

An Interview with Steven Lubet

Steven Lubet is one of the leading authorities in the country on judicial ethics. A professor of law at Northwestern University, he is the co-author, along with Jeffrey Shaman and James Alfini, of the book, *Judicial Conduct and Ethics*, now in its second edition. He is the director of the Northwestern Law School's program on advocacy and professionalism and publishes widely in the areas of legal ethics, litigation, international criminal law and dispute resolution.

Court Review: One of your specialties is judicial ethics. How did you get interested in that?

Steven Lubet: Well, I'm tempted to say that if you lived in Chicago for any period of time, you would necessarily become interested in judicial ethics. But that's not actually the answer. As with so many things in life, I got interested in it completely by accident.

The American Judicature Society is located in Chicago, and at one point in the early '80s they determined that they should publish a monograph on off-the-bench conduct as an issue in judicial ethics. Someone suggested to someone that I'd be a good person to write it. I had no background in the field at the time, but they called me and asked me to do it, and I think I was up for tenure at the time, and I needed all the publications I could get. So I agreed to write the monograph, and I got hooked.

CR: I noted you've done a variety of things, including testifying in judges' disciplinary proceedings. What would be the general scope of what you've done in the ethics area for judges?

Lubet: Well, of course I wrote the

book with Jeff Shaman and Jim Alfini. [It] ... grew directly out of the monograph. Jim and Jeff were both associated with the American Judicature Society, and I came to them with the idea that there ought to be a comprehensive treatise on judicial conduct and ethics. Starting in about 1986, we sat down and wrote the first edition, and then later on we wrote the second.



Over the years, I've been contacted by lawyers for dozens of judges who have been involved in disciplinary proceedings looking for counseling or consultation or perhaps opinion. I've eventually testified in probably four or five cases in judicial discipline, and I've also consulted on the other side with disciplinary organizations looking for my input or analysis before they proceeded in a disciplinary matter against a judge.

CR: What would you say are the hot

topics these days in the area of judicial ethics?

Lubet: Well, you'd really have to divide that into two categories. There are the hot topics in the area of judicial discipline: what are we seeing judges becoming personally involved in, what are the things that judges need to keep an eye on or watch out for? And then there would be what you might characterize as the broader social issues in judicial ethics. It's not necessarily that judges are getting in trouble or need to worry about getting in trouble, but there's a public debate going on about how judges should conduct themselves. So let's take those up one at a time.

CR: Since our audience is judges, first let's talk about the ones that might get them in trouble.

Lubet: Okay. Well, when judges tend to get in trouble — justifiably — it's mostly for off-bench conduct. Of course, we'll immediately put to one side questions of corruption or bribery because we don't need to tell people to avoid that — they know to avoid it, and nothing I say is going to make a difference to anybody.

But apart from that, really the two things that should most concern judges would fall in the categories of either intemperate conduct or misuse of authority. Those would be the two broad categories, and then you would break that down further.

What's intemperate conduct? Well, it's public displays or other sorts of activity that demean the bench and that adults should know better than to engage in. But judges, being human, sometimes lose their temper or lose their

sense of judgment or lose their sense of proportion and do things that they shouldn't do: getting into fights, getting drunk, getting into traffic accidents, and things of that nature.

And some of that leads directly into the second problem, which is misuse of authority. Trying to beat traffic tickets, trying to influence other judges on behalf of friends and family, engaging in charitable solicitation where that's prohibited by the Code. Basically it comes from perhaps a sense of entitlement, some of which is justified, and in the extreme cases judges go over the line.

CR: Is it fair to say that anything that a judge does as to which a reasonable person might perceive that the judge was getting something because he or she was a judge would be prohibited?

Lubet: No. I think that's going too far. I hope that's going too far. I've got a great personal respect for judges. Judges perform a tremendously important social role often at great personal expense in the sense of foregoing the opportunities for a more lucrative career.

Judges are among the smartest, most dedicated, most hardworking people in our country, and judges deserve things that ordinary people don't get in the way of respect and deference and courtesy. What they don't deserve is special privilege, and what they especially don't deserve is treatment that you would consider above the law. And that's really where the trouble arises.

