perceived need underlying the necessity rationale is, thus, a gratuitous need.

As problematic and disfavored the policy of having judges as lawyers is, the fix is not simple, though removing carveouts for part-time judges in judicial codes of conduct is an essential step. Solving the problems involved must also include modifying court systems so as to eliminate any current reliance on part-time judges. Specifically, jurisdictions must structure their court systems for more rational and efficient allocations of judicial resources so that all judges have full-time positions and can devote themselves undividedly to their role as jurists. When reliance on part-time judges is eliminated, the outdated, tenuous, and strained justification for permitting any judge to practice law evaporates.

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311. Greene & Renberg, *supra* note 5, at 1293 ("Low-level state courts are essentially pro se courts, where the vast majority of litigants appear before the court with no attorney to represent them because there is no right to counsel in civil cases.").

312. In addition to being part-time, the judges in such courts may not even have legal training, which raises a host of problems separate from those described in this Article. *See* Maureen Carroll, *Non-Lawyer Judges in Devalued Courts*, CTS. L. (Sept. 12, 2022), https://courtslaw.jotwell.com/non-lawyer-judges-in-devalued-courts/ [https://perma.cc/2SDS-PTPA]; Greene & Renberg, *supra* note 5, at 1287; *see also* Anna E. Carpenter et al., *supra* note 158 (describing the "ethical ambiguity" of the role of judges presiding over "lawyerless courts").

313. Throughout my extensive research on the topic of law practice by judges, I did not encounter any arguments that judges practicing law is *itself* a beneficial feature. Rather, defenders of the exemption permitting part-time judges to practice base their position on the need to allow such judges to supplement their modest judicial pay, as noted throughout this Article.

A. THE ABA'S INCONSISTENT STANCE ON PART-TIME JUDGES

The ABA has sent inconsistent messages about the practice of law by judges even though it has taken a central role in guiding the regulation of ethical conduct by both lawyers and judges. In the *1924 Canons*, the ABA indicated that such practice was disfavored but permissible in some jurisdictions, provided that lawyer-judges sat only in "inferior courts."[314] One hundred years later, and despite countless examples of the inherently problematic nature of such arrangements, the ABA's Center for Professional Responsibility has not progressed beyond that position, and its *Model Code* continues to sanction the policy choice of many jurisdictions to allow lawyer-judges in their low-level courts. The permissive imprimatur here stands in sharp contrast with other stances taken by the ABA. One, as noted in Part III above, is the dim view that ABA's ethics advisory opinions have long taken of permitting judges to practice law for fiscal and practical reasons.[315] Such opinions note that the best solution to ethical problems arising from such practice is to eliminate the need for judges to supplement their judicial salaries.[316] By maintaining the exemption in the *Model Code*, however, the ABA sends mixed messages and gives states little reason to initiate or implement reforms.

More significantly, the ABA's *Standards Related to Court Organization* ("*ABA Standards*"), revised most recently in 1990 by the ABA's Section on Judicial Administration, squarely reject reliance on part-time judges.[317] The Section, which is separate from the Center for Professional Responsibility, based the *Standards* on input solicited from judges, court staff, court administrators, attorneys, academics, and others.[318] As one commentator observed: "The ABA has a long history of exerting influence on the structure and operations of the American court system, both state and federal,"[319] and the *ABA Standards* "serve [] the very useful purpose of a prescriptive overview of how the system ought to be designed and how it ought to work."[320]

The *ABA Standards* specifically reject fragmented systems featuring multiple specialized courts with caseloads too small to justify full-time judges.[321] The

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314. 1924 CANONS, Canon 31.

315. *See supra* notes 213–35 and accompanying text.

316. *Id.*; *see, e.g.*, ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1294 (1974), discussed *supra* notes 231–35 and accompanying text.

317. STANDARDS RELATING TO COURT ORGANIZATION (AM. BAR ASS'N., JUD. ADMIN. DIV., 1990 ed.) [hereinafter ABA STANDARDS]. A prior edition was published in 1974. *Id.* at vi.

318. *Id.* at vii.

319. Cole Blease Graham, Jr., *The American Bar Association's Standards Relating to Court Organization: A General Review*, *in* HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT 101, 116 (Steven W. Hays & Cole Blease Graham eds., 1993).

320. *Id.* at 117.

321. ABA STANDARDS, *supra* note 317, at 8–11.

publication's central theme is: "The judicial branch of government should operate in a coordinated manner."[322] It explains:

> Historically many court structures have developed by accident. In agrarian society, sparse population, poor transportation, and inadequate communications—all remnants in most parts of this country from a previous era in our national life—have forced many court systems to struggle with issues of fragmentation, divided authority, and lack of central leadership and direction. Court administration should not be an obstacle to, but should facilitate, the delivery of justice.[323]

To accomplish these goals, the *ABA Standards* urge states to simplify their trial courts, eliminating specialized and local courts in favor of courts of general jurisdiction and a central administration.[324] A key benefit of this alternative structure is the flexibility it provides for the assignment of judges and the allocation of judicial work,[325] obviating any need for part-time judges.[326] Similarly, the *ABA Standards* specifically discourage any use of judges *pro tempore*:

> Concern may be raised over potential conflict of interest (or the appearance of interest conflict) when an attorney may be a judge one day and an adversary the next, with the attorney who appeared before the judge pro tempore on the other side of the case. This is the same concern that has led to reforms in courts of limited jurisdictions aimed at eliminating part-time judges.[327]

A court's reliance on part-time judges typically reflects the inadequate resources allocated to that court. The *ABA Standards* observed that, among their "persistent inequities," courts of limited jurisdictions too often fail to provide sufficient judicial compensation to "attract and retain qualified full-time judges."[328] Scholars have also noted the financial disparity between limited and general jurisdiction trial courts,[329] specifically the inadequate resources allocated to those courts that are seen as primarily addressing the legal problems of people with low incomes.[330] The *1924 Canons*' distinction between "inferior" and general jurisdiction courts in terms of whether to allow lawyer-judges reflects a longstanding and entrenched acceptance of diminished justice in limited jurisdiction courts. As remarked in one commentary, maintaining such courts perpetuates "a

