Discipline of Judges in Maryland - In Re Diener and Broccolinol In Re Foster

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INTRODUCTION

Judges are human. They are subject to physical, psychological, and moral pressures which may be imposed on any person in an authoritative position of great responsibility. Occasionally a member of the bench becomes incapable of performing his duties or is found unworthy of the public trust vested in his position. Various state procedures exist to mete out judicial discipline, ranging from the traditional impeachment,3 through direct judicial supervision of its own members,4 to the latest innovation, a commission5 with a range of alternative sanctions6 which are subject to judicial review.7

In line with the awareness that old procedures were inadequate, Maryland established a Commission on Judicial Disabilities by constitutional amendment in 1966.8 Since then, the Com-

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3. Impeachment, the oldest disciplinary method, is an awkward procedure. It has fallen into disuse as new and more efficient methods have supplemented its time consuming process and absolute result. From 1955 to 1970 only five states used the impeachment remedy for judicial unfitness. W. Braithwaite, Judicial Misconduct and How Four States Deal With It, 35 LAW AND CONTEMP. PROBS. 151, 154 (1970).
4. E.g., the New Jersey Supreme Court construed its administrative power to discipline members of the bar to extend to lawyers in judicial office. In re Mattera, 34 N.J. 259, 168 A.2d 38 (1961). This procedure is now formalized in N.J.S.A. § 2A:1B-1 to 11 (Supp. 1970), as authorized by N.J. CONST. art. VI, § 6, par. 4. New York has a Court on the Judiciary composed of specified judges who hear cases after written requests by certain authorities or on the motion of the chief judge of the court of appeals. See N.Y. CONST. art. VI, § 22.
5. The commission method of judicial discipline originated in California in 1960. See CAL. CONST. art. VI, § 18 and CAL. GOV'T CODE § 68701-04 (Supp. 1966). By 1973 at least 33 states had adopted this plan, usually as a supplement to their existing disciplinary procedures. See generally, Braithwaite, note 3 supra, at 155 and AMERICAN JUDICATURE SOCIETY, JUDICIAL DISABILITY AND REMOVAL COMMISSION, COURTS AND PROCEDURES (1973) [hereinafter cited as AJS]. A similar plan is being considered for federal judges. See S. 4153, 93rd Cong., 2d Session, § - (1974); N.Y. Times, Mar. 9, 1975, § 4, at 5, col. 2.
6. Judicial misconduct may range from bribery and other felonies to tardiness and discourtesy. Thus, there should be a variety of remedies available, from informal admonition to formal public censure and termination of service, hopefully at a minimum of cost and public spectacle. See Braithwaite, note 3 supra, at 167-68.
7. In a few states, however, the commission recommends discipline to the state legislature. See AJS, note 5 supra, at 1-379.
8. MD. CONST. art. IV, § 4A and 4B (1966). In the 1867 Constitution there were three methods of judicial removal specified: removal by the governor (upon a judge's conviction in a “Court of Law” for incompetency, willful neglect of duty, misbehavior in office, or any other crime); “address” by 2/3 vote of the general assembly (both authorized in Md.
mission has made two disciplinary recommendations to the Court of Appeals. In the first case, *In re Diener and Broccolino*, each judge had been given numerous parking tickets in the course of his docket of the day (or immediately thereafter), and had been asked by the presenting party (known not to be the person actually ticketed) for "a little consideration" or "to see what he [could] do for him." The Commission found that the two judges disposed of these parking tickets "for reasons that can only be described as friendship, or political favoritism, or the importuning of court clerks," and that this constituted "conduct prejudicial to the proper administration of justice," meriting censure. By a four to three vote, the Court of Appeals disregarded the Commission's recommendation of censure, determined that there were no mitigating circumstances which justified mere censure, and, seeing no alternative, ordered the removal of the judges.

In the second case, *In re Foster*, the Chief Judge of the Supreme Bench of Baltimore City had engaged extensively in land acquisition and development activities from late 1969 until 1972. Judge Foster had requested the mayor of Westminster,
Maryland, to introduce him to the Planning and Zoning Commission, which resulted in a meeting and in an impression that he would personally develop the property. He personally attended at least three meetings to discuss the proposed development, including its utilities and zoning. After entering into an agreement with Monumental Properties, a land development corporation, he introduced a Monumental official to the Planning and Zoning Commission, thus giving the appearance of acting as an agent for and a joint adventurer with Monumental. On these facts the Commission on Judicial Disabilities found "reasonable suspicion" that Judge Foster had utilized his office to persuade others to contribute to the success of private business ventures. The Court of Appeals agreed with the Commission that the judge's conduct warranted censure, and rejected, inter alia, the judge's arguments that Canon XXIV could not apply to him retroactively, and that "reasonable suspicion" was unconstitutionally vague as an indicator of improper judicial conduct.

This comment will analyze, through the medium of the

Throughout this period he engaged in extensive correspondence concerning the project, including letters to the city officials, all of which were typed by his official secretary during regular work hours. He also had several meetings with city officials in his court chambers.

On Dec. 6, 1971, Judge Foster entered into two agreements with Monumental Properties, Inc. One of these provided that he was to pay Monumental $31,800 in exchange for which Monumental would convey twelve acres of the subject property upon final authorization to it to build a number of dwelling units. Judge Foster presented a vice-president of Monumental to the Planning and Zoning Commission, and from that time forward gave the appearance of acting as the "agent" for Monumental, or as a joint adventurer with it in the project. He wrote to the mayor requesting approval of Monumental's conditions, and as a result on March 28, 1972, the city reduced sewer hookup charges for utilities by $200 per unit. On March 23, 1972, the city passed an ordinance reducing the minimum width and lot area for interior townhouses. The mayor stated that this was done at Judge Foster's request. The fulfillment of these plus other conditions, enabling Monumental to proceed to a settlement, was described by Judge Foster as a "remarkable feat."

At the settlement on April 28, 1972, Monumental's contract with Judge Foster was modified, to place the deeded twelve acres into escrow until Monumental's development plan was finally approved. The owner of the land, the McLanahan Trust, also benefitted in this transaction, selling at $2650 per acre land previously valued at $1600 per acre. Judge Foster had promised ten acres to the city, and actually deeded one, to "sweeten" the development proposals. Judge Foster and Mrs. Foster on Dec. 11, 1973, held title to eleven acres, valued presently at $132,000, but with a potential commercial value of $360,000. The acreage might be used for commercial purposes. (Findings of Fact 1-20, Commission on Judicial Disabilities, Report, Dec. 11, 1973).