CR: What are the social issues of note today?

Lubet: Well, I think the biggest ones center around questions of free speech and judicial independence. Those are often discussed together, but actually I think they're quite separate.

Up until recent years, it was widely thought that judges simply gave up the right to free speech or at least they agreed to drastic restrictions on free speech, and most judges either happily or grudgingly lived within those

bounds. It made for a constrained life, but people pretty much understood where the boundaries lay.

In recent years, we've seen judges become much more outspoken about political or legal-political issues, and judges have been asserting a greater right to speak out, and in some cases courts and judicial conduct organizations have been backing them up. I actually think that's rather unfortunate. It's not unfortunate that courts have backed up judges, but I think the tendency among judges to want to engage in broader political and social discussion is unfortunate. I think the public is better served when judges stay out of the political arena and avoid off-bench commentaries on controversial issues, whether or not it's constitutionally protected.

CR: Are you thinking about cases like those in which judges have been commentators on television about publicized cases recently, or other areas?

Lubet: Well, there are three areas, really. There's the judge/commentator, there's the question of campaign speech, and then there's the question of political speech in other contexts. The "judges as television commentators" situation is, I think, enormously unfortunate. There's a very well publicized case in New Jersey where the judge had been a commentator 50 times on Court TV, uncompensated, but a constant presence on television. And the New Jersey Supreme Court ordered him to stop. This really caused a lot of controversy because the judge was discussing cases outside of his own jurisdiction, so the suggestion was that he couldn't possibly be prejudicing anybody's rights; and being a judge, he had something interesting to add to the public discussion of other trials. So why not allow him to go ahead and speak? I agree that's a coherent argument.

On the other side, though, I think that the temptation to become a media figure is very powerful, and once judges sort of conflate the business of judging

with the avocation of being a commentator, you really run into a very significant risk that judges might [be] ... doing one job in order to enhance their ability to do the other. And by that I mean you have to think that the judge might come to work in the morning saying, "What can I do today that'll make me more desirable to CNN as a commentator? What can I do today that will make me more likely ... to get that phone call from Court TV or from 60 Minutes the next time they're looking for a judge to comment on a case in some other jurisdiction?" And of course that would affect the judging process. You couldn't be an objective, impartial judge if you have this secondary agenda of wanting to be a television commentator.

CR: Is it the medium that makes the difference? I ask that because judges are allowed under the Code of Ethics to write and teach about the law. Certainly judges have written law review articles for a long time, and most comments about cases, I think, could be made in a law review commentary, while the same comment made on CNN in an immediate forum might lead to your criticism.

Lubet: I wouldn't say it's the medium that makes the difference. I'd say it's the immediacy that makes the difference. The distinction between writing law review articles or teaching classes would be that you're not typically commenting on pending cases. Law reviews move very slowly. You almost never read a law review article that comments on a pending case. Typically, they discuss cases after they're over. Of course television and, to a lesser extent, newspapers and magazines work on short deadlines. So you're really looking at comments on cases as they proceed and as they're pending, and I would locate the distinction there. It's also no trick to get published in law reviews. It's the easiest thing in the world, so there wouldn't be much competition among judges to do it.

CR: Let's talk for a minute about the topic of judicial independence. There is often the argument made on the broad level that judges need to be independent so that they can protect rights of minorities against a majority, and there's general agreement on the broad principle. Do judges also need to be made more accountable than they are today?

Lubet: That's the way the discussion is usually phrased, the distinction between accountability and independence. I'll tell you this, if I had to choose one or the other, I'd pick independence over accountability every time. Our nation is best served by an independent judiciary. There's almost no higher value when it comes to protecting individual rights. And it's not just minorities, it's anybody who runs afoul of the people in power. You know it's often said that a liberal is just a conservative who's been indicted, and the single greatest guarantee against overuse of government power is an independent judiciary who will enforce the laws impartially without regard to political favor or economic power or popular pressure. I would choose a judiciary capable of playing that role over an accountable judiciary every single time.

