IN THE TWELFTH DISTRICT COURT OF APPEALS
BROWN COUNTY, OHIO

STATE OF OHIO,	)	CASE NO. CA2009-07-026
	)	
Appellee,	)	ACCELERATED CALENDAR CASE
	)	
-vs-	)	
	)	
DWAYNE WENNINGER,	)	
	)	
Appellee.	)	

APPEAL FROM BROWN COUNTY COMMON PLEAS COURT
BROWN COUNTY, OHIO

BRIEF OF APPELLANT, DENNIS VARNAU

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STATEMENT OF THE CASE

Procedural Posture

On May 15, 2009, this Appellant filed a motion to unseal and produce court records in this case, for the purposes of challenging the qualifications of the defendant in this case to hold public office. On June 23, 2009, the undersigned further moved to recuse the judge assigned to the case. Both motions were overruled by the trial court, first on May 20, 2009, although not served on any person; and July 2, 2009. This timely appeal was thereafter filed. This Court transferred the matter to the accelerated docket.

Statement of Facts

The "facts" of the case are already public, having been made public by a reported decision still in the public domain. State vs. Wenninger, 125 Ohio Misc.2d 55, 2003-Ohio-5521 (Ringland, J., C.P.). The criminal defendant in this case was indicted for falsifying election records relating to his qualifications to run for and hold the office of Brown County Sheriff. *Id.* Appellant, also a candidate for the same office, filed in this Court a Petition for Writ of Quo Warranto challenging defendant's claim to the office. State of Ohio, ex rel. Dennis Varnau v. Dwayne Wenninger, 12th District Court of Appeals, Brown County Ohio, No. CA2009-02-10.

In conjunction with that case, Appellant Varnau filed in this case a Motion to Unseal and Produce the Records of this case, for use in that challenge to defendant's right to hold this public office. Motion, May 15, 2009. The only response was the Brown County prosecutor requesting an extension of time to appoint a special prosecutor to respond. Motion, May 20, 2009.

The Judge of the trial court had given financial contributions to the family of the defendant in this case (for medical care for his wife), the opponent on the pending motion. See Exhibits attached to Motion, June 23, 2009. According to that *public* information, defendant's

wife publicly "thanked" the Judge, and others, for financial assistance he (the Judge) provided to her and her family -- one of whom was her husband, this defendant. Unbeknownst to Varnau, the same judge had already filed, but not served on anyone, a decision overruling the Motion to unseal, May 20, 2009. Varnau also filed a Motion to Disqualify or for the Recusal of the assigned trial court judge due to the political and financial connection between the judge and the defendant (Wenninger). Motion, June 25, 2009.

The Motion for Recusal was denied, July 2, 2009, as was the Motion to Unseal, again, also July 2, 2009. This Appeal was thereafter timely filed, and on Appellant's Motion this Court assigned the case to the accelerated docket.

ARGUMENT

FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN DECIDING THE PENDING MOTION WITHOUT RECUSING HIMSELF.

Issue Presented for Review: It is a denial of due process to a litigant for a judge, who has contributed money to or for the benefit of the other party to litigation before the court and when the case challenges the right to hold office by the public official who is also in the same political party of the assigned judge, to decide the merits of the case.

The trial court erred in deciding the Motion to Unseal and denying the June 23, 2009, Motion to Recuse himself. Entries, May 20, 2009, July 2, 2009. The Judge was publicly reported as having given financial contributions to this defendant's family, the opponent on the pending motion. This is a financial connection between one party and the Judge, circumstances that implicated Code Jud. Cond. Canon 3. It was therefore appropriate for that judge to recuse himself from any disposition of the issues in this case. See Jud. Cond. Rule 3.1(C), 3.7(A)(5).

Likewise, the Ohio Supreme Court has disqualified all of the judges in a county from serving on a case in which a county officeholder was a party, as was the case here, noting the importance of avoiding " even an appearance of bias, prejudice, or impropriety " and the need to

"ensure the parties, their counsel, and the public the unquestioned neutrality of an impartial judge." In re Disqualification of Celebrezze, 105 Ohio St.3d 1241, 2004-Ohio-7360, ¶ 4, quoting In re Disqualification of Floyd, 101 Ohio St.3d 1215, 2003-Ohio-7354, ¶ 10. For those reasons alone, the Judge should have not decided the Motion.

