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ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT

REPORT NOVEMBER 2006 INTRODUCTION

In this Report the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct (Joint Commission, or Commission) proposes both format and substantive changes to the present ABA Model Code of Judicial Conduct.

Created in July 2003, with a grant from The Joyce Foundation, the Joint Commission was appointed by and operated under the auspices of the ABA Standing Committees on Ethics and Professional Responsibility and on Judicial Independence. The Commission will submit a Report with Recommendations for consideration by the ABA House of Delegates at the 2007 Midyear Meeting of the Association.

It has been nineteen years since the American Bar Association last undertook a comprehensive review of its judicial ethics policies. Between 1987 and 1990, a Subcommittee of the Standing Committee on Ethics and Professional Responsibility conducted an extensive review process that led to adoption of the present ABA Model Code of Judicial Conduct in 1990. Since that time, however, several developments occurred that suggested the need for a careful evaluation of the Model Code. First among them was the extensively reported collective experience of judges, judicial ethics commissions, and judicial regulators that have worked with the existing Code for well over a decade. The Commission was motivated as well by specific issues, including those that had arisen as a result of the variety of methods utilized throughout the United States in the judicial selection process, those stemming from the development of new types of courts and court processes, and those relating to the increasing frequency of *pro se* representation in the courts.

The Joint Commission to Evaluate the Model Code of Judicial Conduct is chaired by Mark I. Harrison of Phoenix, Arizona. Mr. Harrison is a former member of the ABA Standing Committee on Ethics and Professional Responsibility, and a former chair of the Standing Committee on Professional Discipline. He has had an extensive experience in all aspects of lawyer and judicial regulation, having represented both the Arizona Judicial Conduct Commission and judges in judicial discipline proceedings. The Commission membership includes ten distinguished judges and lawyers whose breadth of experience in various courts and areas of practice ensured a thorough and multidimensional review of the Judicial Code. It also includes a public member whose participation in a wide array

of civic, business, and charitable affairs brought to the review process a valuable public perspective, and eleven advisors with extensive experience in judicial ethics and disciplinary matters, many of whom served as formal liaisons from organizations interested in different aspects of judicial conduct. The Commission was supported in its evaluative work by two Reporters and by counsel from the ABA Center for Professional Responsibility and the ABA Justice Center. A roster of the Commission members, advisors, Reporters, and counsel appears at <http://www.abanet.org/judicialethics/roster.html>.

THE EVALUATION PROCESS

Over the course of thirty-nine months, the Commission met in person nineteen times and convened via teleconference thirty-one times. At its in-person meetings (widely advertised in advance), the Commission sponsored public hearings at which it heard comments from several dozen individuals regarding their interests, or the interests of entities they represented, on a broad range of judicial conduct issues. Representatives of the Commission met on several occasions with the Conference of Chief Justices and with various entities within the Judicial Division of the ABA. The Commission also received written comments from some of those who appeared in person and from a number of other interested persons. The Commission's developing work product, in the form of drafts of discrete portions of the Judicial Code, was posted periodically on a website maintained by the ABA, along with requests for responses and suggestions for further revisions. The Commission's work was also disseminated to representatives of sixteen entities whose work focuses upon judicial conduct matters, and to more than two hundred and fifty individuals who had expressed interest in the process and asked that they be provided with electronic notification of all the Commission's recommendations. All told, thirty-nine entities filed written comments with the Commission in relation to the existing Model Code, a Preliminary Report distributed by the Commission in June 2005, or a Proposed Final Draft in December 2005. In total, approximately three hundred individuals also filed comments regarding the Commission's draft revisions to the Code. A listing of the commentators, as well as the text of their comments, can be found at www.abanet.org/judicialethics/comments.

The proposed new Model Rules of Judicial Conduct are the result of vigorous and informed discussion and debate among the Commission members and advisors. The formulations contained in these Model Rules were established by vote of the members of the Commission. Although there was majority support for each of the proposed Rules, there was inevitably some disagreement, ranging from mild to strong, with the formulation of particular proposed Rules. Important differences between the proposed Rules and the present Code are addressed in the section of this Report titled, "Principal Substantive Areas of Concern and Changes from the 1990 Code."

MATERIALS CONTAINED IN THIS REPORT

To assist the reader with review, the Commission provides here a clean copy of the Proposed Model Code of Judicial Conduct, which includes a Preamble, sections on

Scope, Terminology, and Application, the Canons, and the Rules and their accompanying Comments. Interspersed throughout the document are extensive and detailed "Reporters' Explanations of Changes," ("RECs"), which provide explanations of substantive differences between the treatment of the subject matter in the proposed Model Rules and the present Model Code, as well as the sources from which the proposed Model Rules have been derived. All substantive deletions of provisions in the Model Code are also discussed.

ORGANIZATIONAL CHANGES FROM THE 1990 CODE

The structure of these proposed model rules applicable to judicial conduct presents two notable differences from the 1990 Code.

The first difference is the presentation of Canons, which state overarching principles of judicial conduct, followed by black-letter "Rules." In the 1990 Code, each Canon was followed by "sections" that discursively established the parameters of permissible and prohibited conduct. A consensus was reached by the Commission in its first year of deliberations that a structure similar to that of the ABA Model Rules of Professional Conduct (which address permitted and prohibited conduct for lawyers) would be more straightforward and user-friendly. This consensus developed from consideration of the Commission members' own experience in using the present Code both for guidance and for judicial discipline proceedings, and from the experience and testimony of numerous other individuals providing comments to the Commission. Similar to the organization of the Model Rules of Professional Conduct, the rules here are usually followed by comments that provide both aspirational statements and guidance in interpreting and applying the rules. These comments neither add to nor subtract substantively from the force of the rules themselves.

Second, the material treated under each of the Canons has been reorganized to provide what the Commission considers a more logical, functional and helpful arrangement of topics. Canon 1 and its rules combine most of the subject matter of present Canons 1 and 2, addressing the obligations of judges to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office. Canon 2 and its rules address solely the judge's professional duties as a judge, which constitute most of Canon 3 in the present Code. Canon 3 and its rules address specific types of personal conduct, including involvement in extrajudicial activities and in business or financial activities; most of which is now addressed in Canon 4. Finally, Canon 4 and its rules address, as does present Canon 5, acceptable political conduct of judges and judicial candidates. The current Preamble has been divided into two parts: a new Preamble, which states the objectives of the Model Rules, and a Scope section, which describes the manner in which they are to be interpreted, used for guidance, and enforced.