15. 271 Md. at 460-62; 478, 318 A.2d at 529-30, 538.
16. See MD. CANONS OF JUDICIAL ETHICS XXIV, note 92 and accompanying text infra.
17. 271 Md. at 449, 318 A.2d at 528 (1974). The Commission only recommended censure, not removal, since there was no official judicial misconduct, because of the "very nature of the provision of Canon XXIV and Rule 9," and in light of all the circumstances. Recommendation, Commission on Judicial Disabilities, Dec. 11, 1973.
18. 271 Md. at 470-78, 318 A.2d at 534-38.
Diener and Broccolino and Foster decisions, the procedural and substantive aspects of judicial discipline in Maryland. Before examining the substantive problems in this area, it is advisable to be acquainted with the nature and process of the Commission of Judicial Disabilities and the review of its decisions by the Court of Appeals of Maryland.

THE COMMISSION ON JUDICIAL DISABILITIES

The Commission was created by constitutional amendment in 1966 in response to a perceived need to expedite matters of judicial discipline. Either upon receipt of a verified statement or independently on its own motion, the Commission must make a preliminary investigation, providing the judge with notice and an opportunity to be heard. If a majority of the commissioners decide "sufficient cause" is present to warrant a formal hearing, notice of hearing is given and within fifteen days the judge may file an answer. At the recorded hearing, the judge has the right to introduce and compel production of evidence, be repre-

19. The Commission consists of seven members appointed by the governor. Under the present provision there are four members of the judiciary, two experienced members from the active bar, and one "member of the public." Each has a four year term. Md. Const. art. IV, § 4A.

20. The complaint (which may be from any person) must not be obviously unfounded or frivolous and must allege facts sufficient to discipline the judge under Article IV, § 4B(b) of the Maryland Constitution. See Md. R.P. 1227 f 1. Some complaints are clearly frivolous, such as a complaint against the entire Court of Appeals which was based on a lawyer's contention that the court had "improperly decided a case." Address, note 8 supra, at 6. In 1972 and 1973 the Commission opened a total of fifty-two files. Most of these formal complaints were dismissed after a minimum investigation. There were twenty-three preliminary investigations, but only two ripened into formal hearings. COMMISSION ON JUDICIAL DISABILITIES, REPORT FOR 1972 AND 1973 (mimeo).


22. This includes disclosing both the nature of the complaint and the identity of the complainant. Md. R.P. 1227 f 3. Revealing a complainant's identity (at the preliminary investigation stage) has been criticized because of possible retaliation by the judge or his colleagues. See Note, Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges, 41 N.Y.U.L. Rev. 149 (1966). However, the majority of commission states do require identification of the complainant at the preliminary stage. See AJS, note 5 supra, at 1-319.


24. Md. R.P. 1227 g 1 (b).

sented by counsel, and examine and cross-examine witnesses.\textsuperscript{26} If, after a hearing, a majority of the eligible commissioners finds "good cause", the Commission may issue a reprimand,\textsuperscript{27} or recommend censure, removal, "other appropriate discipline," or retirement to the Court of Appeals.\textsuperscript{28}

Formerly all proceedings before the Commission were confidential and privileged, except that a record filed with the Court of Appeals lost its confidential character. As authorized by a 1974 constitutional amendment\textsuperscript{29} the Court of Appeals has recently drafted rules allowing the release of information concerning Commission investigations, and permitting the sealing of part or all of a proceeding filed with the court.\textsuperscript{30}

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\textsuperscript{26} Md. R.R. 1227 j 1.

\textsuperscript{27} Ch. 886, § 1 [1974] Md. Laws 2961-62, amending Md. Const. art. IV, § 4B (1970). It is presently unclear whether such reprimands would be public or private. The latter is more likely, since there is no significant difference between the former and censure.

Presumably, reprimands will be issued for such minor infractions as lateness in opening court, and caustic comments from the bench. The drafters of the provision felt only repeated instances of this type of conduct could form the basis of a Commission recommendation of discipline to the Court of Appeals. MARYLAND COMMISSION ON JUDICIAL REFORM, INTERIM REPORT, 26-28 (Feb. 20, 1974) [hereinafter cited as Interim Report]. The Commission would still be free to recommend a reprimand by the court, in a proper case. It is not clear whether the judge could obtain judicial review of a Commission reprimand which was not forwarded to the Court of Appeals as a recommendation. See notes 31-38 and accompanying text infra.


\textsuperscript{29} The Maryland Constitution is amended by three-fifths passage of the provision in each house of the General Assembly and subsequent ratification of the provision by the electorate in the next general election. Md. Const. art. XIV, § 1.

\textsuperscript{30} See Ch. 886, § 1 [1974] Md. Laws 2961-62. Maryland used to be among the majority of states which required commission proceedings to be confidential until the filing for disciplinary action in the highest court of the state. See Md. R.P. 1227 e. In some other states public disclosure is immediate, or made at the judge's request. See AJS, note 5 supra, at 1-379.

On March 10, 1975, the Court of Appeals adopted Rule 1227 r, which provides for the confidentiality of Commission papers, proceedings, and evidence unless the Court of Appeals directs, after formal request, the release of specific information to a legislative committee, appointing authority, court or bar admission authority, or judicial selection commission, which is considering an investigated judge. In addition, the Commission may issue short clarifying statements if (a) pending charges result in "substantial unfairness" to the judge who has requested such a clarifying statement, or (b) after Commission investigation is concluded without further proceedings or disciplinary recommendation, or (c) where broad public interest exists in the investigation, and confidence in the administration of justice is threatened due to lack of information concerning the status of the proceeding and the requirements of due process. Md. R.P. 1227 r 2, 3. See Interim Report, note 27 supra, at 28.