It doesn't mean that judges should not be accountable. It doesn't mean that judges should be ignored when they take rogue action. Certainly, we need a judicial disciplinary machinery. There was a judge who was using his position to engage in sexual assault, and no matter how independent he was on the bench, obviously he had to be called to account for that kind of conduct. But between the two values, independence is more important than what is often called accountability.

CR: Where do you see threats to judicial independence today?

Lubet: I think people often overstate the threat to judicial independence. Newspaper criticism does not threaten judicial independence terribly.

Restrictions on judges' off-the-bench conduct or off-the-bench speech do not threaten judicial independence terribly. But there is, I think, an unfortunate trend among judicial conduct organizations to seek to discipline judges for the content of their rulings. And even when those rulings are wrong, even when the rulings are outrageous, if judges have to worry about personal jeopardy because of the way they ruled in a case, that will undermine judicial independence more quickly than anything else.

CR: Is there some standard to be applied in determining when a judge may be subject to discipline for an opinion?

Lubet: This is the trickiest and most complex question in all of judicial ethics, in my opinion. When can a judge be disciplined for the content or the nature of a ruling or on the basis of comments made in the course of a ruling? Now, in federal system, of course, the answer's simple. It's never. So that's easy. In the state systems, though, judges have faced discipline for saying or doing things in the course of ruling on cases, and in the common law system, you know, we work out the answer to that question one case at a time. So, for example, there have been sort of an astoundingly high number of judges who have decided cases by coin flips or throwing darts or, in one case, asking the people in the courtroom to vote. There the judge [has] really sort of abdicated the responsibility of doing the job, [and] wasn't judging at all in any real sense. So that's easy to say that discipline is available there, even though it's sort of on the basis of how the judge ruled in cases.

At the other end of the spectrum, you find a situation where judges made rulings seemingly in good faith, maybe they were novel, maybe they were at the extreme edge of the judge's authority. But it seems likely that the judge, from whatever anybody can tell, was trying to

enforce the law the way he or she saw it, and still the judicial conduct organization comes in and files charges. And I think that's truly chilling. That truly sends a message that judges need ... to toe the line, need to do things the accepted way, and can't follow their consciences.

CR: In your book, one of the criteria mentioned for distinguishing misconduct from mere legal error is the degree of egregiousness of the error.

Lubet: Want some examples?

CR: Well, that would be good, and then if you could tell me how a judge would know in advance how egregious their error was likely to be.

Lubet: Of course that's a value judgment, and really when we talk about the degree of the egregiousness of the error, what we're really talking about is competence — whether the judge is showing sufficient competence in the law. But the situations arise where judges, for example, refuse to appoint counsel for defendants in felony cases. And on the one hand that's a legal error, the defendant says please appoint a lawyer for me and the judge says, no, you're going to go to trial without a lawyer. The Supreme Court rulings could not be clearer that an indigent defendant is entitled to appointment of a lawyer on a felony case. So I think anyone who doesn't know that is failing as a judge, and that's [the] sort of egregious error that can lead to discipline.

CR: Let me ask you about another example. There are a lot of jury reform techniques that are being tried out in courts throughout the country now, whether it be letting jurors ask questions or even note-taking by jurors, that in some states there may be fairly recent authority from the state's highest court suggesting that these are not good practices. If a district judge wants to adopt some jury reform measures for their own court, even though the state supreme court has made some disap-

proving comments about those measures in a fairly recent opinion, what ethical considerations should the judge think about?

Lubet: The question would be the clarity of the supreme court statement. [If the] state supreme court says don't do it, then no matter how good an idea it is, I think a trial-level judge is playing with fire if he or she goes ahead and doesn't heed the warning. On the other hand, the whole way the common law system works is that ideas come from the bottom up, and [the] supreme court isn't necessarily the best judge of how trial courts are going to work, and I think supreme court justices tend to know that. So if a state supreme court disapproves something or suggests that it's not a good idea, [in] incidental comments, and a trial court judge wants to try a variation on the theme, that is, do something that seems to resolve the state supreme court's objections even though the conduct falls in the same category, I would not think that that would be disciplinable.