322. *Id*. at 2.
323. *Id*. at 2.
324. *Id*. at 3, 10. The trial courts can include divisions to focus on certain kinds of cases, such as criminal and family matters. *Id*. at 10.
325. *Id*. at 9–12. Other benefits include greater uniformity in the process and application of rules and laws. *Id*. at 10.
326. *Id*. at 11.
327. *Id*. at 70–71.
328. *Id*. at 58.
329. Greene & Renberg, *supra* note 5, at 1317–20.
330. *Id*. at 1328.

much larger problem in our justice system: the devaluation of the problems of the poor, who are disproportionately Black and Latinx."[331]

B. COURT REFORM TRENDS ELIMINATE PART-TIME JUDGES IN FAVOR OF UNIFIED COURT SYSTEMS

The *ABA Standards* reflect developments in court reform throughout the twentieth century as many states moved away from local and limited jurisdiction courts in favor of more unified and centralized systems for most or all of their courts.[332] Dean Roscoe Pound is credited with originating and promoting court structures that became known as "unified court systems."[333] In a 1906 speech to the ABA criticizing most state court systems at the time, Pound complained of, among other problems, the waste of judicial power where "business may be congested in one court while judges in another are idle."[334] In an influential 1940 article, he advocated for unification and integration of trial courts with general jurisdiction, uniform qualifications for judges, and the delegation of authority to set up court systems to state judicial branches.[335]

Pursuing court reform initiatives based on Pound's model, states replaced the local courts formerly presided over by laypersons or part-time judges with a centralized system featuring a professional, full-time judiciary.[336] The traditional justification for local courts—the difficulties of transportation beyond one's town—was no longer compelling given, as Pound noted in 1940, "present easy methods of travel."[337] With improvements in technology as well, many states dispensed with local courts in favor of district- or county-based courthouses, which could now also be reached via telephone, mail, and eventually, electronic filing. The centralized administration of the judiciary proposed by Pound also meant that judicial resources could be allocated to minimize the distance between

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331. *Id*. at 1291–92.

332. James A. Gazell, *The Current Status of State Court Reform: A National Perspective*, *in* Hays & Graham, *supra* note 319, at 79, 80.

333. *See, e.g*., BERKSON & CARBON, *supra* note 167, at 1–2; Cole Blease Graham, Jr., *Reshaping the Courts: Traditions, Management Theories, and Political Realities*, *in* Hays & Graham, *supra* note 319, at 3, 6 (referring to "Pound's Alarm Bell"); Gazell, *supra* note 332, at 79, 81; Donald C. Dahlin, *Normative Models of Court Organization and Management*, *in* Hays & Graham, *supra* note 319, at 53, 54–55.

334. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, *reprinted in* 20 J. AM. JUD. SOC. 178 (1937).

335. Roscoe Pound, *Principles and Outline of a Modern Unified Court Organization*, 23 J. AM. JUD. SOC. 225 (1940); *see also* ROSCOE POUND, ORGANIZATION OF COURTS (1940). Dean Pound was not the only mid-century scholar to advance such reforms. *See, e.g*., Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113, 150–53 (1944) (concluding from their survey of U.S. probate courts that the ideal structure would be to place such courts in the state's judicial organization as a division of the trial court of general jurisdiction and to require judges hearing probate matters to hold the same qualifications and to receive the same pay and tenure are all other judges.

336. Greene & Renberg, *supra* note 5, at 1302. For example, Chicago replaced its justices of the peace system with a "unified metropolitan court system with full-time judges." *See also* Dahlin, *supra* note 333, at 53–58.

337. Pound, *supra* 335 at 235.

courthouses,[338] such as having some judges cover more than one adjacent town or county. The subject matter jurisdiction of courts might be changed as well so there would be fewer specialized courts such as juvenile, traffic, and probate courts. The overall goal and achievement of these unification reforms was to systemize a state's courts further or completely.[339]

One example of such court reform is the Kentucky voters' approval in 1973 of a legislatively referred constitutional amendment to eliminate part-time judges as part of an overhaul and modernization of the state's judicial system.[340] In a concurring opinion several years later, Kentucky Supreme Court Justice Wintersheimer observed that, in approving the amendment, "the people of the Commonwealth clearly spoke against the use of part-time judges in a new and modern judicial system."[341] This trend has continued in recent years, with states such as New Hampshire enacting a substantial reorganization of its court system in 2011, in part to achieve greater efficiency in the use of judicial resources.[342] The National Center for State Courts has recommended that other court systems discontinue the use of part-time lawyer-judges for that same reason. For example, in its 2015 report on Missouri's Municipal Courts, it observed that, in other states, "[i]n instances where there isn't enough work in a court to keep a full-time judge busy, judges 'ride circuit' from one court to another covering multiple calendars."[343]

Some court structure reforms are expressly aimed at addressing concerns about judges practicing law. Through a series of enactments, Michigan eliminated all but one of its part-time probate judge positions by creating probate districts composed of multiple low-population counties and explicitly prohibiting all judges in those districts from practicing law.[344] When signing the 2004 bill that eliminated nine of the ten remaining part-time judge judicial positions, then-Governor Jennifer M. Granholm issued a press release stating that the new law was

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338. BERKSON & CARBON, *supra* note 167, at 21 (noting that some resistance to court reorganization stems from concern that courthouses will close, extending the distance litigants, jurors, and witnesses must travel).

339. *Id*. at 17–18; *see also* Gazell, *supra* note 332, at 79, 80 (noting that the "central theme" of state court reform was to make courts "genuinely coordinate branches of state government").

340. KY. CONST. § 109 (eff. Jan. 1, 1976); s*ee Kentucky Judicial Branch Restructuring Referendum* (1975), BALLOTOPEDIA, https://ballotpedia.org/Kentucky_Judicial_Branch_Restructuring_Referendum_(1975) [https://perma.cc/94KJ-J82G].

341. Regency Pheasant Run Ltd. v. Karem, 860 S.W.2d 755, 759 (Ky. 1993) (Wintersheimer, J., concurring in result). That case concerned the issue of whether a retired judge who acted as a judge *pro tempore* could continue to practice law. *Id.* The majority opinion noted that such practice was allowed by the *Kentucky Code of Judicial Conduct*. *Id*. at 759 *citing* KY. CODE OF JUD. CONDUCT Canon 7. Justice Wintersheimer cautioned that "[c]areful compliance must be observed for the will of the people in order to continue respect for the judiciary" and that allowing such practice presents the "possibility of potential abuse." *Id*.