PRINCIPAL SUBSTANTIVE AREAS OF CONCERN AND CHANGES FROM THE 1990 CODE

CANON 1

Canon 1 combines the previous Canons 1 and 2, placing at the forefront of the document the judge's duties to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office. In doing so, it embraces the most general, but overarching, obligations of a judge, leaving a judge's specific activities—whether occurring while the judge is on the bench, in the judge's private life, or in the political arena—to be addressed in the remaining three Canons.

The Commission heard much oral testimony and received numerous written communications on the question, identified by the Commission itself as an important one at the beginning of the project, of whether the "appearance of impropriety" concept should be retained. A majority of commentators on the subject, citing to judicial discipline cases decided over a three-decade period, strongly urged that the concept be retained. Others, among them lawyers who represent judges and judicial candidates in disciplinary proceedings, voiced concerns that the concept is not clearly definable and does not provide judges and judicial candidates with adequate notice about what conduct might constitute a disciplinable offense. Some of those commentators questioned whether that aspect of the provision might also make it subject to challenge on constitutional grounds. The Commission was persuaded by the former group of commentators. Thus, the Commission proposes to move to the very first Canon the injunction to avoid impropriety and its appearance. (In addition, the Terminology section adds a definition of the term "impropriety.")

Comment [2] to Rule 1.3, Avoiding Abuse of the Prestige of Judicial Office, retains the concept presently in Commentary to Canon 2B whereby letters of recommendation submitted by a judge on behalf of another person may be based upon any "personal knowledge" the judge possesses. In an earlier draft of this provision, the Commission had proposed, based upon considerable discussion and the comments of numerous witnesses, that only knowledge obtained by a judge in his or her official capacity ought to be used in letters of recommendation. In the end, the Commission was persuaded that the formulation in the 1990 Code was well balanced and preferable.

CANON 2

Rule 2.3, Bias, Prejudice, and Harassment, has added to the 1990 Code's list of improper bases for discrimination the categories of ethnicity, marital status, gender, and political affiliation. Also new is the inclusion of "harassment" in the Rule's black letter language, and explanatory Comment that describes both harassment generally and sexual harassment.

Rule 2.5, Competence, Diligence, and Cooperation, combines in a single Rule the treatment of adjudicative competence, addressed in the 1990 Code under the rubric of competence “in the law,” (Canon 3B(2)), and administrative competence (Canon 3C(1)). The new Rule identifies in a single location the judge’s obligation to perform all judicial duties competently.

The Comment to Rule 2.6, Ensuring the Right to Be Heard, expands considerably the present Code Canon 3B(7)(d), discussing judges’ actions in encouraging parties and their lawyers to settle disputes when possible, and cautioning judges against using coercion in doing so. The Comment is expanded to enumerate some of the factors judges should take into account if they participate in settlement proceedings. Whether a judge who participates in facilitating settlement of a matter pending before him or her should be permitted to hear that matter if settlement efforts are unsuccessful is not addressed in these rules.

Rule 2.8, Decorum, Demeanor, and Communication with Jurors, contains a new comment acknowledging the developing practice of judges allowing jurors to discuss court proceedings with them following trial, though cautioning them about discussing the merits of a case. This Comment accommodates recently developed formal and informal procedures the Commission learned of, whereby judges engage in “debriefing” processes with jurors after their jury service concludes.

Paragraph (A)(2) of Rule 2.9, Ex Parte Communications, introduces new requirements when a judge seeks to obtain the written advice of a disinterested expert on the law applicable to a proceeding. The parties must receive advance notice of the person to be consulted and the substance of the advice to be solicited, and must be given a reasonable opportunity to object and respond, both to the notice and to the advice received.

Rule 2.9(C) contains a new provision prohibiting a judge from “investigat[ing] facts in a matter independently.” The comment to the rule states that the prohibition extends to a judge’s use of electronic research, which includes Internet research.

New Comment [4] to Rule 2.9 addresses developing practices in recently created “specialized courts,” such as drug courts, domestic abuse courts, and others. Numerous commentators informed the Commission that rules specially developed for application in such courts frequently authorize—or even require—judges to engage in communications with individuals and entities outside the court system. By virtue of the “authorized by law” exception to Rule 2.9, ex parte communications made in compliance with such rules are permitted.

Rule 2.16 is a new Rule, addressing the duty of a judge to cooperate with judicial and lawyer disciplinary authorities.

CANON 3

In Rule 3.6, Affiliation with Discriminatory Organizations, the categories of gender, ethnicity, and sexual orientation have been added to the list of factors upon which discrimination is prohibited in the policies of clubs and other membership entities to which judges seek to belong. Sexual orientation is presently contained in the 1990 Code's provision prohibiting the manifestation of bias in the court, but neither it nor gender nor ethnicity presently appear in connection with organizational memberships held by a judge. The comment to this rule notes, as does the current Code, that the determination of whether a particular organization's exclusionary membership practices constitute "invidious discrimination," such that a judge may not belong to it, can be made only by considering numerous factors. Two of those factors are whether the organization is "dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members," and whether it is an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.

The Final Draft also adds to the black letter of Rule 3.6 a statement that a judge's attendance at an event in a facility of a group that the judge could not join as a member does not constitute a rule violation when it is an isolated event that "could not reasonably be perceived as an endorsement of the organization's practices."

Comment [3] to Rule 3.6 interprets the black letter to require that a judge immediately resign from an organization to which he or she belongs upon discovering that it engages in invidious discrimination. In the 1990 Code, the prohibition against membership in discriminatory organizations was being newly introduced, and Commentary provided that a judge be given one year to withdraw from membership, unless he or she was successful in influencing the organization to abandon its discriminatory policies. The Commission considers that both the policy and practice of prohibiting judges from belonging to discriminatory organizations are now well established, so that a per se prohibition is appropriate.