CR: Earlier you mentioned that campaign speech often creates some tricky issues. Do you have an opinion as to whether partisan political elections may be inconsistent in any way with having an independent judiciary? The argument would be that it's easy to challenge a judge on the basis of an unpopular opinion in a partisan election.

Lubet: I'm familiar with the argument that partisan, or even nonpartisan, elections necessarily undermine judicial independence. Let's just say there's an unresolvable tension there when judges serve limited terms subject to either a retention vote or a contested election. Obviously, there is some. You can't avoid feeling that these subsequent elections are referendums on — or possible referendums on — the content of the judge's opinion. On the other hand, it's a democracy, and no judge stands election following every verdict. Elections are

four, six, sometimes ten years apart, and I think the cost to judicial independence of the electoral system is not unsurvivable. If I were writing a state constitution, I wouldn't have partisan political elections for judges, and I think you'd get better, more independent judges if we didn't have elections. But I think one can preserve judicial independence within an electoral system.

CR: Are there any other campaign speech topics that are worthy of note today?

Lubet: Well, the federal courts have been expanding the permissible scope of campaign speech, and I think that's too bad. I think we're better off if we stay as far away from the sort of political campaigning that we've seen in other sorts of elections. The content of that discourse tends to race to the bottom. On the other hand, I don't know what the answer is if we're going to be electing judges: they're going to have to be campaigning, they're going to have to be raising funds, and, quite apart from judicial independence, I think that's one of the real drawbacks for an elected judiciary.

CR: The fundraising?

Lubet: Well, the fundraising, the campaigning, the fact that you can't really restrain someone's ability to speak to the electorate once you've decided to have full-bore campaigns. Not that they do it anywhere else in the world. I don't think there are elected judiciaries like we have in the other countries that we tend to compare ourselves to. [They] don't do it in the United Kingdom or Canada or Western Europe.

CR: Let me talk about finances for a minute. *The Kansas City Star* recently ran an investigative series in which it showed that federal district judges in more than one district that it surveyed had failed to recuse themselves in cases involving companies in which the judges owned stock, contrary to ethics requirements, and that the disclosures of

assets of federal judges were often difficult to get. In addition, the federal rules require that the judge be notified each time anyone requests their disclosure form, causing many not to seek it in the first place. In the series of articles, you were quoted as saying that these ethics rules are intended to be picky because the integrity of the system is so important. Did you find it surprising, with a bright-line rule prohibiting a judge from sitting in a case involving a company in which the judge owned any stock at all, that several judges had failed to carefully police this on their own?

Lubet: I didn't find it surprising, and I don't even find it inexcusable. Of course it's wrong. Judges should be careful. Judges sentence people to jail sometimes for technical violations of the law, and judges, I think, have an obligation to view these things carefully. But everyone makes mistakes. Federal court dockets consist of hundreds and hundreds of cases, some of the cases have hundreds of parties, so you're really looking at sort of thousands of decisions along that line in the course of a year. Some people don't manage their own portfolios, so the fact that there would be a slip-up here and there is not surprising, although one would feel better if judges were being more careful to make sure that they adhere to that [recusal] requirement.

CR: Do you think there's a need for any greater disclosure regarding state court judges financially?

Lubet: The financial disclosure requirements for state court judges are all over the map. They run from being very, very demanding and very exacting to being almost nonexistent. And what I would prefer to see is something more approaching a uniform practice geared toward allowing litigants to make meaningful requests for disqualification. And then the best thing would be if there were some sort of audit for compliance. What I've noticed in my research is

sometimes [in] states that have [these] extraordinarily detailed disclosure requirements, judges more or less ignore them, and no one says anything because no one looks at the forms when they come in. So then the judges who are complying, spending 10 or 15 hours filling out the forms every year, are doing it for nothing because the other judges who sort of blow it off don't even get a phone call about it.

CR: One of the most ambiguous provisions in the code of judicial conduct is the requirement that a judge avoid the appearance of impropriety. Are there any reliable guides to conduct in that area?