The new Rule also provides for the possible sealing of all or part of a Commission record filed with the Court of Appeals. See Md. R.P. 1227 r 1. This reflects the claim of the Commission on Judicial Reform that full disclosure of Commission proceedings often resulted in "unsupported charges of improprieties being made public without affording
The Maryland Constitution as amended in 1974 states that, "[u]pon any recommendation of the Commission, the Court of Appeals . . . may remove . . . censure or otherwise discipline . . . or . . . may retire the judge." Thus, any recommendation of the Commission is subject to judicial review and modification.

Problems may arise, however, where the Commission does not make any recommendation to the Court of Appeals, as where a reprimand is issued directly by the Commission. No one would doubt that a reprimand, if it becomes public, damages a judge's reputation in the eyes of the general populace and the members of the bench and bar. Fairness to the judge demands some method of review of any Commission action. However, the Constitution only denotes Court of Appeals review of a Commission recommendation. The Commission could solve this problem by recommending all reprimands to the Court of Appeals, or the Court of Appeals might promulgate a rule which would mandate a Commission recommendation to the Court of Appeals upon request of the judge.

In the absence of a subsequent Commission recommendation, there might be other avenues to appellate review, such as mandamus. This would permit the review of the Commission

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32. Such a rule could be promulgated under the amended Constitution, since it allows the Commission to recommend any "appropriate discipline", and "any recommendation" is reviewable by the Court of Appeals. See Ch. 886, § 1 [1974] Md. Laws 2961-62. The court rule might also allow review of a private reprimand. See note 27 supra.

33. The common law writ of mandamus, directing the performance or non-performance of particular public ministerial duties, has been used in Maryland to include review of discretionary administrative actions. Baker v. Board of Trustees, 269 Md. 740, 744, 309 A.2d 768, 770 (1973); State Dep't of Health v. Walker, 238 Md. 512, 523, 209 A.2d 555, 561 (1965); Heaps v. Cobb, 185 Md. 372, 379, 45 A.2d 73, 76 (1945). However, the Court of Appeals itself will not entertain any original petitions for writs such as mandamus. See, e.g., Board of Supervisors v. Attorney Gen., 246 Md. 417, 427, 229 A.2d 388, 393 (1967); Henson v. State, 227 Md. 659, 660, 180 A.2d 300, 301 (1962); Moore v. Board of License Comm'rs, 203 Md. 502, 505, 102 A.2d 272, 273-74 (1954); State ex rel. Mayor and City Council v. Rutherford, 145 Md. 363, 368-70, 125 A. 725, 727-28 (1922). An exception would have to be created for Commission review. This would be perfectly appropriate, since a recommendation is the only action directly appealable to the Court of Appeals.
reprimand, but might not permit the Court of Appeals to raise the reprimand to an order of removal. Article 33 of the Maryland Declaration of Rights provides: "That the independence and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the People: Wherefore, the Judges shall not be removed, except in the manner, and for the causes provided in this Constitution. . . ." Article IV, Section 4B(b) does not expressly permit the Court of Appeals to order removal except after a Commission recommendation of some form of discipline. Nevertheless, in Diener and Broccolino, the Court of Appeals ordered the removal of two judges after the Commission had only recommended censure, an action that the Constitution did not explicitly permit at that time. The court simply held that the Commission's express power to recommend removal included the lesser power to recommend censure, and thus Article 33 was no impediment. This holding of Diener and Broccolino provides the court with precedent to raise any action by the Commission, including non-recommended reprimand, to removal.

34. Prefacing the Maryland Constitution, the Declaration of Rights and the Constitution together compose the Maryland governmental charter, and they must be interpreted as one instrument. See Mayor and City Council v. State ex rel. Bd. of Police, 15 Md. 376 (1860). Article 33 contains concrete rules as to the removal of judges, and has substantially the same force as any other part of the Maryland Constitution. E. Niles, MARYLAND CONSTITUTIONAL LAW 14 (1915).

35. MD. CONST., Decl. of Rights, Art. 33 (emphasis added). The current phraseology is unchanged since the present Constitution's adoption in 1867. See CONSTITUTIONAL CONVENTION COMMISSION, CONSTITUTIONAL REVISION STUDY DOCUMENTS 614-17 (1968). See Gordy v. Dennis, 176 Md. 106, 114, 5 A.2d 69, 72 (1939). There is no similar provision in any other state constitution.


37. 268 Md. at 689, 304 A.2d at 603. However, the court's interpretation of the then art. IV, § 4B(b) was questionable, since censure and removal were separately mentioned: "Upon recommendation . . . that a judge be removed from office, or . . . be retired, the Court of Appeals . . . may remove the judge from office or may censure him . . . ." Since at that time there was no constitutional provision which expressly authorized a removal order after a Commission recommendation of censure, any power the court may have exercised to escalate the Commission's recommendations immediately violated Article 33.

38. However, Diener and Broccolino might be distinguished from the present problem. There the court held the greater power of recommendation included the lesser. Here, in order to remove the judge in the absence of a Commission recommendation, the court would have to find an implied power to review. This implied review power would violate Article 33 if it led to removal.

There is no other possible justification of removal in the absence of a Commission recommendation. Since the inhabitants of the State of Maryland are entitled to the common law of England by Article 5 of the Md. Declaration of Rights, perhaps the English mode of removal might be applicable. But as the dissent in Diener and Broccolino indicated (268 Md. at 715, 304 A.2d at 619) the English courts did not regulate the conduct of judicial officers after the Act of Settlement in 1701. See 12 and 13 Will. III c. 2. Thus
Since the Maryland Constitution was amended in 1974, it is clear that the Commission has the power to recommend any appropriate disciplinary action to the Court of Appeals, and the court may accept or reject the recommendation. The remainder of this comment will examine the substantive law of judicial discipline to determine when and what type of discipline is appropriate in various circumstances.

"CONDUCT PREJUDICIAL TO THE PROPER ADMINISTRATION OF JUSTICE": JUSTIFICATION OF DISCIPLINE

Formal ethical standards are necessary adjuncts to any judicial disciplinary system. They aid the judge in appraising his future conduct, provide rules which can be enforced through the discipline and review procedures, and reach conduct which, while not inherently improper, should be restricted so as to prevent the possibility or appearance of misconduct.39

The Maryland Constitution provides for judicial discipline in cases where the Court of Appeals, after proper review, finds misconduct while in office, persistent failure to perform duties of the office, or conduct prejudicial to the proper administration of justice.40 Official interpretations of these general phrases are contained in the Canons of Judicial Ethics and the Rules of Judicial Ethics. These have been adopted by the Maryland Court of Ap-

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40. Ch. 886, § 1 [1974] Md. Laws 2961-62, amending Md. Const. art. IV, § 4B(b) (1973). See also Md. Const. art. IV, § 4 (Governor may remove upon a judge's conviction for incompetency, wilful neglect of duty, misbehavior in office, or any other crime) and note 8 supra.