The substance of Rule 3.13, Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, and Other Things of Value remains largely unchanged from its former presentation in Section 4D(5) of the 1990 Code, although the Rule's structure has been revised. The extensive discussion of what does *not* constitute a gift has been deleted.

Rule 3.14, Reimbursement of Expenses and Waivers of Fees or Charges, adds language not contained in its predecessor in the 1990 Code, Canon 4H, to clarify that in addition to actual reimbursement to judges for expenses they may have incurred, waivers of fees or other charges are also regulated by the Rule. In an important addition to the Commentary on this subject, Comments [2] and [3] discuss the analysis a judge should employ in making a determination about whether to accept reimbursements or fee waivers.

Rule 3.15, Reporting Requirements, sets out the requirements for reporting extrajudicial compensation, gifts, and other things of value, as well as reimbursements and waivers of

fees. Paragraph (A)(2) of the rule introduces an important change, prohibiting judges from accepting gifts in excess of specific dollar limits to be established by individual jurisdictions. The present Code provision simply requires that gifts be reported. The provision enables judges to receive modest and innocuous gifts not excepted elsewhere in the rules, but prohibits gifts of unlimited size. Also of significant note is the time line established for reporting of reimbursements. Following the recent issuance of guidelines by the Judicial Conference of the United States for federal judges, paragraph (C) of this Rule requires that reimbursement of expenses and waivers of fees be reported within thirty days following the conclusion of the event or program to which they relate. Consistent with the new rules' acknowledgment of the impact of developing technology upon judicial practices, the rule requires the posting of information relating to compensation and reimbursement on appropriate websites.

CANON 4

Throughout its deliberations, the Joint Commission has sought to find a balance that accommodates the political realities of judicial selection and election while ensuring that the concepts of judicial independence, integrity, and impartiality are not undermined by the participation of judges and judicial candidates in political activity. The Commission has expanded the title of the Canon, specifically identifying "campaign" activities in addition to political activities generally. More importantly, it has replaced the difficult-to-define term "inappropriate political activity" with the phrase "activity inconsistent with the independence, integrity, or impartiality of the judiciary." This extends to the political arena the focus that the new Model Rules apply consistently on those fundamental principles. The Commission also has added extensive commentary to the Rules it proposes within Canon 4, confident that it will enhance compliance with and, when necessary, enforcement of the Rules.

The internal organization of Canon 4 (formerly Canon 5) has been significantly modified. Rule 4.1 signals, in its introductory clause ("except as permitted by law, or by Rules 4.2, 4.3 and 4.4") that there will be exceptions to its provisions. It then addresses the prohibitions against political activity that apply generally to judges and judicial candidates, as does the present Canon, leaving it to Rules 4.2, 4.3 and 4.4 to identify those obligations and prohibitions that relate to judges and judicial candidates who seek office through various judicial selection processes. Depending upon the type of selection process involved, these rules may introduce new restrictions, reduce the scope of prohibitions set out in Rule 4.1, or eliminate them entirely. Rule 4.5 applies solely to judges who seek election to nonjudicial office.

There are several notable changes effected by Rule 4.1 and its Comment. A broad prohibition against seeking, accepting, or using endorsements from political organizations has been included. Although this is among the prohibitions that are ultimately relaxed somewhat in specific Rules that follow, it nonetheless carries forth

from the present Code the statement of a preference for reducing the level of politicization in judicial selection.

Rule 4.1 broadens the present Code's prohibition against a judge "knowingly misrepresent[ing] the identify, qualifications, present position, or other fact concerning the candidate or an opponent," instead prohibiting judges and judicial candidates from "knowingly, or with reckless disregard for the truth,... making any false or misleading statement."

The Commission deleted language that required that judges and judicial candidates maintain "appropriate dignity," finding the phrase both unhelpful and less effective at capturing the fundamental characteristics of proper judicial conduct, independence, integrity, and impartiality, than using the terms themselves.

Where the present Code discusses only briefly the fact that judges are entitled to engage in the political process as voters, Comment [6] specifically notes that judges in jurisdictions that employ caucus procedures to select political candidates are not prohibited from participating in such caucuses.

Perhaps the most significant addition to Comment accompanying Rule 4.1, however, is the series of five comments that discuss the distinction between "announce clauses," (which have been found unconstitutional and therefore eliminated from judicial ethics rules) and "pledges and promises clauses," which the Commission remains convinced are solidly supportable limits that must be set to prohibit judges from promising to reach particular results on specific issues that may come before them. Comment [14] explains that promises respecting a judge's intentions to handle matters of court administration are exempt from the general prohibition against "pledges and promises."

Rule 4.2, which permits certain political activity, as part of the electoral process, that otherwise would be prohibited in Rule 4.1, nevertheless narrows the time frame in which such activity is permitted. Although leaving to the discretion of each adopting jurisdiction the question of what time period will be used, the Rule permits certain political activity "not earlier than [amount of time] before the first applicable primary election, caucus, or general or retention election."

The Rule departs from the present Code in permitting judges to seek "public support," while retaining the Code's prohibition against personally soliciting or accepting campaign contributions. Except with respect to those who are running in partisan judicial races, however, it limits judges to seeking such support from political organizations other than partisan ones.

Finally, Rule 4.2 imposes a new requirement that judges personally approve the contents of campaign literature and other materials employed to promote their election.

The activities permitted to candidates seeking appointive judicial office under proposed Rule 4.3 reach beyond what was permitted in the 1990 Code. First, a candidate for

appointment is not obligated to wait to be invited to seek an endorsement, but is free to initiate a request for endorsement. Second, the candidate is not limited to seeking endorsements from organizations "regularly making recommendations to appointing authorities," but may seek endorsement from any individual or organization.

Rule 4.4, relating to the activities of a judge's or judicial candidate's campaign committee, carry forth the provisions of the present Code, but add to them a specific injunction that the judge or judicial candidate is responsible for ensuring that his or her campaign committee complies with both the provisions of the Model Rules and other applicable law.