342. REP. OF THE JUD. INNOVATION COMM'N, *supra* 308 at 14–16.

343. GRILLER ET AL., *supra* note 150, at 14 n.18.

344. MICH. COMP. LAWS ANN. §§ 600.807, 600.821 (West 2023). Keweenaw County is the only Michigan county that still has a part-time probate judge permitted to practice law. *Id*. at § 600.821(1). The conversion of such position to full-time was left to the county voters. MI Legis. 492 (2004), *amending* § 600.808.

designed to "streamline jurisdiction among local trial courts and enable Michigan's court system to more effectively align judicial resources with community needs."[345] She also observed that it "represents a major step toward the elimination of Michigan's part-time judges *to address ethical concerns about judges who continue to practice law while also serving on the bench*."[346]

Clearly, in sanctioning the use of part-time and temporary judges to maintain limited jurisdiction courts, the *Model Code* is out of step with contemporary best practices and with important developments in court organization. While aspects of unified court systems have their critics,[347] none of these criticisms are based on a claimed benefit of using part-time judges. Judge Cotton referred to court models featuring part-time judgeships as "antiquated and fossilized."[348] "No other single, sweeping change can so dramatically improve the legal system in Tennessee," he wrote, "as abolishing the part-time judge."[349]

C. RESISTANCE AND SUCCESSES IN COURT REFORM EFFORTS TO ELIMINATE PART-TIME JUDGES

The solution to the problems inherent in allowing judges to practice law is obvious, but restructuring court systems to eliminate the need for part-time judges is not always easily achieved. While several states have undertaken such reform, similar efforts have stalled in others. The relevant reform is a policy matter and, in most locations, requires the collaboration and involvement of state courts, local governments, and the state legislature. While the belief that judges should not practice law is held widely among judges and lawyers, the changes needed to eliminate the conditions leading to exemptions for certain judges often must come from legislators' statutory or constitutional amendments, as was the case in Kentucky, Michigan, and other states.[350]

Resistance to proposals for relevant court reorganization can be based on various concerns, local or general. It sometimes arises from concern that present local control, such as the selection of judges by a mayor, town council, or local voters, will be replaced with a remote centralized court administration.[351] Critics of

345. Press Release, *Governor Granholm Signs Law to Eliminate Part-Time Judges* (Dec. 29, 2004).

346. *Id*. (emphasis added).

347. *See* Dahlin, *supra* note 333, at 58–62.

348. Cotton, *supra* note 246, at 15.

349. *Id*.

350. The jurisdiction and structure of courts is largely a legislative matter, while some courts are established directly by constitutions. *See* BERKSON & CARBON, *supra* note 167, at 84–85, 91–99 (discussing how state legislatures have "traditionally dominated the courts" and the various routes to reforming court structures by way of constitutional amendments and legislative enactments).

351. For example, in Ohio, Mayor's Court judges are appointed by the mayor. OHIO REV. CODE ANN. § 1905.05 (2023). In Wyoming, mayors appoint municipal court judges. WYO. STAT. ANN. § 5-6-103 (2023). Town councils in Rhode Island appoint that state's probate judges. TIT. 8. R.I. GEN LAWS ANN. § 8-9-4 (2023). One of the principal arguments against unified trial court systems is a loss of local control and accountability if there is no longer a "resident judge" who is part of the community. BERKSON & CARBON, *supra* note 167, at 21, 183–84. Close connections between judges and their communities are not necessarily a positive feature of a

reform may also contend that transitioning to a system of general trial jurisdiction courts would be cost-prohibitive.[352] The lawyer-judges whose own positions would be changed or eliminated may be on either side of the court reform debate. Motives and interests vary. In some cases, an individual may want to protect the benefit of maintaining a lucrative law practice while also being able to engage in public service or enjoy the prestige of being a sitting judge.[353] A lawyer-judge may fear that if their judicial position were converted to full-time, they would lose that position entirely.[354] A number of part-time judges, however, have acknowledged both the limitations of court systems that retain that position and the difficulties of their own dual roles, and have, therefore, supported reform.[355]

In 2005, when the Connecticut General Assembly was considering reforms to its system of local probate courts, Yale Professor Langbein offered testimony in which he urged: "Judges should be required to be full-time officers of justice, legally trained, but forbidden to practice law or to be partners in law firms." He continued: "We do not need 123 full-time probate judges. Thus, achieving proper professionalization of our probate courts is intimately connected to reducing the number of these courts."[356] Connecticut did reduce the number of probate districts to 54 in 2011.[357] The state continues, however, to rely on part-time probate

court system with the goal of an impartial and independent judiciary. A 1967 report of Maine's probate court system considered two "disadvantages" to bringing the probate judges into the state court system as full-time judges raised by some probate judges—less "access to judges" and decreased connection with community. *Id.* The report's authors concluded that such changes would in fact be *improvements*, since they would minimize the "problem of preserving the confidence of the community in the impartiality of the judge." *Id.* at 24–25 (internal quotations omitted). More recently, a former Maine State Senator and Attorney General, Michael Carpenter, explained why he disagrees with "local control" as an important component of courts. Hogan, *supra* note 12. "Courts should be above local control. Local control is about electing your school board, electing your town council and that sort of thing. It's not about, it shouldn't be about, interpreting the law, in my opinion," he explained. *Id.* While the notion of "local control" may be a useful political tactic, in the context of court systems it also means less efficiency in the allocation of resources and less uniformity among courts.

352. BERKSON & CARBON, *supra* note 167, at 21–22.

353. *Id.* at 76, 130, 141 (describing political impact of advocacy by part-time judges against reform efforts in Idaho, Alabama, and Colorado).

354. Some states "grandfathered" certain existing part-time judgeships as part of court reform initiatives. *Id.* at 142.

355. In a 1967 study of Maine's part-time probate courts, when the probate courts' caseloads were considerably lighter than they are today, 12 of the 16 probate judges interviewed believed that the system would operate more efficiently if they were full-time positions, eliminating their need to attend to a law practice at the same time. BPA REPORT, *supra* note 238, at 21–23. They also felt that converting the positions to full time would increase the respect for the position and decrease the chances for abuse of judicial discretion. *Id.* All three sitting probate judges on a recent Maine commission recommending the elimination of part-time probate judges supported that specific reform, and differed only in terms of whether the new full-time positions should be appointed or elected. 2021 ME. COMM'N REP., app. B (membership list), app. R-3 (Minority View of Judge Jarrod Crockett) (Dec. 2021).