In addition to the above provision, a 1974 constitutional amendment has apparently rendered judges liable to automatic suspension without pay or benefits upon conviction or a plea of nolo contendere to any felony, or to a misdemeanor "related to his public duties and responsibilities and [which] involves moral turpitude for which the penalty may be incarceration." If the conviction becomes final, removal is automatic. Ch. 879, § 1 [1974] Md. Laws 2942-45, now Md. Const. art. XV, § 3. The provision applies to "any elected official of the State . . . county or . . . municipal corporation." Id. Although both appellate and trial judges in Maryland are now appointed, each judge must be elected at the next general election, and every fifteen years thereafter. See Md. Const. art. IV, § 5. Therefore, once the judge has been elected, he should be subject to the amendment. However, it is not clear whether a newly-appointed judge who has not yet been elected would also be subject to automatic suspension and removal.
peals and are binding on Maryland judges as part of the Maryland Rules.\textsuperscript{41}

1. Canons

The first organized list of standards was the Canons of Judicial Ethics adopted by the American Bar Association in 1924.\textsuperscript{42} The Canons were intended to be nothing more than guides for individual judges,\textsuperscript{43} but by 1968 they had been adopted either as advisory or as binding by a majority of state supreme courts.\textsuperscript{44} In 1972 the A.B.A. adopted a new Code of Judicial Conduct, revising the organization, language, and to some degree the substance of the Canons.\textsuperscript{45}

The Maryland State Bar Association formally adopted the original Canons of Judicial Ethics in 1953.\textsuperscript{46} From that time until the creation of the Commission on Judicial Disabilities in 1966, however, they were mere recommendations, neither adopted by the courts nor with any enforceable procedures except through impeachment.\textsuperscript{47} Although the Commission made no formal rec-

\begin{itemize}
\item\textsuperscript{41} See Md. R.P. 1231. Although misconduct in office, persistent failure to perform the duties to the office, or a disability seriously interfering with the performance of duties which is, or is likely to become permanent are other stated grounds for a preliminary investigation which may eventually result in a commission recommendation (see Md. R.P. 1227 f 1), Rule 1231's effect may be to include these grounds within "conduct prejudicial to the proper administration of justice." Included within Rule 1231 are the Rules of Judicial Ethics, which contain particular requirements and prohibitions. See note 52 and accompanying text infra. Ethics Rule 14 makes any Ethics Rule violation "conduct prejudicial to the proper administration of justice." Since Ethics Rule 1 equates an Ethics Rule violation with an aggravated or persistent failure to comply with the Canons, and since all three of the above grounds would satisfy Rule 1's equation, all three of the grounds thereby amount to "conduct prejudicial to the proper administration of justice."

The two cases which reached the Court of Appeals each used the phrase, even though the two judges in the first case also arguably engaged in misconduct while in office. To the extent future Commission and Court of Appeals disciplinary actions are grounded in the current Rule 1231 and especially on the interplay between Ethics Rules 1 and 14, reliance on the three remaining "good causes" above (except disability) will lessen.

\item\textsuperscript{42} 49 ABA REP. 65-71 (1924).
\item\textsuperscript{43} Martineau, Enforcement of the Code of Judicial Conduct, 1972 UTAH L. REV. 410, 411.
\item\textsuperscript{44} See AMERICAN JUDICATURE SOCIETY, CANONS OF JUDICIAL ETHICS 4-11 (Report Nov. 8, 1968). Statutes, constitutions, and various bar associations have also adopted the Canons. See Martineau, note 43 supra, at 411.
\item\textsuperscript{46} See 58 TRANSACTIONS, MD. ST. BAR ASSOC. 252 (1953). Since the Maryland State Bar Association is not formally connected with the courts, its adoption of the Canons did not bind any judges under force of law. However, the association's adoption was and is evidence of what the bar feels is proper judicial conduct.
\item\textsuperscript{47} See note 3 supra. The Maryland State Bar Association's Ethics Committee has
ommendations from 1966 to 1970 it probably could have used the Canons as part of the criteria for ascertaining "conduct prejudicial to the proper administration of justice." Finally, in 1970, the Maryland Judicial Conference adopted the Maryland Canons by resolution. More specific disciplinary rules were not promulgated until 1971, when the entire set of Canons were set forth in Rule 1231. In summary, then, Maryland judges have been aware of the A.B.A. Canons since 1924, but only since 1971 have the Canons and new disciplinary rules of judicial ethics been formally imposed as enforceable rules governing judges’ conduct.

2. Rules of Judicial Ethics

An examination of the present Rule 1231 reveals that the Canons of Judicial Ethics, composing the first part of that rule, consist of simple advisory axioms of judicial common sense. On the other hand, the Rules of Judicial Ethics, the second part of Rule 1231, contain particular requirements and prohibitions, using the mandatory word “shall” as opposed to the Canons’ more permissive “should.”

used the 1953 Canons as the basis for answering submitted questions, but these have no force of law behind them. See II Proceedings, Twenty-Fourth Annual Meeting of the Maryland Judicial Conference 29-30 (1969).


49. The Maryland Judicial Conference, which meets and reports annually is authorized by Maryland Rule 1226 to consider the status of judicial business in the various courts, to devise means for relieving congestion of dockets where it may be necessary, to consider improvements of practice and procedure in the courts, to consider and recommend legislation, and to exchange ideas with respect to the improvement of the administration of justice and the judicial system of Maryland.