Rule 4.5, which relates to the activities of judges who become candidates for nonjudicial office, has been expanded beyond its counterpart in the present Code, which solely addressed the obligation of a judge to resign when he or she becomes a candidate for a nonjudicial office. A second paragraph is added to establish that judges who are merely seeking appointment to some nonjudicial office are not required to resign their position simply to be considered for an appointment – especially because there may be a large pool of potential appointees being considered.

As noted earlier in this Report, detailed "Reporters' Explanations of Changes" are contained within the Web site posting of the Commission's proposal. Also posted is a "Correlation Table" that indicates the source of the proposed Canons, Rules and Comments in the 1990 Code.

PROPOSED REVISED ABA MODEL CODE OF JUDICIAL CONDUCT

Contents

PREAMBLE.....	12
SCOPE.....	14
TERMINOLOGY.....	17
APPLICATION.....	22

CANON 1

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTERGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

RULE 1.1	Compliance with the Law.....	32
RULE 1.2	Promoting Confidence in the Judiciary.....	34
RULE 1.3	Avoiding Abuse of the Prestige of Judicial Office.....	36

CANON 2

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

RULE 2.1	Giving Precedence to the Duties of Judicial Office.....	41
RULE 2.2	Impartiality and Fairness.....	43
RULE 2.3	Bias, Prejudice and Harassment	46
RULE 2.4	External Influences on Judicial Conduct.....	49
RULE 2.5	Competence, Diligence, and Cooperation.....	51
RULE 2.6	Ensuring the Right to Be Heard.....	54
RULE 2.7	Responsibility to Decide.....	56
RULE 2.8	Decorum, Demeanor, and Communication with Jurors.....	58
RULE 2.9	Ex Parte Communications.....	60
RULE 2.10	Judicial Statements on Pending and Impending Cases.....	66
RULE 2.11	Disqualification.....	69
RULE 2.12	Supervisory Duties.....	74
RULE 2.13	Administrative Appointments.....	76
RULE 2.14	Disability and Impairment.....	78
RULE 2.15	Responding to Judicial and Lawyer Misconduct.....	80
RULE 2.16	Cooperation with Disciplinary Authorities.....	83

CANON 3

A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

RULE 3.1	Extrajudicial Activities in General.....	87
RULE 3.2	Appearances before Governmental Bodies and Consultation with Government Officials.....	92
RULE 3.3	Testifying as Character Witness.....	95
RULE 3.4	Appointments to Government Positions.....	97
RULE 3.5	Use of Nonpublic Information.....	99
RULE 3.6	Affiliation with Discriminatory Organizations.....	101
RULE 3.7	Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities.....	105
RULE 3.8	Appointments to Fiduciary Positions	111
RULE 3.9	Service as Arbitrator or Mediator.....	113
RULE 3.10	Practice of Law.....	116
RULE 3.11	Financial, Business, or Remunerative Activities.....	118
RULE 3.12	Compensation for Extrajudicial Activities.....	121
RULE 3.13	Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value.....	124
RULE 3.14	Reimbursement of Expenses and Waivers of Fees or Charges.....	131
RULE 3.15	Reporting Requirements.....	136

CANON 4

A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY

RULE 4.1	Political and Campaign Activities of Judges and Judicial Candidates in General.....	142
RULE 4.2	Political and Campaign Activities of Judicial Candidates in Public Elections.....	152
RULE 4.3	Activities of Candidates for Appointive Judicial Office.....	160
RULE 4.4	Campaign Committees.....	163
RULE 4.5	Activities of Judges Who Become Candidates for Nonjudicial Office.....	168

1
2 **Proposed Revised ABA Model Code of Judicial Conduct**
3 **As of October 31, 2006**

4
5
6 **PREAMBLE**

7
8 [1] An independent judiciary is indispensable to our system of justice. The U.S. legal
9 system is based upon the principle that an independent, impartial, and competent
10 judiciary, composed of men and women of integrity, will interpret and apply the law that
11 governs our society. Thus, the judiciary plays a central role in preserving the U.S.
12 principles of justice and the rule of law. Inherent in all the Rules contained in this Code
13 are the precepts that judges, individually and collectively, must respect and honor the
14 judicial office as a public trust and strive to maintain and enhance confidence in the legal
15 system.

16
17 [2] Judges should maintain the dignity of judicial office at all times, and avoid both
18 impropriety and the appearance of impropriety in their professional and personal lives.
19 They should aspire at all times to conduct that ensures the greatest possible public
20 confidence in their independence, impartiality, integrity, and competence.

21
22 [3] The Model Code of Judicial Conduct establishes standards for the ethical conduct
23 of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct
24 of judges and judicial candidates, who are governed in their judicial and personal conduct
25 by general ethical standards as well as by the Code. The Code is intended, however, to
26 provide guidance and assist them in maintaining the highest standards of judicial and
27 personal conduct.

PREAMBLE

REPORTER'S EXPLANATION OF CHANGES

EXPLANATION OF BLACK-LETTER:

1. The 1990 Preamble has been essentially dissected, with the objective of describing the general purpose and rationale of the Code in Preamble, and moving to a new "Scope" section the specific explanation of how the Rules are intended to operate. This approach parallels that taken in the ABA Model Rules of Professional Conduct, whose general format the proposed revised Rules and Comments also follow.
2. The 1990 Code Preamble language discussing the "degree of discipline to be imposed" in the course of enforcing the Code's provisions has been deleted completely.
3. New language has been added to emphasize that, at all times, judges should avoid both impropriety and the appearance of impropriety in their professional and personal lives and that they should aspire to conduct that ensures the greatest possible public confidence in their independence, integrity, impartiality, and competence.
4. Other changes in language are solely stylistic.

SCOPE

1
2
3 [1] The Model Code of Judicial Conduct consists of four Canons, numbered Rules
4 under each Canon, and Comments that generally follow and explain each Rule. Scope
5 and Terminology sections provide additional guidance in interpreting and applying the
6 Code. An Application section establishes when the various Rules apply to a judge or
7 judicial candidate.