356. Langbein, *supra* note 243.

357. 2009 Conn. Legis. Serv.-September Sp. Sess. P.A. 09-1, § 1 (H.B. 7001).

judges who are required to work no more than 20 hours per week and are permitted to practice law.[358]

Resistance to the reorganization or elimination of limited jurisdiction courts that would obviate the need for part-time or temporary judges is also seen in other states.[359] When a part-time Juvenile Court judge in Georgia came under scrutiny for representing a person "charged with several counts of child molestation and sodomy" in 2003, some citizens in the state raised the broader question of the practice of law by judges.[360] Another Juvenile Court judge interviewed for a news story on the question explained that the Juvenile Court judge's practice was "not only legal, but this state has a long tradition of part-time judges," and noted that there were still many part-time judges in Georgia. He remarked, "A lot of that goes back into history as a matter of economics and a matter of the available number of lawyers," [361] and added: "You can avoid the [public] objections if you have a full-time judge," but if the residents want a competent full-time juvenile court judge then they "need to be willing to pay for it."[362] Nearly one-third of Georgia's Juvenile Court judges are still part-time.[363]

In Maine, decades of concerted efforts to create a new probate court system that would eliminate part-time judges have thus far failed to result in actual reform.[364] Those efforts included a statewide referendum. In 1967, a majority of Maine voters approved an amendment to the state constitution repealing the 1855 amendment that provided for the election of probate judges by the residents of each county.[365] The vote outcome's effective date was postponed indefinitely by

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358. CONN. H.R. 6385 § 8(f); Margaret E. St. John, Note, *The Connecticut Probate Court System Reform a Step in the Right Direction*, 24 QUINNIPIAC PROB. L.J. 290, 301, 310 (2011).

359. The question of what to do with probate courts has been featured in many court unification initiatives in individual states, and in some they were retained for political reasons notwithstanding unification of other courts. *See e.g.*, BERKSON & CARBON, *supra* note 167, at 51–53, 76. In addition to Connecticut, efforts to bring Ohio's and Florida's probate courts into a unified court system encountered significant resistance. *Id.*

360. Randall Frank, *Part-Time Judges as Lawyer*, NW. GA. NEWS (Jan. 13, 2003), https://www.northwestgeorgianews.com/part-time-judges-as-lawyer-local-headline/article_0a447046-d234-5472-bb8d-7e8d8101e8ed.html [https://perma.cc/33DT-446L].

361. *Id.*

362. *Id.*

363. *See* COUNCIL OF JUV. CT. JUDGES OF GA. (June 1, 2023), https://georgiacourts.gov/cjcj/ [https://perma.cc/6VPM-L9P4] (noting that as of June 1, 2023, Georgia has 164 Juvenile Court Judges, broken down as follows: "76 Full-Time Juvenile Courts Judges, 27 Part-Time Juvenile Court Judges; 7 Full-Time Associate Juvenile Court Judges and 8 Part-Time Associate Juvenile Court Judges; 27 Pro Tempore Judges; and 19 Senior Judges").

364. Hogan, *supra* note 12. In 2017, the Legislature did enact "An Act to Promote Impartiality in the Probate Court" to prohibit probate judges from appearing in contested matters in other probate courts, but it failed to override Governor Paul LePage's veto of the bill. An Act to Promote Impartiality in the Probate Court, Legis. Doc. 128-1043, 1st Reg. Sess. (Me. 2017).

365. *See* ACTS AND RESOLVES, 103D LEG., ch. 77 (Me. 1967) (amending ME. CONST. art. VI, § 6 (repealed 1967)). Approximately 55% of the voters approved the amendment on November 7, 1967. *Amendments to the Maine Constitution, 1820 – Present*, ME. ST. LEG. (last updated Nov. 2023), https://www.maine.gov/legis/lawlib/lldl/constitutionalamendments/ [https://perma.cc/6H9K-RB9T]. The referendum was held after the Maine Legislature authorized a University of Maine Bureau of Public Administration study of the probate

the language of the new amendment, which provided that the repeal "shall become effective at such time as the Legislature by proper enactment shall establish a different Probate Court system with full-time judges."[366] As elaborated later by the Maine Supreme Judicial Court, the purpose of that contingency was "to give the Legislature discretion to study and determine the best system for administering and adjudicating matters traditionally within the jurisdiction of the probate courts. *The intent was to open the way for change in the system.*"[367] Fifty-six years after the referendum, several reports, and numerous court restructuring proposals in the years since its passage, the Maine Legislature has still not fulfilled the condition of the amendment.[368]

Each study of the Maine county-based probate courts outlined the many serious implications of permitting probate judges to practice law part-time.[369] Most recently, the Legislature received the 2021 report of its Commission to Create a Plan to Incorporate the Probate Courts into the Judicial Branch.[370] The report recommended that the present sixteen part-time, county-based, probate judges be replaced by nine full-time judges as part of a statewide Probate Court within the state judicial branch.[371] These recommendations were specifically aimed at addressing the problem of part-time judges practicing law, due to "the potential for conflicts of interest and the appearance of impropriety attendant to these situations."[372] In the following year, while a majority of the state's legislators approved the Commission's recommendations, the Legislature declined to appropriate funds for enacting them.[373]

Where a state's policymakers fail to enact reforms eliminating its court system's reliance on part-time judges permitted to practice law, the state's supreme court can, and should, do what it can within its sphere of authority to limit such practice. If it does not force the issue, it should at least send a strong signal of the need for relevant reform. The Maine Supreme Judicial Court has acknowledged

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courts which noted, among other problems, that the probate judges were part-time and "members of the bar." BPA REPORT, *supra* note 238, at 7.

366. ACTS AND RESOLVES, supra note 365 at ch. 77.

367. *Opinion of the Justices*, 412 A.2d 958, 982 (Me. 1980) (emphasis added).

368. 2021 ME. COMM'N REP., at 1. For example, a report issued by the Institute for Judicial Administration soon after the 1967 election recommended that the Legislature assign jurisdiction of the various matters then heard before the probate courts to the Superior Court as part of a simple "three-tier court structure," noting that the "modern trend" among states was "to make the probate judge a full-time judicial officer." IJA REPORT, *supra* note 238, at 16–18, 25.

369. *See* BPA REPORT, *supra* note 238 and accompanying text.