50. The Canons relevant to this comment are identical to those adopted by the Maryland State Bar Association.


52. There is confusion as to whether the Canons are suggestive or mandatory. These semantic problems could be eliminated by the court’s complete adoption of the new Code of Judicial Conduct approved by the American Bar Association in 1972. See note 45 supra. Cf. note 109 infra. Its adoption would be beneficial in providing a unified code which by its terms is mandatory unless otherwise indicated. See Preface, ABA CODE OF JUDICIAL CONDUCT. As of Oct. 31, 1974, thirty-five states had adopted all or part of the Code. As
Unlike the Canons, the Ethics Rules also indicate the consequences of a violation. Ethics Rule 14 states "violations of any of these rules is conduct prejudicial to the proper administration of justice within the meaning of Maryland Rule 1227 (Removal or Retirement of Judges)."\(^5\) The Canons are incorporated into the Rules of Judicial Ethics by Ethics Rule 1, which provides that "an aggravated or persistent failure to comply with the Canons of Judicial Ethics shall be deemed a rule violation."\(^6\) Thus, the Ethics Rules carry more disciplinary potential than the Canons.\(^5\)

Ethics Rule 15 establishes a Judicial Ethics Committee, which acts as an advisory panel to supplement the Commission on Judicial Disabilities. The rule states that any judge may in writing request the opinion of the Committee on any aspect of Rule 1231, and compliance with the majority ruling affords complete protection of the requesting judge from any charge of violation.\(^5\)

Although the Canons and Ethics Rules form a defined structure, they are certainly not the only sources for interpreting "conduct prejudicial to the proper administration of justice." For example, the Maryland court in Diener and Brococolino declined to define the term outright and did not rely on the Canons. The court determined that disposing of cases for reasons other than an honest appraisal of the facts and law would always be "conduct prejudicial to the proper administration of justice."\(^57\) This case indicates clearly that the court will look to general norms of the profession and will not be limited to the court rules in defining improper judicial conduct.

In contrast to the court's ignoring the Canons in Diener and Brococolino, one of the major issues in Foster was whether the court could properly apply the Canons to Judge Foster's conduct which bracketed the July 1971 adoption of the Canons as a formal

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55. This is not to say that, absent a persistent or aggravated violation of the Canons, no action by the Commission on Judicial Disabilities is possible. Any complaint to the Commission will initiate an investigation, and in other states such an inquiry has usually effected the desired change. See Frankel, Removal of Judges: California Tackles an Old Problem, 49 A.B.A.J. 166, 170 (1963). If necessary, the Commission might also reprimand the offending judge. See note 27 and accompanying text supra.
57. 268 Md. at 670, 304 A.2d at 594.
rule of court. The majority provided alternative rationales for applying the Canons: that norms of conduct existed in the profession (with the knowledge of Judge Foster in particular), and that even if the Canons were not applied to his early conduct, there was censurable conduct which occurred after July 1971.

A majority of the court declared that since the 1966 adoption of sections 4A and 4B of Article IV of the Maryland Constitution, it has been possible to discipline a Maryland judge for "misconduct while in office" or "conduct prejudicial to the proper administration of justice," for which objective standards could have been found in the Canons of Judicial Ethics of the American Bar Association, and the ethical opinions published thereunder.

The constitutional language under which Judge Foster was censured was adopted before Judge Foster's activities had begun. Application of the Canons to pre-1971 conduct would be reasonable if the principles they embody could fairly have been used from 1966 to help define the constitutional language.

The Canons of Judicial Ethics were adopted by the Maryland State Bar Association in 1953. This indicates that, at least as early as 1953, the Maryland legal community recognized conduct proscribed by the Canons to be detrimental to the reputation of the judiciary. In the debates leading to the resolution by

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58. Md. R.P. 1231. By the date of the Canon's adoption, July 1, 1971, Judge Foster, through Wheeler Holding had acquired the option to purchase the tract, and had had much personal contact with the local city officials. His association with Monumental Properties began after this date. See note 46 supra.

59. 271 Md. at 478, 318 A.2d at 538. See notes 17, 18 and accompanying text supra.

60. See Md. Const. art. IV, § 4B(b) (1973).

61. 271 Md. at 471-72, 318 A.2d at 534-35. The majority also noted that at the threshold of his involvement, Judge Foster was Chairman of the Maryland Judicial Conference in 1970, the year the Judicial Conference adopted the ABA Canons in principal. He was also an original member of the Commission on Judicial Disabilities, active in the American Bar Association, and president of the National Conference of Trial Judges. That Judge Foster was questioned concerning the ethics of his proposed transactions at the threshold of the negotiations also should have dictated a more cautious approach. See 271 Md. at 470-73, 318 A.2d at 534-35.

The dissenting judges, in an opinion by Judge Smith, believed that censuring a judge under Canon XXIV and an Ethics Rule not effective until July 1, 1971, was "repugnant to traditional concepts of Anglo-American jurisprudence and elementary fairness," noting Maryland's constitutional ban against ex post facto laws. 271 Md. at 480-81, 318 A.2d at 539. See Md. Const., Declaration of Rights, art. 17. The dissent admitted that since 1966 a Maryland judge could be disciplined under the constitution, but only for acts traditionally regarded as improper, such as in Diener and Broccolino, and not for technical violations of the Canons. See 271 Md. at 481-82, 318 A.2d at 539-40.


63. Since 1924, the ABA Canons of Judicial Ethics were also recognized by the national legal community as appropriate judicial guidelines. With minor amendments, these were adopted as the Maryland Canons in 1971.
the Maryland Judicial Conference, approving the principles of the Canons in 1970, it was asserted that the Commission on Judicial Disabilities had Canon enforcement responsibility since 1966, and stated that the Ethics Committee had been using the 1953 Canons to answer submitted ethical questions. Judge Foster himself recognized the potential force of the Canons when he said at the 1970 meeting: “We ought to have sufficient judgment to decide whether or not our activities are conflicting with our work or with our responsibilities, and if we don’t then under Canon 23 and 24 we certainly may be taken to task.” At that conference, the judges formally determined to be bound by the Canons. This was prior to the date on which Judge Foster first filed his petition for rezoning the land in question.

There are cases in other states which used the Canons as standards for judicial conduct, despite their lack of formal adoption within the particular jurisdiction. The Foster court referred to In re Troy, where the Massachusetts court also pointed to the formally unadopted Canon XXIV as a “generally accepted guide.” In re DeSaulnier applied the proposal of Canon 5 of the new ABA Code of Judicial Conduct (roughly corresponding to Maryland Canon XXIV) to a Massachusetts judge’s past conduct and found that “[t]here can be little doubt that, measured by the general standards of new Canon 5, which directly reflect long-existing and well recognized principles of judicial conduct, Judge DeSaulnier’s conduct as shown by our findings falls far short [of Canon 5’s standard].” The California Supreme Court has similarly applied the new ABA Code of Judicial Conduct, stating


66. 271 Md. at 468 n.10, 318 A.2d at 533 n.10.


