

# Q&A



## LAWYER LIABILITY AND ETHICS

### Not All Judges Are Created Equal



Joseph Brophy

On June 21, 2019, a subcommittee of the U.S. House Judiciary Committee heard testimony on H.R.1057. If enacted, the “Supreme Court Ethics Act” would direct the U.S. Judicial Conference to issue a code of conduct applicable to all federal judges, including Supreme Court justices. Currently, federal judges other than U.S. Supreme Court justices are subject to an ethics code, which is published and updated by the Judicial Conference. The conference is headed by Chief Justice John Roberts.

Supreme Court justices are not required to observe the code. According to the Constitution, they serve as long as they exhibit “good behavior,” or face possible impeachment and removal for “treason, bribery, or other high crimes and misdemeanors.” There is no other oversight or law governing United States Supreme Court justices, save for whatever budgetary constraints Congress may choose to exercise over the high court. This makes the Supreme Court justices unique among federal employees. They are almost entirely self-regulating. The decision to recuse from a given case belongs to the particular justice alone.

In 2011, Chief Justice Roberts made it clear in his end-of-year report that he believed Congress didn’t have the constitutional power to impose conduct rules on the Supreme Court. “The Code of Conduct, by its express terms, applies only to lower federal court judges. That reflects a fundamental difference between the Supreme Court and the other federal courts,” Justice Roberts said. “Article III of the Constitution creates only one court, the Supreme Court of the United States, but it empowers Congress to establish additional lower federal courts that the Framers knew the country would need. Congress instituted the Judicial Conference for the benefit of the courts it had created. Because the Judicial Conference is an instrument for the management of the lower federal courts, its committees have no mandate to prescribe rules or standards for any other body.”

The primary driver of this effort appears to be that the justices frequently take trips

paid for by outside groups, ranging from the mundane (visits to college campuses, promotional book tours) to the interesting (legal seminars or lectures in America’s top cities) to the exclusive, like teaching junkets in Prague, Zurich and Honolulu. Justices Thomas and Scalia have been criticized for speaking at Federalist Society fund-raising events. Ironically for those arguing that the justices should be subject to a code of conduct, none of the trips described would be prohibited by the current code even if it applied to the Supreme Court. The criticism is based on the commentary to Canon 4 of the Code of Conduct, which “prohibits” judges from speaking or serving as guests of honor at fund-raisers. Missed by the critics, however, is that the Canon 4 commentary is aspirational and lower court federal judges are not subject to discipline for violating the guideline.

It is hard not to be somewhat sympathetic to those who believe that the Supreme Court should be subject to a code of ethics. So many of our federal public servants behave badly, what are the odds the Court is any different? Nevertheless, this appears to be a solution in search of a problem.

It is perhaps unsurprising that the Judicial Conference sided with its leader and came out against the Supreme Court Ethics Act. Moreover, the ultimate arbiters of Chief Justice Roberts’s separation of powers argument stated above and the constitutionality of any attempt by Congress to impose a code of conduct on the Supreme Court would be the Court itself, which is unlikely to submit to the control of a coequal branch of government. Congress loves to complain about the Supreme Court, which, to be fair, does make an excellent piñata for both political parties. But a review of the testimony on June 21, 2019 did not reveal any evidence of misconduct or bias by any of the justices. Maybe after Congress is done scratching this particular itch they will get around to solving problems that affect the American people and are actually in their purview. ■

*Joseph Brophy is a partner with Jennings Haug Cunningham in Phoenix. His practice focuses on professional responsibility, lawyer discipline and complex civil litigation. He can be reached at JAB@JHC.law.*

## LOCAL TALENT. LOCAL JOBS.



Visit The MCBA  
**ONLINE CAREER CENTER**

[www.maricopabar.org](http://www.maricopabar.org)



### Volunteer @ André House of Hospitality

Saturday, October 19, 2019 from 3:00 p.m. – 7:00 p.m.  
213 S. 11<sup>th</sup> Avenue, Phoenix, AZ 85007

#### WHY?

There are diverse reasons why people fall into homelessness. The André House believes that each person regardless of their story deserves the right to their basic needs of food, clothing and shelter.

#### DINNER SERVICE

Every meal is made from scratch. Each day a fresh lettuce salad is served and many days a fresh fruit salad is served as well. Anywhere from 20-40 volunteers come each day to prepare and serve approximately 550 to 650 meals every night.

Please email Andrea Marshall at [acm@jaburgwilk.com](mailto:acm@jaburgwilk.com) to register for the event. Sponsored by the MCBA – Paralegal Division.

DOG TOYS, CAT TOYS, SOFT DOG TREATS

# PET DRIVE



## 2019 MCBA PARALEGAL CONFERENCE

SUPPORTS THE



ARIZONA HUMANE SOCIETY

This year, during the conference, we are holding a Pet Drive benefitting the Arizona Humane Society. We are collecting donations of new dog toys, cat toys and/or soft dog treats. Bring your donations with you to the conference and drop them off at the AHS table and you will receive an additional raffle ticket for a chance to win the Grand Prize drawing held at the conclusion of the conference.

#### WHEN?

November 8, 2019

#### QUESTIONS?

Andrea: [acm@jaburgwilk.com](mailto:acm@jaburgwilk.com)