370. 2021 ME. COMM'N REP., ch. 104.

371. *Id*. at ii.

372. *Id*. at 10. The move to full-time judges was an integral part of the 1967 constitutional amendment, but the Commission also took note of the consensus of reports about Maine's probate courts. *Id*. The Commission also received several public comments urging the Commission to create a system in which judges would not practice law. *Id*. apps. J-1, J-2.

373. An Act To Implement the Recommendations of the Commission To Create a Plan To Incorporate the Probate Courts into the Judicial Branch, Legis. Doc. 130-1959, 1st Reg. Sess. (Me. 2022), https://legislature.maine.gov/legis/bills/getPDF.asp?paper=HP1453&item=1&snum=130 [https://perma.cc/8DMJ-2T23].

that the practice of law by probate judges is controversial and unpopular but maintains that imposing restrictions on the practice of law by probate judges must begin with the Maine Legislature.[374] The Court observed in the Introductory note of the 2015 version of the *Maine Code of Judicial Conduct*:

> This Code has been adopted by the Court after consideration of comments and suggestions from members of the bench, bar, and public. Issues concerning Probate Court judges' part-time status, particularly their representation of clients in probate court matters, generated substantial negative comments. That issue, however, is a matter that *can only be addressed by legislative action*.[375]

The actions of the Illinois Supreme Court exemplify how court leadership can have an impact. The Court issued a series of opinions, spanning two centuries, strongly condemning the practice of law by judges, which eventually led to the elimination of lawyer-judges in Illinois. In an 1886 opinion, the Court commented that while there was no constitutional prohibition on the practice of law by judges, "[p]ropriety may forbid a judge . . . from practicing law, as not being congruous with the judicial office."[376] Similarly, in dicta from an 1891 case, the Court observed that the practice of law by judges "is one not to be commended, because of [its] tendency to bring the administration of the law into disrepute and contempt."[377]

In a 1954 opinion, *Schnackenberg v. Towle*, the Court pointed to these early cases in Illinois and other authority when it held that a contract term for the provision of legal services by a county circuit judge was unenforceable as contrary to public policy, even though the judge was not prohibited from practicing law outside of his own court.[378] The Court interpreted the existing prohibition on such a judge practicing "in the court in which he presides" broadly as prohibiting them from appearing in any circuit court throughout the state.[379] It reasoned: "[T]he policy of keeping our courts free from suspicion would be difficult, if not impossible, to maintain if this court gave judicial sanction to one whom the people have

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374. *See In re* Estate of McCormick, 765 A.2d 552, 558–59 (Me. 2001) ("The practice of allowing part-time probate judges to litigate cases as part-time lawyers has received widespread criticism . . . The Maine Legislature has addressed this issue and has continued to allow probate judges to maintain active probate practices."). However, the statutory provision cited by the Court in *McCormick* as the source of probate judges' authority to practice law, 4 M.R.S.A. § 307, contains only an implicit reference to such authority, rather than actually conferring it. *Id*.; *see* 4 ME. REV. STAT. ANN. tit. 4, § 307 (2023). The only express authorization for the practice of law by probate judges is in *Maine Code of Judicial Conduct*, which expressly exempts probate judges from the prohibition on practice. ME. CODE OF JUD. CONDUCT Coverage & Effective Date § I(B)(2) (2023). However, as a practical matter, amending the *Code of Judicial Conduct* to restrict probate judges' practice of law needs to occur in the context of broader reform to the probate courts' structure, which only the Maine Legislature can implement.

375. ME. CODE OF JUD. CONDUCT, *supra* note 237 (emphasis added).

376. Town of Bruce v. Dickey, 6 N.E. 435, 440 (Ill. 1886).

377. O'Hare v. Chicago, Madison & N. R.R. Co., 28 N.E. 923, 923 (Ill. 1891) (internal citations omitted).

378. Schnackenberg v. Towle, 123 N.E.2d 817, 819 (Ill. 1954).

379. *Id*. at 820.

elected a judge, with State-wide power, to engage for personal gain in the partisan practice of law."[380] Such prohibition, the Court clarified, must be applied even absent evidence that a judge attempted to use the judicial office to further their practice.[381]

Seven years later, in *Bassi v. Langlois*, the Illinois Supreme Court again exerted its authority to limit the practice of law by judges. Here, it held that financial considerations could no longer justify permitting the practice by county judges, even in the absence of any statutory prohibition on their practice.[382] It observed that "the problem of judges practicing law while occupying judicial office has been the concern of the profession for many years," and that, while allowing judges to practice in courts other than their own "has never been favored, it has been condoned because the salaries paid the judges were in many instances so low that it was impossible for them to properly maintain themselves and their families."[383] The Court then held: "We are of the opinion that the practice of law by an attorney during his tenure as county judge, in or out of court, directly or indirectly, is incompatible with his judicial responsibilities and duties and contrary to public policy."[384] The Court explained that the prohibition on such practice would have only prospective application, and it delayed the effective date by eighteen months to "permit the General Assembly to consider remedial legislation" and to give the affected judges "time to make the necessary adjustments to comply."[385]

In 1964, three years after *Bassi*, Illinois amended its state constitution and adopted a unified court system, eliminating all local and limited jurisdiction courts.[386] Section 16 of the Judicial Article of 1964 provided that judges could

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380. *Id.*

381. *Id.*

382. Bassi v. Langloss, 174 N.E.2d 682, 684–85 (Ill. 1961).

383. *Id.* at 683–84.

384. *Id.* at 684.