68. 271 Md. at 471-72, 318 A.2d at 534-35.


70. See note 52 supra and note 109 infra.


The Foster dissent argued Judge Troy’s conduct was generally recognized as forbidden. See note 76 and accompanying text infra. Thus the Massachusetts court’s reliance on the Canons was discounted. See 271 Md. at 481-82, 318 A.2d at 539-40. However, this argument attacks the application of a particular Canon, and does not reach the merits of applying the entire set of Canons.
“California is fortunate in that it need not formally adopt the proposed code in order to hold its judiciary to the high standard of conduct the public and the bar are entitled to expect of the judicial branch of government.” These applications, even broader than Maryland’s, indicate that the original 1924 Canons of Judicial Ethics and subsequent enactments have embodied a tradition which offers adequate guidance for judges despite the lack of formal adoption. While fairness to the judge might dictate prior enactment of a totally new and unique provision before its violation could be charged, here the Canons have been long-standing and well-known embodiments of common notions of judicial ideals.

The Maryland Court of Appeals has, in Foster, accepted the view of the majority of jurisdictions that have been presented with the issue that judges can be disciplined for violating the Canons of Judicial Ethics despite their lack of formal adoption. This conclusion implies that the Canons are the embodiment of previously accepted standards of judicial conduct. There may be a difference, however, between violations of the Canons as in Foster, and clear violations of a judge’s duty not contained there, as far as the severity of discipline is concerned.

3. Conduct Meriting Judicial Discipline

“Conduct prejudicial to the proper administration of justice” is a broad term, which in application yields varying results. In all of the following situations the definition was satisfied and resulted in removal or its equivalent: (1) judge used vulgar language in the presence of and in reference to professional associates, employees and officers of the court, and interfered with the attorney-client relation between public defenders and their clients;1


2. Id. The same court had defined its standard for judicial conduct: “conduct which constantly reaffirms fitness for the high responsibility of judicial office. It is immaterial that the conduct concerned was probably lawful, albeit unjustifiable ... .” 10 Cal.3d at 281, 110 Cal. Rptr. at 208, 515 P.2d at 8. Judge Geiler was removed for the combination of willful misconduct and “conduct prejudicial to the administration of justice which brings the judicial office into disrepute.” 10 Cal.3d at 284, 110 Cal. Rptr. at 209-10, 515 P.2d at 9-10. See Cal. Const. art. 6, § 18.

bate judge commingled funds belonging to an estate with his personal funds and negotiated a loan to himself from an estate under his personal control and order;\textsuperscript{75} (4) judge lied under oath, pressured a lawyer for a political contribution, wilfully directed filling of tidewater area in an illegal manner, consistently neglected judicial duties, consistently used court officer as bulldozer operator during court hours, and procured substantial legal services from lawyers appearing before him without paying them and without disclosing his relationship to opposing counsel;\textsuperscript{76} (5) judge convicted of federal crime of conspiring to use mail to perpetrate fraud (conduct occurred before becoming a judge);\textsuperscript{77} (6) judge interfered with judicial investigation into matters pertaining to his former law partnership;\textsuperscript{78} (7) judge involved in procuring woman for illicit acts and associated with persons with known criminal records and reputations.\textsuperscript{79}

From these cases one can draft a general rule that conviction of a felony, gross misconduct outside the courthouse, or incompetence in performing judicial duties will warrant removal. Applying this rule to the \textit{Diener and Broccolino} facts, disposing of parking tickets for reasons other than an honest appraisal of the facts and the law,\textsuperscript{80} illustrates the tremendous discretion in applying any rule.\textsuperscript{81} This is a case of improper motive of adjudication, involving neither the commission of a felony nor conduct

\textsuperscript{75} \textit{In re Graham}, 366 Mich. 268, 114 N.W.2d 333 (1962) (suspension and recommendation of removal to legislature).


\textsuperscript{79} \textit{In re Haggerty}, 257 La. 1, 241 So.2d 469 (1970).

\textsuperscript{80} 268 Md. at 671, 304 A.2d at 594.

\textsuperscript{81} The Commission had only recommended censure, because of the lack of financial gain, general reliance on clerks who curried favor, and acceptance of prior court practices as precedent. However, the Maryland court discounted these considerations and saw "no alternative" to the judges' removal, despite the permissive nature of the court's mandate in Article IV, § 4B(b): "may censure" and "may be removed." \textit{Id.} at 734, 304 A.2d at 625. Certainly the lenient recommendation should have provoked more factual comparisons and analysis than the majority proffered.

Although in each case the judge had already resigned, two former New Jersey judges who were involved in fixing one traffic ticket were suspended from the practice of law, one for two months and the other for six months. See \textit{In re Spitalnick}, 63 N.J. 429, 308 A.2d 1 (1973); \textit{In re Sgro}, 63 N.J. 538, 310 A.2d 459 (1973). Their prior resignation plus their isolated conduct move their cases away from the \textit{Diener and Broccolino} fact pattern.
outside the courtroom. Disposition of a case for personal reasons unrelated to the merits clearly involves a drastic misapprehension of the nature of a judge's function on the bench, thus fitting within the third part of the rule, incompetence.

In order to determine if the Maryland court was harsher than others, it is necessary to explore cases in other jurisdictions resulting in censure: 82 (1) judge actively aided a party in a case before him and "gave an impression approximately equivalent to that of attorney representation," and gave the same impression in dealings with a former client who had just escaped from the state jail, and committed other infractions; 83 (2) judge made remarks during juvenile hearing indicating ethnic bias; 84 (3) judge referred to victim of alleged crimes in insulting manner in chambers and in court; 85 (4) while attired in judicial robes, judge negotiated in chambers with counsel concerning disposition of charges against his fellow law partner; 86 (5) judge consoled at length in his chambers a court employee whose son was arrested, and continued to answer her telephone calls, in the last of which the judge agreed to meet her for further discussion and possibly to have a drink; 87 (6) judge was under the influence of alcohol on more than one occasion during a two month period, and permitted a magistrate to take a major role in arraigning criminal defendants; 88 (7) judge represented relatives appearing in traffic court; 89 (8) judge permitted bailiff to participate in sentencing, periodically and suddenly assumed the role of advocate or witness, and was intemperate with court personnel (but mollified by inexperience and striving for judicial reform). 90 From these cases it may be gath-

82. Censure, in ecclesiastical law, was a form of spiritual punishment. BLACK'S LAW DICTIONARY 283 (Rev. 4th ed. 1968). In this note it refers to the public upbraiding of a judge, whether it is called either formal censure or public reprimand.