Lubet: I don't think there are, I have to say. I wrote a law review article¹ a number of years ago suggesting six factors² to think about when judging the appearance of impropriety, and that's what I would look at, but I don't know that one could count on state supreme courts or judicial conduct organizations to consider those same six factors. I think the best guide for judges is to ask themselves, "Could somebody else think that this might lead to unfairness or lack of respect or inability for me to do the job that the robe requires?" And if the only answer is [that] someone who knows me would understand that I'm not doing anything wrong, then the conduct should be avoided, because judges are not only going to be reviewed by people who know them, they have to worry about public appearance as well.

CR: An *ABA Journal* article a couple of years ago suggested that civility on the bench was becoming a greater prob-

lem area. I know that you teach trial advocacy and have commented on civility among the legal profession. Do you have any feeling for whether civility on the bench is a growing problem?

Lubet: I don't know if it's growing. Actually, my guess would be that it's diminishing as a problem. But it's still a problem. The reason I think the incivility issue is diminishing as a problem is because in the past, much of it was directed at women and minorities. Fortunately there's been a tremendous increase of women and minorities as judges, and there's also been a great educational process going on among judges of the need to avoid that sort of behavior. So, I wouldn't call it a problem of the past, but that's a problem that has greatly diminished. Then we have the other problem about judges just being mean and nasty, and, you know, there's tens of thousands of judges in the country. A certain percentage of them are going to be mean and nasty. We have to do what we can to get those people to change their ways, or remove them from the bench if they won't.

CR: Do you keep track of numbers of judicial complaints to have any knowledge as to whether complaints are higher or lower these days?

Lubet: I don't keep close track of that, and I don't know the answer. It wouldn't really tell you that much about conduct, though, even if you did know the answer, because complaints go up when public awareness rises and the ability to complain [rises], even if the general level of conduct has been

improving. So, for example, you might find more complaints these days about sexist remarks by judges, but I'm fairly certain that the actual quantum of sexist remarks has gone down. But people's willingness and interest in complaining about it has gone up.

CR: You seem to have caused a bit of a stir recently with regard to an issue that most of us didn't even know was an issue: whether items are admitted *in* evidence or *into* evidence. You've written an article on it and gotten a reply by another professor. What's the deal?

Lubet: Well, it's probably the single most important question in litigation today. I think if we could really resolve this problem once and for all, we could ease the litigation explosion, increase the quality of justice, lower taxes, probably end the trade deficit, and resolve three or four foreign policy crises all at once.

CR: You're speaking to America's judges. Give us the answer.

Lubet: Well, the answer, I'm afraid, is that exhibits are offered "into" evidence, they are admitted "as" evidence, and thereafter they are "in" evidence.

CR: Want to give a quick rationale, or is there one?

Lubet: You'll have to take my word for it.³

CR: All right. Thank you.

¹ See Steven Lubet, *Judicial Impropriety: Love, Friendship, Free Speech, and Other Intemperate Conduct*, 1986 ARIZ. ST. L. J. 379 (1986). The discussion of these factors is updated and explored further in JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS §§ 10.23 to 10.38 (2d ed. 1995).

² The six factors are: (1) the public or private nature of the act when done; (2) the extent to which the conduct is protected as an individual right; (3) the degree of discretion exercised by the judge; (4) whether the conduct was harmful or offensive to others; (5) the degree of respect or lack of respect for the public or individual

members of the public that the conduct demonstrates; and (6) the degree to which the conduct is indicative of bias, prejudice, or improper influence. *Id.* at § 10.23.

³ For those wanting a more extended discussion, see Steven Lubet, *Into Evidence*, 81 CORNELL L. REV. 154 (1995); Martha M. Ertman, *The In/Into Controversy: Rising to Lubet's Bait: Vive No Difference*, 91 NW. U. L. REV. 642 (1997); and Steven Lubet, *The In/Into Controversy: Rising to Lubet's Bait: A Reply to Critics of Into Evidence*, 91 NW. U. L. REV. 662 (1997).