385. *Id.* at 685. The court acknowledged that there were many sitting county judges who relied on the tradition and prior case holdings that permitted the practice of law by judges when necessary to allow supplementary income who should not be "compelled to either immediately cease practicing law or resign their judgeships." *Id.*

386. *See Illinois Courts, How Cases Proceed Through the Court System,* ILL. CTS., https://www.illinoiscourts.gov/public/how-cases-proceed-through-the-courts/ [https://perma.cc/WQ6L-FZUV] (last visited Nov. 8, 2023); *see also Structure of the Illinois Court System*, 19TH JUD. CIR. CT., https://www.19thcircuitcourt.state.il.us/1273/Structure-of-the-Illinois-Court-System [https://perma.cc/HX8Z-XFG3] (last visited Nov. 8, 2023); *History of Illinois Courts*, 19TH JUD. CIR. CT., https://www.19thcircuitcourt.state.il.us/1281/History-of-the-Illinois-Courts [https://perma.cc/VM3T-TVQT] (last visited Nov. 8, 2023); DAVID F. ROLEWICK, SHORT HISTORY OF ILLINOIS JUDICIAL SYSTEMS 28-30 (1968); Harry G. Fins, *Analysis of Illinois Judicial Article of 1961 and Its Legislative and Judicial Implementation*, 11 DEPAUL L. REV. 185, 188–89 (1962). Illinois now has a centralized and unified court system consisting of one trial court of general jurisdiction, the Circuit Court, an intermediate appellate court, and the Illinois Supreme Court. *State Court Structures*, NAT'L CTR FOR STATE CTS., https://cspbr.azurewebsites.net/ [https://perma.cc/CK9L-M28Y] (last visited Nov. 8, 2023).

not "engage in the practice of law."[387] The reforms were reflected in further voter-approved amendments to the Illinois Constitution in 1970, which included the following provision: "Judges and Associate Judges shall devote full time to judicial duties. They shall not practice law . . . ." [388] When Illinois adopted the *Illinois Code of Judicial Conduct* in 1987, it did not include any exceptions to the practice of law or any reference to part-time judges.[389]

CONCLUSION

Jurisdictions compromise the core values of our justice system when they continue to allow lawyer-judges to preside in under-resourced courts where the most marginalized and vulnerable people are litigants. As the Illinois Supreme Court observed with respect to the "inadequate remuneration" rationale for the "deviation from propriety" that allowed judges to practice law: "When the reason for a rule disappears, the rule itself should disappear."[390]

There is no reason today—if one ever existed—to permit any judges to practice law. Jurisdictions should eliminate any such exemptions in their judicial codes or laws. States relying on a necessity rationale for their exemptions can follow the example of Kentucky, Illinois, Michigan, and other states that eliminated the use of part-time and temporary judges. The costs of allowing lawyer-judges to straddle their inherently incompatible roles are simply too great to tolerate. The legal profession—both the bench and the bar—understands those costs well and therefore must lead efforts to revisit and reform these problematic arrangements wherever they remain in the United States.

Courts with a full-time dedicated judiciary garner more dignity and respect, which also reflects on their functions and litigants. Full-time judges can immerse fully in their judicial role rather than having their attention, interests, and duties divided by maintaining a separate law practice. Every matter heard in a court must be overseen by a competent and dedicated professional judge. Each litigant—no matter how seemingly "minor" their case may be—deserves no less. We must not minimize what is at stake. As explained by Judge Cotton, the need for this reform is clear, stark, and urgent: "How the public views our judges is the gold standard by which they measure the legal system as a whole. Public perception of the judiciary goes to the very heart of why the public is willing to obey court decisions—that is, follow the rule of law."[391]

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387. *See Judicial Article of 1964*, 19TH JUD. CIR. CT., https://19thcircuitcourt.state.il.us/1287/Judicial-Article-of-1964 [https://perma.cc/AW6E-D84C] (last visited Nov. 10, 2023).

388. JUD. ART. OF THE ILL. CONST. OF 1970, art. VI, § 13(b).

389. ILL. S. CT. R. 61–68 (1987); *see* Jeffrey M. Shaman, *The Illinois Code of Judicial Conduct and the Appearance of Impropriety*, 22 LOY. UNIV. CHI. L.J. 581, 582 (1991). The original language provided, "[a] judge should not practice law." Ill. S. Ct. R 65, Canon 5(F). In the 2023 version, that language was changed to "[a] judge shall not practice law." ILL. CODE OF JUD. CONDUCT art. XL, r. 3.10 (2023).

390. Schnackenberg v. Towle, 123 N.E.2d 817, 819 (Ill. 1954).

391. *See* Cotton, *supra* note 246, at 15.

APPENDIX

State	Exemption from Prohibition on Law Practice	Citation
Alabama	Part-Time Judges. Judges *Pro Tempore*, and Probate Judges are exempt from complying with Canon 5F (Practice of Law).	ALA. CANONS OF JUD. ETHICS Compliance with the Canons of Judicial Ethics
Alaska	Part-Time Magistrate Judges and Deputy Magistrates are exempt from complying with Section 4G (Practice of Law).	ALASKA CODE OF JUD. CONDUCT Application of the Code of Judicial Conduct
Arkansas	Continuing Part-Time Judges and Periodic Part-Time Judges exempt from complying with Rule 3.10 (Practice of Law) but "shall not practice law in the court on which the judge serves, shall not appear in any criminal matter in the county in which the judge serves. .. ." *Pro tempore* Part-Time judges are fully exempt from Rule 3.10.	ARK. CODE OF JUD. CONDUCT Application III–V
Arizona	Retired Judges Available for Assignment, Continuing or Periodic Part-Time Judges, *Pro Tempore* Part-Time Judges are exempt from complying with Rule 3.10 (Practice of Law) with some specific provisions for *Pro Tempore* Part-Time Judges	ARIZ. CODE OF JUD. CONDUCT Application, Part B
California	Temporary Judges, Referees, and Court-Appointed Arbitrators are required to comply with only certain parts of the Code of Judicial Conduct; Canon 5G (Practice of Law) is not included.	CALIF. CODE OF JUD. ETHICS Canon 6 Compliance with the Code of Jud. Ethics

State	Exemption from Prohibition on Law Practice	Citation
Colorado	Part-Time Judges are exempt from complying with Rule 3.10 (Practice of Law) with Model Code limitations[392]; Appointed Judges are exempt from complying with Rule 3.10 (Practice of Law).	COLO. CODE OF JUD. CONDUCT Application III–IV
Connecticut	Only limitation on practice of law is "No judge shall appear as an attorney in the court to which he or she was elected, notwithstanding the fact that another judge has been cited in to hear the matter." All other Connecticut Judges subject to Connecticut Code of Judicial Conduct, which has no exemptions from prohibition on practice of law	CONN. CODE OF PROB. JUD. CONDUCT R. 3.10 CONN. CODE OF JUD. CONDUCT Application, R. 3.10
Delaware	No exemptions from prohibition on practice of law.	DEL. JUDGES' CODE OF JUD. CONDUCT Application
District of Columbia	Senior judges are exempt from complying with Rule 3.10 (Practice of Law) subject to Model Code limitations.	D.C. CODE JUD. CONDUCT Applicability of the Code (C)

392. *See* MODEL CODE Application (providing that part-time judges permitted to practice law "shall not practice law in the court on which they serve, or act as lawyers in proceedings for which they have served as judges or in any proceeding related thereto; nor should they practice law in any court over which the court they serve as a part-time judge conducts appellate review"). Note that this chart does not include limitations on law practice consistent with Model Rule of Professional Conduct 1.12(a) to the effect that a lawyer "shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge . . . unless all parties to the proceeding give informed consent, confirmed in writing." MODEL RULES R. 1.12(a). Most or all jurisdictions have adopted a limitation to such effect for former judges which applies to part-time judges, if any, as well. *Id.* cmt. 1.