8
9 [2] The Canons state overarching principles of judicial ethics that all judges must
10 observe. The Canons are given effect by the Rules. For a judge to be disciplined for
11 violating a Canon, violation of a Rule must be established. Where a Rule contains the
12 term “shall” or “shall not,” it establishes a mandatory standard to which the judge or
13 candidate for judicial office will be held. Where a Rule contains a permissive term, such
14 as “may” or “should,” the conduct being addressed is committed to the personal and
15 professional discretion of the judge or candidate in question, and no disciplinary action
16 should be taken for action or inaction within the bounds of such discretion.

17
18 [3] The Comments that accompany the Rules serve two functions. First, they provide
19 guidance regarding the purpose, meaning, and proper application of the Rules. They
20 contain explanatory material and, in some instances, provide examples of permitted or
21 prohibited conduct. Comments neither add to nor subtract from the binding obligations
22 set forth in the Rules. Therefore, when a Comment contains the term “must,” it does not
23 mean that the Comment itself is binding or enforceable; it signifies that the Rule in
24 question, properly understood, is obligatory as to the conduct at issue.

25
26 [4] Second, the Comments identify aspirational goals for judges. To implement fully
27 the principles of this Code as articulated in the Canons, judges should strive to exceed the
28 standards of conduct established by the Rules, holding themselves to the highest ethical
29 standards and seeking to achieve those aspirational goals, thereby enhancing the dignity
30 of the judicial office.

31
32 [5] The Rules of the Model Code of Judicial Conduct are rules of reason that should
33 be applied consistent with constitutional requirements, statutes, other court rules, and
34 decisional law, and with due regard for all relevant circumstances. The Rules should not
35 be interpreted to impinge upon the essential independence of judges in making judicial
36 decisions.

37
38 [6] Although the text of the Rules is binding and enforceable, it is not contemplated
39 that every transgression will result in disciplinary action. Whether disciplinary action is
40 appropriate should be determined through a reasonable and reasoned application of the
41 text, and should depend upon factors such as the seriousness of the transgression, the
42 extent of any pattern of improper activity, and the effect of the improper activity upon the
43 judicial system or others.

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1 [7] The Code is not designed or intended as a basis for civil or criminal liability.
2 Neither is it intended to be the basis for litigants to seek collateral remedies against each
3 other or to obtain tactical advantages in proceedings before a court.

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SCOPE

REPORTER'S EXPLANATION OF CHANGES

EXPLANATION OF BLACK-LETTER:

This new Scope section contains the concepts in the 1990 Preamble that explain how the various parts of the Rules are intended to operate. With regard to the Canons, or Rule headings, the Scope section explains that the Canons are given effect by the Rules, and for a judge to be disciplined for violating a Canon, violation of a Rule must be established.

TERMINOLOGY

1

2 **The first time any term listed below is used in a Rule in its defined sense, it is**
3 **followed by an asterisk (*).**

4 **“Aggregate,”** in relation to contributions for a candidate, means not only contributions in
5 cash or in kind made directly to a candidate's committee or treasurer, but also all
6 contributions made indirectly with the understanding that they will be used to support the
7 election of a candidate or to oppose the election of the candidate's opponent. See Rules
8 2.11 and 4.4.

9 **“Appropriate authority”** means the authority having responsibility for initiation of
10 disciplinary process in connection with the violation to be reported. See Rules 2.14 and
11 2.15.

12 **“Contribution”** means both financial and in-kind contributions, such as goods,
13 professional or volunteer services, advertising, and other types of assistance, which, if
14 obtained by the recipient otherwise, would require a financial expenditure. See Rules
15 2.11, 2.13, 3.7, 4.1, and 4.4.

16 **“De minimis,”** in the context of interests pertaining to disqualification of a judge, means
17 an insignificant interest that could not raise a reasonable question regarding the judge's
18 impartiality. See Rule 2.11.

19 **“Domestic partner”** means a person with whom another person maintains a household
20 and an intimate relationship, other than a person to whom he or she is legally married.
21 See Rules 2.11, 2.13, 3.13, and 3.14.

22 **“Economic interest”** means ownership of more than a de minimis legal or equitable
23 interest. Except for when a judge participates in the management of such a legal or
24 equitable interest, or the interest could be substantially affected by the outcome of a
25 proceeding before a judge, it does not include:

- 26 (1) an interest in the individual holdings within a mutual or common investment
27 fund;
- 28 (2) an interest in securities held by an educational, religious, charitable, fraternal,
29 or civic organization in which the judge or the judge's spouse, domestic
30 partner, parent, or child serves as a director, an officer, an advisor, or other
31 participant;
- 32 (3) a deposit in a financial institution or deposits or proprietary interests the judge
33 may maintain as a member of a mutual savings association or credit union, or
34 similar proprietary interests; or
- 35 (4) an interest in the issuer of government securities held by the judge.

36 See Rules 1.3 and 2.11.

1 **“Fiduciary”** includes relationships such as executor, administrator, trustee, or guardian.
2 See Rules 2.11, 3.2, and 3.8.

3 **“Impartial,” “impartiality,”** and **“impartially”** mean absence of bias or prejudice in
4 favor of, or against, particular parties or classes of parties, as well as maintenance of an
5 open mind in considering issues that may come before a judge. See Canons 1, 2, and 4,
6 and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1, and 4.2.

7 **“Impending matter”** is a matter that is imminent or expected to occur in the near future.
8 See Rules 2.9, 2.10, 3.13, and 4.1.

9 **“Impropropriety”** includes conduct that violates the law, court rules, or provisions of this
10 Code, and conduct that undermines a judge’s independence, integrity, or impartiality. See
11 Canon 1 and Rule 1.2.

12 **“Independence”** means a judge’s freedom from influence, or controls other than those
13 established by law. See Canons 1 and 4, and Rules 1.2, 3.1, 3.12, 3.13, and 4.2.

14 **“Integrity”** means probity, fairness, honesty, uprightness, and soundness of character.
15 See Canon 1 and Rule 1.2.

16 **“Judicial candidate”** means any person, including a sitting judge, who is seeking
17 selection for or retention in judicial office by election or appointment. A person becomes
18 a candidate for judicial office as soon as he or she makes a public announcement of
19 candidacy, declares or files as a candidate with the election or appointment authority,
20 authorizes or, where permitted, engages in solicitation or acceptance of contributions or
21 support, or is nominated for election or appointment to office. See Rules 2.11, 4.1, 4.2,
22 and 4.4.