Judge Barnes, in his dissent in Diener and Broccolino, concluded that the conduct of the Maryland judges "[did] not begin to equal" the impropriety of the Alaskan judge's actions. See 268 Md. at 671, 304 A.2d at 629.


85. In re Glickfeld, 3 Cal.3d 891, 92 Cal. Rptr. 278, 479 P.2d 638 (1971).


87. In re Suglia, 36 App. Div. 2d 326, 320 N.Y.S.2d 352 (1971) ("[conduct] unneces-sarily and unwisely put a burden of explanation and justification not only on himself but on the judiciary of which he is an officer").


90. McCartney v. Commission on Judicial Qualifications, 12 Cal.3d 512, 116 Cal. Rptr. 260, 526 P.2d 268 (1974). A few recent cases do not fit into the noted patterns because of their unusual leniency. See In re Sanchez, 9 Cal.3d 844, 109 Cal. Rptr. 78, 512 P.2d
ered that isolated lapses of personal or professional conduct and lack of proper judicial temperament are the most frequent causes of censure. However, no other censure case besides *In re Foster*\(^91\) has been found which relied solely on the "reasonable suspicion" of utilizing his position for business persuasion purposes, which is contained in ABA Canon XXV (Maryland Canon XXIV):

A judge should avoid giving ground for any reasonable suspicion that he is utilizing the power or prestige of his office to persuade or coerce others to patronize or contribute, either to the success of private business ventures, or to charitable enterprises. He should, therefore, not enter into such private business, or pursue such a course of conduct, as would justify such suspicion, nor use the power of his office or the influence of his name to promote the business interests of others; he should not solicit for charities, nor should he enter into any business relation which, in the normal course of events reasonably to be expected, might bring his personal interest into conflict with the impartial performance of his official duties.\(^92\)

Judge Foster was also censured for violating Ethics Rule 8 (now Rule 9), which forbids a judge to "directly or indirectly, lend the influence of his name or the prestige of his office to aid or advance the welfare of any private business or permit others to do so."\(^93\)

The Commission on Judicial Disabilities believed that the words "reasonable suspicion" should be given their normal mean-

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\(^{92}\) This Canon was identical with Canon 25 of the Canons of Judicial Ethics of the American Bar Association at the time of its adoption by the Court of Appeals on May 4, 1971. 271 Md. at 468, 318 A.2d at 533.

\(^{93}\) Md. Ethics Rule 9. Ethics Rule 14 states that a violation of any other Ethics Rule is "conduct prejudicial to the proper administration of justice," and thus grounds for disciplinary action.

The Commission distinguished the *Diener and Broccolino* result of removal by noting that Judge Foster's extra-judicial conduct did not affect his official duties, whereas the two aforementioned judges improperly disposed of cases pending in their courts. The *Foster* court impliedly accepted this distinction. See 271 Md. at 478, 318 A.2d at 538.
The Foster majority agreed: the phrase had a "long history" in Canon XXV of the ABA Canons; the court simply listed, without comment, two definitions of "suspicion" and defined "reasonable" in reference to the "reasonable and prudent man" test in negligence law:

Given a certain set of facts, would a reasonable person be justified in suspecting that a judge might be "utilizing the power or prestige of his office to persuade . . . others to . . . contribute . . . to the success of private business ventures. . . ."?

The majority, cognizant that "reasonable suspicion" is "an elas-
tic standard based on questions of degree," held that when Judge Foster personally and publicly assumed a command responsibility in the furtherance of the real estate project, which conduct persisted over a two year period and involved personal appearances, continuing correspondence, and frequent telephone calls, he created an atmosphere where ground was given for "reasonable suspicion" of using his position for economic advantage.

There is other authority to the effect that conduct which gives the appearance of using a judicial position to aid private business dealings is improper within the meaning of the Canons of Judicial Ethics. In Cincinnati Bar Association v. Heitzler, an Ohio judge, inter alia, was a director of a loan company, and entered numerous judgments on its behalf. As a consequence he was suspended from the practice of law indefinitely. In deciding that the judge's dealings raised a "reasonable suspicion" of exploitation of his position, the Ohio court stated

[i]f the fact of a judge's membership on the board of directors is used by the corporation to persuade others to patron-

97. 271 Md. at 475, 318 A.2d at 536. Counsel for the Commission advanced at oral argument a smoke-fire analogy which helps explain the application of the phrase:

[The test is] whether the reasonable man would believe that, not that he would necessarily conclude that the impropriety had occurred, but that there was smoke and hence there may very well be fire and when the smoke is caused by the judge's putting himself into that position, the canon prohibits that and admonishes judges not to, I believe, get into a situation where by their activities they create the smoke whether or not there is fire.

Id. at 500, 318 A.2d at 549.

98. Id. at 475, 318 A.2d at 536. The Foster majority recognized that if Wheeler Holding Co., through an attorney, had continued the land development process and investigative reporting had identified Judge Foster as a stockholder, there would not be grounds for "reasonable suspicion." Id. It was Judge Foster's personal involvement with the city officials which gave rise to the reasonable suspicion regardless of any publicity. Awareness of this personal involvement by anyone would warrant a commission investigation. Even in the holding company situation a judge would probably have a duty to prevent his agents from using the prestige of his office. See notes 99-101 and accompanying text infra.