State	Exemption from Prohibition on Law Practice	Citation
Florida	Civil Traffic Infraction Hearing Officers are exempt from Canon 5G except they "should not practice law in the civil or criminal traffic court in any county in which the civil traffic infraction hearing officer presides."	FLA. CODE OF JUD. CONDUCT Application A
Georgia	Part-Time Judges and Judges *Pro Tempore* are exempt from complying with Rule 3.10 (Practice of Law) with Model Code limitations. Statute also prohibits practice of law by full-time judges, but "[a] part-time judge of the state court may engage in the private practice of law in other courts but may not practice in his or her own court or appear in any matter as to which that judge has exercised any jurisdiction."	GA. CODE OF JUD. CONDUCT Application A, B Commentary (2021) GA. CODE ANN. § 15-7-21 (West). *See also* § 15-10-22(c) (addressing magistrates).
Hawaii	Part-Time Judges are exempt from complying with Rule 3.10 (Practice of Law) with Model Code limitations.	HAW. CODE OF JUD. CONDUCT Application III
Idaho	Masters, Special Masters, and Judges *Pro Tempore* are not required to comply with Canon 3 (which includes Rule 3.10 (Practice of Law)) while serving in that capacity.	ID. CODE OF JUD. CONDUCT Application (A)(2)
Illinois	No exemptions from prohibition on practice of law.	ILL. CODE OF JUD. CONDUCT R. 3.10

State	Exemption from Prohibition on Law Practice	Citation
Indiana	Part-Time Judges are exempt from complying with Rule 3.10 (Practice of Law) with Model Code limitations. Judges *Pro Tempore* are exempt from complying with Rule 3.10 (Practice of Law).	IND. CODE OF JUD. CONDUCT Application III–V.
Iowa	Magistrates are exempt from complying with Rule 51:310 (Practice of Law) with Model Code limitations. They "may appear as counsel for a client in a matter that is within the jurisdiction of a magistrate so long as the matter is heard by a district judge or a district associate judge," unless other prohibited my Iowa Rules of Professional Conduct, and "[p]artners or associates of a magistrate may appear before a magistrate other than their partner or associate." Special Masters, Referees, and Other *Pro Tempore* Part-Time Judges are exempt from complying with Rule 51:310 (Practice of Law).	IOWA CODE OF JUD. CONDUCT Application III–IV
Kansas	Part-Time Judges are exempt from complying with Rule 3.0 (Practice of Law) with Model Code limitations "unless specifically prohibited by the terms of an appointment" and "shall not practice law of the type which the judge is assigned to hear in the court on which the judge serves . . . ."	KAN. R. REL. JUD. CONDUCT Application IV–V

State	Exemption from Prohibition on Law Practice	Citation
Kentucky	Part-Time Judges are exempt from complying with Rule 3.0 (Practice of Law) with Model Code limitations and *Pro Tempore* Part-time Judges are exempt from complying with Rule 3.0 (Practice of Law).	KEN. COD OF JUD. CONDUCT Application
Louisiana	Part-Time Judges' practice of law subject to Model Code limitations, but state's code does not have a specific prohibition on the practice of law.	LA. CODE JUD. CONDUCT Compliance with the Code of Judicial Conduct
Maine	Probate Judges are exempt from complying with Rule 3.10 (Practice of Law).	ME. CODE JUD. CONDUCT Coverage & Effective Date I(B)
Maryland	Part-Time Orphans Court Judges are exempt from complying with Rule 18-3.10 (Practice of Law) "provided that: (A) the judge shall not use the judge's judicial office to further the judge's success in the practice of law; and (B) the judge shall not appear as an attorney in the court in which the judge serves." Cross-references the following statute: Estates and Trust Code prohibits part-time Orphans Court Judges from acting "as an attorney at law in a civil or criminal matter during a term of office" except that judges who sit in certain courts are exempt to varying degrees from such limitation.	MD. CODE JUD. CONDUCT 18-103.10 MD. EST. & TRUSTS ART. § 2-109

State	Exemption from Prohibition on Law Practice	Citation
Massachusetts	No exemptions from the practice of law except that a "judge may serve as a judge advocate general in the context of a judge's" military service. Prohibition on practice of law by judges of the trial court, with no exceptions, also in statute.	MA. CODE. JUD. CONDUCT Application, § 3.10(B) M.G.L.A. 211B § 4
Michigan	Code of Judicial Conduct does not have express exemptions from prohibition on practice of law but provides: "A judge should not practice law for compensation except as otherwise provided by law."	MICH. CODE JUD. CONDUCT 4(H)
Minnesota	Part-Time Judges exempt from complying with Rule 3.10 (Practice of Law) with Model Code limitations.	MINN. CODE JUD. CONDUCT Application
Mississippi	Part-Time Judges, Special Judges, and Magistrates exempt from complying with Canon 4G (Practice Law) "except as regards practice in the court in which the part-time judge serves."	MISS. CODE JUD. CONDUCT Application of the Code of Judicial Conduct
Missouri	Part-Time Municipal Court Judges exempt from R. 2-3.10 (Practice of Law), subject to Model Code limitations, and are prohibited from practicing in the municipal division of the circuit court in which they serve or in any matter "wherein any underlying facts occurred within the geographic boundaries of the political subdivision" in which the judge serves, and which matter could be brought in that division.	MO. CODE OF JUD. CONDUCT Rule 2.04 Application (III)