In addition, the appearance, if not the fact, implicates basic fairness and due process. In Caperton v. A.T. Massey Coal Company, Inc., --- U.S. ---, 129 S.Ct. 2252, 173 L. Ed. 2d 1208 (2009), the issue was the disqualification of a judge on a case involving a party that had given financial contributions to the judge, the mirror of this case. The United States Supreme Court confirmed that even a judge who *may appear to be biased* violates the constitutional rights of litigants. The Due Process Clause implements an objective standard, which does not require proof of actual bias. See Tumey v. Ohio, 273 U. S. 510, 532 (1927); Mayberry v. Pennsylvania, 400 U. S. 455, 465-66 (1971); Aetna Life Ins. Co. v. Lavoie, 475 U. S. 813, 825 (1986). In defining these standards the Court asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Withrow v. Larkin, 421 U. S. 35, 47 (1975).

Here a judge decided, without written opposition, and 5 days after the notice was listed, that a public official of his same political party and in his same County, who was indicted for being unqualified for the office, should not have the records and proof of the already-public prosecution opened for use in court challenging that position, although he, the judge, had been publicized as having given money to that party's wife. That judge should have been recused, and it was error of constitutional magnitude to decide, although no opposition had been filed, the motion in that party's favor.

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN DENYING THE MOTION TO UNSEAL THE RECORD.

Issue Presented for Review: The interest of the public in having access to the records of a public and officially reported criminal prosecution of a public official for purposes of challenging the official's right to hold the office outweighs the private interests of the public official in maintaining a seal of those records.

The trial court erred in denying the Motion to Unseal the records in this case. Entries, May 20, 2009, July 2, 2009. Appellant Varnau moved the Court to unseal the records in this case, and for the limited purposes of using said record for a pending civil case between Varnau, as Relator for the State and the public, against the defendant, Dwayne Wenninger. Motion, May 15, 2009. There was then (and now) pending before this Court a petition for writ of quo warranto, challenging the right of this defendant to hold the office of Brown County Sheriff. The proof and documentation of the lack of qualifications was obviously of substantial import in the proceedings in this case. They may in fact be in the sole possession of this case, although sealed.

The rights of the general public and this Appellant for only lawful candidates running for and holding public office in this State and County, outweigh the privacy interests of this defendant to keep from *Court* inspection, even if *in camera* or under seal, a matter which was of public record and still in the public domain. Those records were already in the possession of at least the trial court, the prosecuting attorney, the defendant himself, his attorneys, and were already known to the general public as result of a reported Decision and newspaper accounts and public attendance in the course thereof. Although an appellate court reviews a trial court's disposition of an application for sealing (or the reverse) of a record under an abuse of discretion, where questions of law are in dispute, an appellate court reviews the trial court's determination *de novo*. State v. Pierce, 2007-Ohio-1708, ¶ 5, citing State v. Hilbert (2001), 145 Ohio App.3d 824, 827; State v. Derugen (1996), 110 Ohio App.3d 408, 410; State v. Spencer, 2009-Ohio-563,

¶ 14. An abuse of discretion can be found if the decision is not supported by a sound reasoning process. AAAA Ent. Inc. v. River Place Community Urban Redevelopment Corp. (1990), 50 Ohio St.3d 157, 161. Even under the abuse of discretion standard, a "finding of an error of law is a legitimate ground for reversal." Davis vs. Flickinger (1997), 77 Ohio St.3d 415, 419; Andrew P. vs. Jessy Z., 177 Ohio App.3d 837, 842, 2007-Ohio-4124, ¶ 34.

"A trial court abuses its discretion in denying an R.C. 2953.52 application without balancing the requisite factors . . . . weighing the requisite interests of appellant and the state." State v. Widder, 146 Ohio App.3d 445, 2001-Ohio-1521, ¶5-6, 21. In this instance, the trial court abused its discretion by denying the motion to *unseal* the court record where the public's need to know outweighs and privacy interest of the defendant.

The trial court relied on R.C. 2953.52, but that Statute is not sufficiently tailored to protect the public's right of access to court proceedings guaranteed not only by the First Amendment, but also by Section 11, Article I, and Section 16, Article I, of the Ohio Constitution (the Ohio "Open Courts" Amendment). Both the United States Constitution and the Ohio Constitution create a right of public access to proceedings that have historically been open to the public. Press Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (Press Enterprise II); State, ex rel. Scripps Howard Broadcasting Co. v . Cuyahoga Ctv. Court of Common Pleas (1995), 73 Ohio St.3d 19, 20. Criminal trials historically have been open to the public. State . ex rel . The Repository Div. of Thompson Newspapers, Inc. v . Unger (2000), 28 Ohio St.3d 418. The public in fact has a compelling interest in access to records of criminal proceedings. State, ex rel. The Repository Div. of Thompson Newspapers, *supra*; State v. Hall (2001), 141 Ohio App. 3d 561. This right of access includes records and transcripts that document the live proceedings. Scripps Howard Broadcasting, *supra* at 21; Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984)