The dissent criticized disciplining a judge for actions which did not involve moral turpitude or affect professional performance. The minority judges felt the imposition of discipline in these cases would tend to be influenced by the degree to which the offense became known to the public: "Without the hue and cry of certain elements of the media against Judge Foster no reasonable suspicion of his misconduct would have been perceived by anyone anywhere." Id. at 502-03, 318 A.2d at 550-51. However, this argument ignores the possibility of one person who had attended the zoning board meeting making a formal complaint, thus triggering the disciplinary process regardless of any further publicity.


100. The judge was also faulted for giving the impression of living with a woman while separated from his wife, and for hiring a man with a lengthy criminal record as a constable. Id. at — , 291 N.E.2d at 482-88.
ize it or is used by the corporation to promote its business interest, the judge, by accepting membership on the board of directors, has given ground for "reasonable suspicion" that the judge is using "the power or prestige of his office" for that purpose.\footnote{101}

The use of "reasonable suspicion" in this context indicated the court's willingness to apply the phrases so that the first act of the judge (accepting the membership post) may later be found to have given grounds for "reasonable suspicion" if the fact of the membership was subsequently misused by others. The court found that when the judge accepted membership on that board, he undertook the affirmative duty to make certain that there would be no misuse by the company of that membership.\footnote{102}

An opinion of the Committee on Professional Ethics of the American Bar Association illustrated the dangers inherent in such business relationships. Formal Opinion 254\footnote{103} decided that it was improper for a trial judge to serve as a director of a bank. In reference to Canon 25 (Maryland's Canon XXIV), the Committee said:

A certain amount of publicity is given by all banks to the personnel of their board of directors. Accordingly, publicity would be given to the fact that the bank had a judge on its board. This might create reasonable suspicion that the judge was utilizing the prestige of his office to persuade others to patronize the bank. The Canon condemns such conduct.\footnote{104}

This opinion and Heitzler indicate that foreseeable future publicity tending to discredit the judiciary is clearly an element of "reasonable suspicion." Heitzler was an instance where the initial act of the judge gave "reasonable suspicion" of impropriety because it was foreseeable that his position would be used by others to gain special treatment. Judge Foster's appearance before a

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\footnote{101}{Id. at ___, 291 N.E.2d at 485 (emphasis added).}
\footnote{102}{Id.}
\footnote{103}{ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 254 (1943). See also Opinion 322 (1969) (judge must order his personal affairs to avoid appearance of impropriety) and Judicial Conference of the United States, Advisory Committee on Judicial Activities, Opinion No. 40 (1975), 43 U.S.L.W. 2340 (Feb. 11, 1975) (federal judges should resign membership in such organizations as Anti-Defamation League, Sierra Club, and Nat'l Ass'n for Advancement of Colored People, if such organizations are likely to come before them or federal courts in general). This latter reasoning would be doubly true for Judge Foster, who was actively involved in a business association with a company who would frequently come before the courts in Baltimore City.}
\footnote{104}{ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 254 (1943) (emphasis added).}
county zoning board was improper for the same reason.

The censure of Judge Foster in this situation indicates the strictness with which the Commission and the Court of Appeals will apply the Canons and Rules of Judicial Ethics. It is by far the sternest case in any jurisdiction warning judges not to be directly involved in business relationships. No other case was found which disciplined a judge on this basis alone.

It is very difficult to mark the boundary between conduct meriting removal and conduct meriting censure. The line lies more in the degree of the misconduct, rather than its nature, although there is a greater tendency to remove a judge for criminal actions or conduct directly affecting the performance of judicial duties. *Diener and Broccolino* fits into the latter category. The *Foster* fact pattern involved neither, and the Court of Appeals ordered censure.

**Recommendations and Conclusions**

In the past eight years judicial discipline in Maryland has become reality. The Commission on Judicial Disabilities is an improvement over previous attempts at judicial discipline, as illustrated by the two principal cases. However, further improvement is necessary. The recently approved constitutional amendment, 105 by including an opportunity for the Court of Appeals to keep portions of the record in a case before it secret, eliminated the absolute right of the public to know the full circumstances of each case. However, once the Commission recommends censure or removal there is no justifiable purpose in keeping the proceedings secret. 106 Therefore, the record should be once again opened up completely to the public, upon its transmission to the Court of Appeals.

Another procedural problem is posed by the lack of explicit judicial review of a Commission reprimand, in the absence of a Commission recommendation to the Court of Appeals. 107 Fairness dictates some judicial review of the reprimand. A court rule requiring appellate review, upon request, of any decision of the Commission would eliminate this potential trouble spot.

In the *Foster* case the Court of Appeals quoted favorably from the ABA Code of Judicial Conduct. 108 The court should now

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106. See note 30 and accompanying text supra.
107. See notes 31-36 and accompanying text supra.
108. 271 Md. at 473-74, 318 A.2d at 535-36.
adopt the Code in its entirety. The mandatory nature of practically the entire Code, its acceptance in many courts, and its improvement in wording over the Canon's recommend it highly.

As the number of judicial discipline commissions increases, and this body of law continues to develop, hopefully all judges will realize that their office carries with it the burden of keeping as free of human frailties as possible, both on and off the bench. The judicial system exists for the people, and we must set the highest possible standards of conduct and demand their strict enforcement. As Judge Smith of the Maryland Court of Appeals has written: "Courts, be they high or low, should and must be like Caesar's wife, above suspicion. Any other standard is one which undermines the trust and confidence of the average citizen in his government."

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109. Since it is a unified whole, the Code would eliminate the split in Rule 1231 between the current Maryland Canons and the Rules of Judicial Ethics. Desired features of Rule 1231 (such as the mechanics of financial disclosure) could be incorporated into the Code.

The Court of Appeals has already incorporated some Code language into the current norms: in Maryland Canon VIII (from ABA Canon 3B(2), concerning staff conduct); XI (from Canon 3B(3), concerning other court officer's conduct and the duty to report same); XIII (from Canon 2B, banning judicial testimony as a character witness); XVI (from Canon 3A(4), concerning outside consultation on a case); XXV (from Canon 3C(2), concerning awareness of personal finances); XXX (from Canon 3F, prohibiting a judge from acting as an arbitrator). Compare also Ethics Rule 2 with ABA Canon 3C(1)(c) and Ethics Rule 12 with ABA Canon 3A(6).

110. The Code of Judicial Conduct has been adopted in whole or in part in at least 35 states.


112. Diener and Broccolino, 268 Md. at 698, 304 A.2d at 607.