23 **“Knowingly,” “knowledge,” “known,”** and **“knows”** mean actual knowledge of the
24 fact in question. A person’s knowledge may be inferred from circumstances. See Rules
25 2.11, 2.13, 2.15, 2.16, 3.6, and 4.1.

26 **“Law”** encompasses court rules as well as statutes, constitutional provisions, and
27 decisional law. See Rules 1.1, 2.1, 2.2, 2.6, 2.7, 2.9, 3.1, 3.4, 3.9, 3.12, 3.13, 3.14, 3.15,
28 4.1, 4.2, 4.4, and 4.5.

29 **“Member of the candidate’s family”** means a spouse, domestic partner, child,
30 grandchild, parent, grandparent, or other relative or person with whom the candidate
31 maintains a close familial relationship.

32 **“Member of the judge’s family”** means a spouse, domestic partner, child, grandchild,
33 parent, grandparent, or other relative or person with whom the judge maintains a close
34 familial relationship. See Rules 3.7, 3.8, 3.10, and 3.11.

1 **“Member of a judge’s family residing in the judge’s household”** means any relative of
2 a judge by blood or marriage, or a person treated by a judge as a member of the judge’s
3 family, who resides in the judge’s household. See Rules 2.11 and 3.13.

4 **“Nonpublic information”** means information that is not available to the public.
5 Nonpublic information may include, but is not limited to, information that is sealed by
6 statute or court order or impounded or communicated in camera, and information offered
7 in grand jury proceedings, presentencing reports, dependency cases, or psychiatric
8 reports. See Rule 3.5.

9 **“Pending matter”** is a matter that has commenced. A matter continues to be pending
10 through any appellate process until final disposition. See Rules 2.9, 2.10, 3.13, and 4.1.

11 **“Personally solicit”** means a direct request made by a judge or a judicial candidate for
12 financial support or in-kind services, whether made by letter, telephone, or any other
13 means of communication. See Rule 4.1.

14 **“Political organization”** means a political party or other group sponsored by or affiliated
15 with a political party or candidate, the principal purpose of which is to further the election
16 or appointment of candidates for political office. For purposes of this Code, the term does
17 not include a judicial candidate’s campaign committee created as authorized by Rule 4.4.
18 See Rules 4.1 and 4.2.

19 **“Public election”** includes primary and general elections, partisan elections, nonpartisan
20 elections, and retention elections. See Rules 4.2 and 4.4.

21 **“Third degree of relationship”** includes the following individuals: great-grandparent,
22 grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild,
23 nephew, and niece. See Rule 2.11.
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TERMINOLOGY
REPORTER'S EXPLANATION OF CHANGES

EXPLANATION OF BLACK-LETTER:

1. The Commission proposes to change the use of asterisks to indicate defined terms, employing them in each/any Rule only where the defined term is used for the first time. Several commentators observed that the use of asterisks each time a frequently-appearing defined term occurred was more interruptive than useful to the reader.

2. Apart from the addition of "domestic partner" to the definitions of "Member of the candidate's family" and "Member of the judge's family," the following terms are defined in a manner essentially identical to the way they are defined in the 1990 Code (any differences are intended to be purely stylistic):

Aggregate

Appropriate authority

Economic interest

Fiduciary

Knowingly, knowledge, known, or knows

Law

Member of the candidate's family

Member of the judge's family

Member of the judge's family residing in the judge's household

Nonpublic information

Public election

Third degree of relationship

3. The following terms are no longer contained in the Terminology Section:

"Continuing part-time judge," on the theory that the provision applicable to continuing part-time judges in the Application Section provides a definition already.

"Court personnel," which in the 1990 Code was not, in fact, a definition, but a statement that the term did not include lawyers in a proceeding before the judge. The Commission believed this was too evident to need statement, and otherwise believed that the term "court personnel" is clear enough that it does not need definition.

"Periodic part-time judge" (on the same theory as applied to "continuing part-time judge"; see above)

"Pro tempore part-time judge" (same reason as above)

"Require," which the Commission believed is easily understood.

The following definitions have been modified:

1
2 “De minimis” is defined specifically in the context of “interests pertaining to the
3 disqualification of a judge,” because it is only in Rule 2.12 (“Disqualification”) that the
4 Commission believes a precise definition of the term need be applied.

5
6 “Judicial candidate” is similar to the 1990 Code’s term “candidate.” The phrase
7 “including a sitting judge” has been added for clarification. The language stating that the
8 term “candidate” applies to a judge who is seeking a non-judicial office has been deleted,
9 consistent with the reformulation of the term being defined.

10
11 “Political organization” has been expanded to include the qualifying language “sponsored
12 by or affiliated with a political party or candidate,” the principal purpose of which is to
13 further the election or appointment of candidates for political office. In addition,
14 language has been added to clarify that the term is not meant to include a judicial
15 candidate’s own campaign committee.

16
17 4. The following new defined terms have been added:

18
19 “Domestic partner,” on the theory that now commonplace so-called “non-traditional”
20 relationships that exist outside marriage are deserving of treatment equal to that afforded
21 marital relationships in evaluating their potential conflict-of-interest implications under
22 the Model Rules.

23
24 “Impartiality,” because it is a fundamental goal of the judicial system, and additionally
25 because it has become a defined term in recent decisional law with respect to political
26 activity of judges.

27
28 “Impending matter,” in order to set temporal limits on the phrase.

29
30 “Impropriety,” also because of its fundamental importance as a concept underlying the
31 importance of appearances created by judges.

32
33 “Independence,” as a fundamental concept underlying the justice system.

34
35 “Integrity,” for the same reason as above.

36
37 “Pending matter,” so as to set temporal limits on the phrase and create greater certainty in
38 the application of the Code’s restrictions on judicial speech.

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APPLICATION

The Application section establishes when the various Rules apply to a judge or judicial candidate.