(Press Enterprise I); Press Enterprise II, *supra*. This present case is that "rare case that has important significance to the public at large," as stated by the Court in State ex rel. The Cinti. Enquirer v. Winkler, 149 Ohio App.3d 350, 2002-Ohio-4803, ¶ 28, aff'd, 101 Ohio St.3d 383, in response to a challenge of R.C. 2953.52 being "overbroad" in its construction.

Furthermore, since Wenninger was a public official, he does not have the privacy interests others have. His "privacy interests" cannot outweigh the public's right to know if their elected public officials are legally holding office. The trial court abused its discretion by saying otherwise. The court appeared to have arbitrarily, unreasonably, or unconscionably, failed to weigh at all the interest of the public's "need to know" as against one individual's privacy interests in having the record sealed, and relied instead only on the Statute. That Statute, without consideration of the public's rights, is "overbroad" in its construction, as it substantially imperils the public's constitutional right of access to judicial records. Keeping the case sealed violates Appellant's (as Relator in a related matter) due process rights by preventing the introduction of pertinent evidence into the pending quo warranto case, and contributes to a potential cover up of an existing illegal condition: usurpation of public office by an unqualified candidate.

Further, the privacy rights of the defendant have been waived, by affirmatively using parts of these proceedings in the other proceedings before this Court (which this Court may take judicial notice of). Wenninger himself has made the Record here relevant there. Wenninger used reference to this "sealed" case in his Memorandum opposing Varnau's Motion for Summary Judgment: "This case is (at the least) the third time that Wenninger has faced a challenge as to either his qualifications to become Sheriff or to retain the office." Respondent's counsel further states, "The issues that Varnua [sic] now raises have been raised and found without substance on numerous occasions in the past and are either res judicata, collaterally stopped or moot." In the

same Brief, in Appendix A, that first page of their memoranda, in response to Sandra Martin's protest, that second-last paragraph which states "it is as likely that the jury found that Sheriff Wenninger, in fact, met the qualifications to become sheriff and determined his prosecution to be a political witch hunt." That statement is using the outcome of the criminal case to tender "proof" that said case somehow validated Wenninger's qualifications, when actually the opposite is true. This creates a reason to unseal due to "opening of the door" by Wenninger.

The weighing of the public interest to that information, in the context of this case, outweighs any private interest in keeping the remaining records private. The "facts" of the case are already public, having been made public by reported decisions still in the public domain. State vs. Wenninger, 125 Ohio Misc.2d 55, 2003-Ohio-5521 (Ringland, J., C.P.). The only issue left is access to the actual *proof* of the allegations contained in the underlying records -- the only thing the defendant has to protect from public knowledge. Making the proof available for the case which is now pending only between these parties, challenging the right of a purported public official to hold office, supports the public interest and does not prejudice the private interest of one person, considering there may be nothing not already available although by other more complicated and diverse means.

In Pepper Pike v. Doe (1981), 66 Ohio St.2d 374, the Ohio Supreme Court stated: "Typically, the public interest in retaining records of criminal proceedings, and making them available for legitimate purposes, outweighs any privacy interest the defendant may assert." (Citation omitted.) *Id.* at 377. The interests of the public in the qualifications of any of its elected officials to hold the office cannot be any less. See State ex rel. Beacon Journal Publishing Co. v. Bond, 98 Ohio St.3d 146, 2002-Ohio-7117. Such a case should not be kept sealed because: "Public officials such as . . . Chiefs of Police have substantial discretionary

authority. The qualifications of the occupants of such offices are of legitimate public concern." State ex rel. The Plain Dealer v. Cleveland, 75 Ohio St.3d 31, 1996-Ohio-379.

Further, the Decision denying the motion should be vacated for violation of Sup. R. 44-47, which includes the presumption of public access to court records, and the process for making a determination otherwise. Sup. R. 45(A).

CONCLUSION

The trial court's judgments should be reversed; the record unsealed even if only for the limited purposes requested; or the matter remanded to a neutral judge to render a decision.