State	Exemption from Prohibition on Law Practice	Citation
Montana	No exemptions from prohibition on practice of law by judges.	MONT. CODE JUD. CONDUCT Application
Nebraska	Part-Time Child Support Referees, Referees, and Clerk Magistrates are exempt from Rule 3.10 (Practice of Law) but may not practice in the court upon which they serve.	NEB. CODE. JUD. CONDUCT Application (II)
Nevada	Part-Time Judges are exempt from Rule 3.10 (Practice of Law) with Model Code limitations	NEV. CODE JUD. CONDUCT Application (III), (IV)
New Hampshire	Part-Time Judges exempt from Rule 3.10 (Practice of Law) subject to Model Code limitations plus restrictions on being counsel for a town in which they sit as judge.	N.H. CODE JUD. CONDUCT Application (C)
New Jersey	Part-Time Municipal Court Judges "cannot practice law except as permitted by the Rules of Court." Limitations on practice of law by Municipal Court Judges and Surrogates or Deputy Surrogates	N.J. CODE JUD. CONDUCT Applicability N.J. CT. R. 1:15-1(b)–(c)
New Mexico	Elected Part-Time Probate or Municipal Judges or other Part-Time Judges serving by contract or appointment are exempt from Rule 21-310 (Practice of Law) with limitation on practicing in the court in which they serve.	N.M. CODE JUD. CONDUCT R. 21-004(B)
New York	Part-Time Judges exempt from section 100.4(G) (Practice of Law) with Model Code limitations and additional limitations on practice by judge's partners and associates and accepting employment in a federal, state, or municipal department or agency.	N.Y. CODE. JUD. CONDUCT § 100.6(B)

State	Exemption from Prohibition on Law Practice	Citation
North Carolina	No exemptions from prohibition on practice of law.	N.C. CODE. JUD. CONDUCT Canon 5(F)
North Dakota	Part-Time Judges and Judges *Pro Tempore* are exemption from Rule 3.10 (Practice of Law) with Model Code limitations	N.D. CODE JUD. CONDUCT Compliance with the Code of Judicial Conduct (A), (B)
Ohio	Part-Time Judges exempt from Rule 3.10 (Practice of Law) subject to Model Code limitations.	OHIO CODE JUD. CONDUCT Application (III)
Oklahoma	Part-Time Judges exempt from complying with Rule 3.10 (Practice of Law) subject to Model Code limitations.	OKLA. CODE JUD. CONDUCT Application (III)
Oregon	Senior Judges and Judges *Pro Tempore* are exempt from complying with Rule 4.8 (Practice of Law), and Municipal Court Judges are exempt from the Code of Judicial Conduct.	OR. CODE JUD. CONDUCT R. 1.2(B)–(D)
Pennsylvania	Code of Judicial Conduct does not apply to Magisterial District Judges and Philadelphia Municipal Court Traffic Division Judges. A judge is not prohibited from practicing law pursuant to military service if the judge is otherwise permitted by law to do so. Magistrate District Court Rule 3.10 imposes several limitations on their practice of law which is otherwise allowed.	PA. CODE. JUD. CONDUCT, Application R. 3.10 PA. RULES GOVERNING STANDARDS OF CONDUCT OF MAGISTERIAL DISTRICT JUDGES R. 3.10(E)

State	Exemption from Prohibition on Law Practice	Citation
Rhode Island	Part-Time Judges exempt from complying with Rule 3.10 (Practice of Law) subject to Model Code limitations. Also, "Upon written request to the Supreme Court, a judge may engage in the limited practice of law pursuant to his or her military service."	R.I. CODE JUD. CONDUCT Application (III)–(IV), R. 3.10(C)
South Carolina	Part-Time Judges are exempt from complying with Section 4G (Practice of Law), subject to Model Code limitations.	S.C. CODE JUD. CONDUCT Application of the Code of Judicial Conduct
South Dakota	Part-Time Judges are exempt from complying with Section 4G (Practice of Law).	S.D. CODE JUD. CONDUCT Application of the Code of Judicial Conduct
Tennessee	Part-Time Judges are exempt from complying with Rule 3.10 (Practice of Law), subject to Model Code limitations with some minor variations. Statute provides that "[g]eneral sessions judges" in certain counties "shall be considered part-time judges and shall not be prohibited from the practice of law or other gainful employment while serving as judge except to the extent the practice or employment constitutes a conflict of interest."	TENN. CODE JUD. CONDUCT Application (III), (V) TENN. CODE ANN. § 16-15-5002 (West)

State	Exemption from Prohibition on Law Practice	Citation
Texas	Justices of the Peace, Municipal Court Judges, County Judges, Judges *Pro Tempore* as well as Part-Time Commissioners, Masters, Magistrates, and Referees are exempt from Canon 4G (Practice of Law), but County Judges are subject to Model Code limitations.	TEX. CODE. JUD. CONDUCT Canon 6 (B)–(E)
Utah	Part-Time Justice Court Judges and Judges *Pro Tempore* are exempt from complying with Rule 3.10 (Practice of Law).	UTAH. CODE JUD. CONDUCT Applicability (III)
Vermont	Part-Time Judges exempt from complying with Rule 3.10 (Practice of Law) but continuing Part-Time Judges "shall not act as a lawyer in any case in any unit of the division of the court in which the judge serves or in any unit in any division of the superior court in a proceeding in which the judge has served as a judge or in any other proceeding related thereto."	VT. CODE JUD. CONDUCT Application (B)–(C)
Virginia	Judges *Pro Tempore*, Special Justices, and Substitute Judges are exempt from complying with Canon 2P ("Limitation on practice of law").	CANONS OF JUD. CONDUCT FOR COMMONWEALTH OF VA. Exceptions to Applicability
Washington	Part-Time Judges and Judges *Pro Tempore* are exempt from complying with Rule 3.10 (Practice of Law).	WASH. CODE JUD. CONDUCT Application (II)–(III)

State	Exemption from Prohibition on Law Practice	Citation
West Virginia	Part-Time Judges and Judges Pro Tempore are exempt from complying with Rule 3.10 (Practice of Law) subject to Model Code limitations and a continuing Part-Time Judge shall not act as a lawyer "in any matter involving the same subject-matter jurisdiction."	W. VA. CODE JUD. CONDUCT Application (III)– (V)
Wisconsin	Part-Time Judges, including Reserve Judges, Part-Time Municipal Judges, and Part-Time Commissioners, are exempt from complying with Rule 60.05(7) (Practice of Law).	WISC. CODE JUD. CONDUCT § 60.07(2)
Wyoming	No exemptions from prohibition on practice of law.	WYO. CODE JUD. CONDUCT Canon 3 R. 3.10