I. APPLICABILITY OF THIS CODE

(A) The provisions of the Code apply to all full-time judges. Parts II through V of this section identify those provisions that apply to four distinct categories of part-time judges. Canon 4 applies to judicial candidates.

(B) Anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary,¹ is a judge within the meaning of this Code.

COMMENT

[1] The Rules in this Code have been formulated to address the ethical obligations of any person who serves a judicial function, and are premised upon the supposition that a uniform system of ethical principles should apply to all those authorized to perform judicial functions.

[2] The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. For the purposes of this section, as long as a retired judge is subject to recall, the judge is considered to “perform judicial functions.” The determination of which category and, accordingly, which specific Code provisions apply to an individual judicial officer, depend upon the facts of the particular judicial service.

[3] In recent years many jurisdictions have created what are sometimes called “problem solving” courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts’ programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. When local rules specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions set forth in the Code. Nevertheless, judges serving on “problem solving” courts shall comply with this Code except to the extent local rules provide and permit otherwise.

¹Each jurisdiction should consider the characteristics of particular administrative law judge positions in adopting, adapting, applying, and enforcing the Code for administrative law judges. See, e.g., Model Code of Judicial Conduct for Federal Administrative Law Judges ([insert year of publication]) (endorsed by National Conference of Administrative Law Judges in February 1989).

1 **II. RETIRED JUDGE SUBJECT TO RECALL**

2
3 **A retired judge subject to recall for service, who by law is not permitted to practice**
4 **law, is not required to comply:**

5
6 (A) **with Rule 3.9 (Service as Arbitrator or Mediator), except while**
7 **serving as a judge; or**

8
9 (B) **at any time with Rule 3.8 (Appointments to Fiduciary Positions).**

10
11 **COMMENT**

12
13 [1] For the purposes of this section, as long as a retired judge is subject to being
14 recalled for service, the judge is considered to “perform judicial functions.”

15
16
17
18 **III. CONTINUING PART-TIME JUDGE**

19
20 **A judge who serves repeatedly on a part-time basis by election or under a**
21 **continuing appointment, including a retired judge subject to recall who is permitted**
22 **to practice law (“continuing part-time judge”),**

23
24 (A) **is not required to comply:**

25
26 (1) **with Rules 2.10(A) and 2.10(B) (Judicial Statements on**
27 **Pending and Impending Cases), except while serving as a judge; or**

28
29 (2) **at any time with Rules 3.4 (Appointments to Governmental**
30 **Positions), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as**
31 **Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (Financial,**
32 **Business, or Remunerative Activities), 3.14 (Reimbursement of**
33 **Expenses and Waivers of Fees or Charges), 3.15 (Reporting**
34 **Requirements), 4.1 (Political and Campaign Activities of Judges and**
35 **Judicial Candidates in General), 4.2 (Political and Campaign**
36 **Activities of Judicial Candidates in Public Elections), 4.3 (Activities of**
37 **Candidates for Appointive Judicial Office), 4.4 (Campaign**
38 **Committees), and 4.5 (Activities of Judges Who Become Candidates**
39 **for Nonjudicial Office); and**

40
41 (B) **shall not practice law in the court on which the judge serves or in any**
42 **court subject to the appellate jurisdiction of the court on which the judge**
43 **serves, and shall not act as a lawyer in a proceeding in which the judge has**
44 **served as a judge or in any other proceeding related thereto.**

45

1 **COMMENT**

2
3 [1] When a person who has been a continuing part-time judge is no longer a
4 continuing part-time judge, including a retired judge no longer subject to recall, that
5 person may act as a lawyer in a proceeding in which he or she has served as a judge or in
6 any other proceeding related thereto only with the informed consent of all parties,
7 pursuant to [Rule 1.12(a) of the ABA Model Rules of Professional Conduct. An adopting
8 jurisdiction should substitute a reference to its applicable rule].
9

10
11
12 **IV. PERIODIC PART-TIME JUDGE**

13
14 **A periodic part-time judge who serves or expects to serve repeatedly on a part-time**
15 **basis, but under a separate appointment for each limited period of service or for**
16 **each matter,**

17
18 (A) **is not required to comply:**

19
20 (1) **with Rule 2.10 (Judicial Statements on Pending and Impending**
21 **Cases), except while serving as a judge; or**

22
23 (2) **at any time with Rules 3.4 (Appointments to Governmental**
24 **Positions), 3.7 (Participation in Educational, Religious, Charitable,**
25 **Fraternal, or Civic Organizations and Activities), 3.8 (Appointments**
26 **to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10**
27 **(Practice of Law), 3.11 (Financial, Business, or Remunerative**
28 **Activities), 3.13 (Acceptance and Reporting of Gifts, Loans, Bequests,**
29 **Benefits, or Other Things of Value), 3.15 (Reporting Requirements),**
30 **4.1 (Political and Campaign Activities of Judges and Judicial**
31 **Candidates in General), and 4.5 (Activities of Judges Who Become**
32 **Candidates for Nonjudicial Office); and**

33
34 (B) **shall not practice law in the court on which the judge serves or in any**
35 **court subject to the appellate jurisdiction of the court on which the judge**
36 **serves, and shall not act as a lawyer in a proceeding in which the judge has**
37 **served as a judge or in any other proceeding related thereto.**

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41 **V. PRO TEMPORE PART-TIME JUDGE**

42
43 **A pro tempore part-time judge who serves or expects to serve once or only**
44 **sporadically on a part-time basis under a separate appointment for each period of**
45 **service or for each case heard is not required to comply:**
46

1 (A) except while serving as a judge, with Rules 1.2 (Promoting Confidence
2 in the Judiciary), 2.4 (External Influences on Judicial Conduct), 2.10
3 (Judicial Statements on Pending and Impending Cases), or 3.2 (Appearances
4 before Governmental Bodies and Consultation with Government Officials);
5 or

6
7 (B) at any time with Rules 3.4 (Appointments to Governmental Positions),
8 3.6 (Affiliation with Discriminatory Organizations), 3.7 (Participation in
9 Educational, Religious, Charitable, Fraternal, or Civic Organizations and
10 Activities), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as
11 Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (Financial, Business, or
12 Remunerative Activities), 3.13 (Acceptance and Reporting of Gifts, Loans,
13 Bequests, Benefits, or Other Things of Value), 3.15 (Reporting
14 Requirements), 4.1 (Political and Campaign Activities of Judges and Judicial
15 Candidates in General), and 4.5 (Activities of Judges Who Become
16 Candidates for Nonjudicial Office).