THOMAS G. EAGLE CO., L.P.A.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was served upon the Brown County Prosecutor's Office, 200 East Cherry Street, Georgetown, Ohio 45121, Gary A. Rosenhoffer, 302 E. Main St., Batavia, OH 45103, and Patrick L. Gregory, 717 W. Plane, Bethel, OH 45106, Attorneys for Dennis Wenninger, by ordinary U.S. Mail this 29th day of September, 2009.

Thomas G. Eagle (#0034492)

FILED
CLERK OF COURTS
BROWN COUNTY, OHIO
2009 MAY 20 AM 11:19
TINA MERANDA
CLERK OF COURTS

COURT OF COMMON PLEAS
GENERAL DIVISION
BROWN COUNTY, OHIO

STATE OF OHIO	:	CASE NOS. 2002-2234
Plaintiff	:	(JUDGE SCOTT T. GUSWEILER)
vs.	:	JUDGMENT ENTRY
DWAYNE WENNINGER	:	
Defendant	:	

This matter coming before the Court on Motion to Unseal and Produce Court Records filed by Dennis Varnau through Counsel Thomas G. Eagle;

The Court having reviewed the contents of the Motion, as well as reviewed O.R.C. §2953.53(D), as well as Akron v. Frazier (2001), 142 Ohio App. 3d 718;

THE COURT FINDS the O.R.C. §2953.53 establishes the only exceptions and the only individuals who could have access to sealed records. Movant Dennis Varnau is not one of them.

The Court hereby overrules Dennis Varnau's Motion to Unseal and Produce Court Records.

IT IS SO ORDERED.

5/20/09
JUDGE SCOTT T. GUSWEILER / **date**

Cc: Brown County Prosecutor

403034

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TO THE CLERK:

Serve upon the following attorneys notice of the within judgment, and the date of entry, and note the same upon the docket:

Thomas G. Eagle 3386 North State Route 123 Lebanon, OH. 45036 **Counsel for Dennis Varnau**	Gary Rosenhoffer 302 E. Main St. Batavia, OH. 45103 **Counsel for Respondent**	Patrick L. Gregory 717 W. Plane, P.O. Box 378 Bethel, OH. 45106 **Counsel for Respondent**

4030035

COURT OF COMMON PLEAS
GENERAL DIVISION
BROWN COUNTY, OHIO

STATE OF OHIO	:	CASE NOS. 2002-2234
Plaintiff	:	
vs.	:	(JUDGE SCOTT T. GUSWEILER)
DWAYNE WENNINGER	:	JUDGMENT ENTRY
Defendant	:	

This matter coming before the Court on Motion to Unseal and Produce Court Records filed by Dennis Varnau through Counsel Thomas G. Eagle;

The Court having reviewed the contents of the Motion, as well as reviewed O.R.C. §2953.53(D), as well as Akron v. Frazier (2001), 142 Ohio App. 3d 718;

THE COURT FINDS the O.R.C. §2953.53 establishes the only exceptions and the only individuals who could have access to sealed records. Movant Dennis Varnau is not one of them.

The Court hereby overrules Dennis Varnau's Motion to Unseal and Produce Court Records.

The Court finding the Clerk failed to serve the parties specified on page 2 reissues its previous decision.

IT IS SO ORDERED.

JUDGE SCOTT T. GUSWEILER 7/2/09 **Date**

COURT OF COMMON PLEAS
GENERAL DIVISION
BROWN COUNTY, OHIO

STATE OF OHIO	:	CASE NOS. 2002-2234
Plaintiff	:	(JUDGE SCOTT T. GUSWEILER)
vs.	:	ENTRY OVERRULING MOTION FOR A RECUSAL OF ASSIGNED JUDGE AND MOTION TO VACATE DECISION OR ORDER
DWAYNE WENNINGER	:	
Defendant	:	

This matter coming before the Court on Movant's Motion for a Recusal of Assigned Judge and Motion to Vacate Decision or Order filed June 29, 2009 by Dennis Varnau through Counsel Thomas G. Eagle;

THE COURT FINDS that after having reviewed the contents of the Motion for a Recusal of Assigned Judge and Motion to Vacate Decision or Order hereby overrules the same.

IT IS SO ORDERED.

JUDGE SCOTT T. GUSWEILER 7/2/09 date

TO THE CLERK:

Serve upon the following attorneys' notice of the within judgment, and the date of entry, and note the same upon the docket:

Thomas G. Eagle
3386 North State Route 123
Lebanon, OH. 45036
Counsel for Dennis Varnau

Gary Rosenhoffer
302 E. Main St.
Batavia, OH. 45103
Counsel for Respondent

Patrick L. Gregory
717 W. Plane, P.O. Box 378
Bethel, OH. 45106
Counsel for Respondent

Jessica A. Little
Brown County Prosecutor

TO THE CLERK:

Serve upon the following attorneys notice of the within judgment, and the date of entry, and note the same upon the docket:

Thomas G. Eagle
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Counsel for Dennis Varnau

Gary Rosenhoffer
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Counsel for Respondent

Patrick L. Gregory
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Counsel for Respondent

Jessica A. Little
Brown County Prosecutor

been held to answer before the grand jury for the commission of an offense.

(B) "Prosecutor" has the same meaning as in section 2953.31 of the Revised Code.

(C) "Court" means the court in which a case is pending at the time a finding of not guilty in the case or a dismissal of the complaint, indictment, or information in the case is entered on the minutes or journal of the court, or the court to which the foreperson or deputy foreperson of a grand jury reports, pursuant to section 2939.23 of the Revised Code, that the grand jury has returned a no bill.

(D) "Official records" means all records that are possessed by any public office or agency that relate to a criminal case, including, but not limited to, the notation to the case in the criminal docket; all subpoenas issued in the case; all papers and documents filed by the defendant or the prosecutor in the case; all records of all testimony and evidence presented in all proceedings in the case; all court files, papers, documents, folders, entries, affidavits, or writs that pertain to the case; all computer, microfilm, microfiche, or microdot records, indices, or references to the case; all index references to the case; all fingerprints and photographs; all records and investigative reports pertaining to the case that are possessed by any law enforcement officer or agency, except that any records or reports that are the specific investigatory work product of a law enforcement officer or agency are not and shall not be considered to be official records when they are in the possession of that officer or agency, and all investigative records and reports other than those possessed by a law enforcement officer or agency pertaining to the case. "Official records" does not include records or reports maintained pursuant to section 2151.421 [2151.42.1] of the Revised Code by a public children services agency or the department of job and family services.

HISTORY: 140 v H 227 (Eff 9-26-84); 146 v H 274 (Eff 8-8-96); 148 v H 471. Eff 7-1-2000.

The effective date is set by section 12(A) of HB 471.

Cross-References to Related Sections

Disposition of reports, work product excepted from definition of official records, RC § 2953.54.

Rules relating to inspection of sealed records by law enforcement agencies, RC § 2953.32.1.

Text Discussion

Expungement — generally, **Ohio Crim. Prac. & Pro.** § 43.101.

Jurisdiction for expungements, **Ohio Crim. Prac. & Pro.** § 43.102.

Research Aids

Sealing of records of persons found not guilty:
O-Jur3d: Crim L § 3980.
Am-Jur2d: Crim L §§ 1307-1310.

§ 2953.52 Sealing of official records after not guilty finding, dismissal of proceedings or no bill.

(A)(1) Any person, who is found not guilty of an offense by a jury or a court or who is the defendant named in a dismissed complaint, indictment, or information, may apply to the court for an order to seal his official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the finding of not guilty or the dismissal of the complaint, indictment, or information is entered upon the minutes of the court or the journal, whichever entry occurs first.

(2) Any person, against whom a no bill is entered by a grand jury, may apply to the court for an order to seal his official records in the case. Except as provided in section 2953.61 of the Revised Code, the application may be filed at any time after the expiration of two years after the date on which the foreman or deputy foreman of the grand jury reports to the court that the grand jury has reported a no bill.

(B)(1) Upon the filing of an application pursuant to division (A) of this section, the court shall set a date for a hearing and shall notify the prosecutor in the case of the hearing on the application. The prosecutor may object to the granting of the application by filing an objection with the court prior to the date set for the hearing. The prosecutor shall specify in the objection the reasons he believes justify a denial of the application.

(2) The court shall do each of the following:

(a) Determine whether the person was found not guilty in the case, or the complaint, indictment, or information in the case was dismissed, or a no bill was returned in the case and a period of two years or a longer period as required by section 2953.61 of the Revised Code has expired from the date of the report to the court of that no bill by the foreman or deputy foreman of the grand jury;

(b) Determine whether criminal proceedings are pending against the person;

(c) If the prosecutor has filed an objection in accordance with division (B)(1) of this section, consider the reasons against granting the application specified by the prosecutor in the objection;

(d) Weigh the interests of the person in having the official records pertaining to the case sealed against the legitimate needs, if any, of the government to maintain those records.

(3) If the court determines, after complying with division (B)(2) of this section, that the person was found not guilty in the case, that the complaint, indictment, or information in the case was dismissed, or that a no bill was returned in the case and that the appropriate period of time has expired from the date of the report to the court of the no bill by the foreman or deputy foreman of the grand jury, that no criminal proceedings are pending against the person, and the interests of the person in having the records pertaining to the case sealed are not outweighed by any legitimate governmental needs to maintain such records, or if division (E)(2)(b) of section 4301.69 of the Revised Code applies, the court shall issue an order directing that all official records pertaining to the case be sealed and that, except as provided in section 2953.53 of the Revised Code, the proceedings in the case be deemed not to have occurred.

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is not limited to, communicating directly with the judge or lawyer involved, communicating with a supervisor, partner, or colleague, or reporting the suspected violation to the appropriate disciplinary authority.

Rule 2.16 Cooperation with disciplinary authorities

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person *known* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

(Adopted eff. 3-1-09)

Official Comment

[1] Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in division (A), instills confidence in the commitment of judges to the integrity of the judicial system and the protection of the public.

Canon 3

A judge shall conduct the judge's personal and extrajudicial activities so as to minimize the risk of conflict with the obligations of judicial office.

Rule 3.1 Extrajudicial activities in general

A judge may engage in extrajudicial activities, except as prohibited by *law*. However, when engaging in extrajudicial activities, a judge shall not do any of the following:

(A) Participate in activities that will interfere with the proper performance of the judge's judicial duties;

(B) Participate in activities that will lead to frequent disqualification of the judge;

(C) Participate in activities that would appear to a reasonable person to undermine the judge's *independence, integrity, or impartiality*;

(D) Engage in conduct that would appear to a reasonable person to be coercive;

(E) Make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for extrajudicial activities permitted by *law*.

(Adopted eff. 3-1-09)

Official Comment

[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by: (1) speaking, writing, teaching, or participating in scholarly research projects; (2) participating in judicial or bar association activities; or (3) serving on a board, commission, committee or task force established by the Supreme Court or a judicial or bar association. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal, or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7. However, a judge should consider whether engaging in a particular extrajudicial activity could give rise to an unlawful interest in a public contract as prohibited by R.C. 2921. 42.

[2] Participation in both law-related and other extrajudicial activities helps integrate judges into their communities and furthers public understanding of and respect for courts and the judicial system.

[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

Rule 3.2 Appearances before governmental bodies and consultation with government officials

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except as follows:

(A) In connection with matters concerning the *law*, the legal system, or the administration of justice;

(B) In connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties;

(C) When the judge is acting *pro se* in a matter involving the judge's legal or *economic interests*, or when the judge is acting in a *fiduciary* capacity.

(Adopted eff. 3-1-09)

Official Comment

[1] Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this code, such as Rule 1.3, prohibiting judges from using the prestige of office to

sexual orientation persons who would otherwise be eligible for admission. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

[4] A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this rule.

[5] This rule does not apply to national or state military service.

Rule 3.7 Participation in educational, religious, charitable, fraternal, or civic organizations and activities

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the *law*, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(1) Assisting such an organization or entity in planning related to fundraising, and participating in the management and investment of the organization's or entity's funds;

(2) Soliciting *contributions* for such an organization or entity, but only from *members of the judge's family*, or from judges over whom the judge does not exercise supervisory or appellate authority;

(3) Participating in but not soliciting funds for *de minimis* fundraising activities that are directed at a broad range of the community and that may be performed by other volunteers who do not hold judicial office;

(4) Soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the *law*, the legal system, or the administration of justice;

(5) Appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, provided the participation does not reflect adversely on the judge's *independence*, *integrity*, or *impartiality*;

(6) Making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the *law*, the legal system, or the administration of justice;

(7) Serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity will be engaged in either of the following:

(a) Proceedings that would ordinarily come before the judge;

(b) Frequently in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(B) A judge may encourage lawyers to provide *pro bono publico* legal services.

(Adopted eff. 3-1-09)

Official Comment

[1] The activities permitted by division (A) generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions, and other not-for-profit organizations, including law-related, charitable, and other organizations.

[2] Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.

[3] Mere attendance at an event, whether or not the event serves a fundraising purpose, does not constitute a violation of division (A)(5). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fundraising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

[4] Identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fundraising or membership solicitation does not violate this rule. The letterhead may list the judge's title or judicial office if comparable designations are used for other persons.

[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in *pro bono publico* legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do *pro bono publico* legal work, and participating in events recognizing lawyers who have done *pro bono publico* work.