17
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19
20 **VI. TIME FOR COMPLIANCE**

21
22 A person to whom this Code becomes applicable shall comply immediately with its
23 provisions, except that those judges to whom Rules 3.8 (Appointments to Fiduciary
24 Positions) and 3.11 (Financial, Business, or Remunerative Activities) apply shall
25 comply with those Rules as soon as reasonably possible, but in no event later than
26 one year after the Code becomes applicable to the judge.

27
28 **COMMENT**

29
30 [1] If serving as a fiduciary when selected as judge, a new judge may,
31 notwithstanding the prohibitions in Rule 3.8, continue to serve as fiduciary, but only for
32 that period of time necessary to avoid serious adverse consequences to the beneficiaries
33 of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at
34 the time of judicial selection in a business activity, a new judge may, notwithstanding the
35 prohibitions in Rule 3.11, continue in that activity for a reasonable period but in no event
36 longer than one year.
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**APPLICATION
REPORTER'S EXPLANATION OF CHANGES**

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4 1. The Commission is proposing a more user-friendly Application section as an
5 alternative to the current version, which is complex and difficult with which to work. The
6 most significant substantive change brings within the definition of "judges" justices of
7 the peace, hearing officers, and "members of the administrative law judiciary."

8
9 **EXPLANATION OF BLACK-LETTER:**

10
11 2. The title of Part I, "Applicability of This Code," is clearer and simpler than the
12 title in the 1990 Code. No change in substance is intended.

13
14 3. Part I (A) has been revised to make clear which provisions of the Code apply to
15 certain categories of judges or judicial candidates. This is a stylistic change and does not
16 change the substance of the provision.

17
18 4. In Part I(B) of the revised Application, "justice of the peace" and "member of the
19 administrative law judiciary " are included as judges "within the meaning of this Code."
20 The application of the Rules to the administrative judiciary is consistent with policy
21 adopted by the ABA House of Delegates in Report 101B (2001), which provided that
22 members of the administrative judiciary should be accountable under appropriate ethical
23 standards adapted from the Code in light of the unique characteristics of particular
24 positions in the administrative judiciary. The rationale for applying the Rules to justices
25 of the peace and members of the administrative law judiciary derives from the fact that
26 they perform essentially the same function as a trial judge hearing a case without a jury.

27
28 5. To facilitate easier recognition of the subject matter of the many Rules cited
29 throughout the Application section, parentheticals have been added with the names of
30 each rule cited, eliminating the need to search through the entire Code. This approach is
31 consistent with the format used when citing Rules throughout the rest of the Code.

32
33 6. A footnote reference has been revised to state that each jurisdiction "should
34 consider the characteristics of particular administrative law judge positions in adopting,
35 adapting, applying and enforcing the Rules for administrative law judges. See, e.g.,
36 Model Code of Judicial Conduct for Federal Administrative Law Judges (1989)
37 (endorsed by the National Conference of Administrative Law Judges in February 1989)."
38 The Commission deleted the language that alluded to the executive branch of government
39 in order to avoid difficulties associated with separation of powers issues.

40
41 7 The phrase "[F]or service" was added to Part II to explain more fully the
42 meaning of a judge's being "subject to recall." No substantive change is intended.

43
44 8. In Parts III, IV and V, the definitions of the various types of part-time judges have
45 been introduced into the text, and deleted from the "Terminology" section of the Code,

1 consistent with the Commission's decision to place definitions within the body of a Rule
2 when that is the only time that a term appears.

3
4 9. Sections I(D)(2) and I(E)(2) of the 1990 Code were deleted in acknowledgement
5 that these Rules do not reach conduct of lawyers, but that of judges. The situations
6 described in both provisions arise under and are to be decided according to the Model
7 Rules of Professional Conduct for lawyers.

8
9 10. Part VI, "Time for Compliance," has not changed in substance. Taken directly
10 from Section F of the 1990 Code's Application section, it acknowledges the need to
11 allow new judges to continue to serve as fiduciaries or in a business relationship for a
12 period of up to one year in order to avoid hardship or serious adverse consequences to the
13 beneficiaries of the fiduciary relationship.

14
15
16 EXPLANATION OF COMMENTS:
17 PART I

18
19 [1] A new introductory Comment has been added to highlight the fact that it is
20 desirable to have a uniform system of ethical principles that applies to all individuals
21 serving a judicial function.

22
23 [2] The Commission moved the statement, "[t]he four categories of judicial service in
24 other than a fulltime capacity are necessarily defined in general terms because of the
25 widely varying forms of judicial service" from commentary to the present Code's Section
26 A.

27
28 [3] This new Comment confirms the propriety of using nontraditional methods in
29 "problem solving" courts, such as drug and domestic violence courts, where they are
30 permitted by law, including court rules.

31
32
33 NOTE: The published Model Code of Judicial Conduct contains several Appendices that
34 are not part of the Code itself. Accordingly, the reference to the Appendices was deleted
35 from the Comment and will be reinstated elsewhere following the revised Code's
36 approval by the House of Delegates.

37

CANON 1

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.

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1
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3 **CANON 1**
4 **REPORTER'S EXPLANATION OF CHANGES**

5 **1990 CODE COMPARISON:**

6
7 Canon 1 is a combination of Canons 1 and 2.

8
9 **EXPLANATION OF BLACK-LETTER:**

10
11 1. Canon 1 combines most of the subject matter of Canons 1 and 2 in the 1990 Code,
12 addressing both the obligation of judges to uphold the integrity, impartiality, and
13 independence of the judiciary and the obligation to avoid impropriety and its appearance.
14 The admonishment that judges avoid not only impropriety but also its appearance is in
15 the text of Canon 1 and in Rule 1.02 Comment [2].

16
17 The decision to combine Canons 1 and 2 in the 1990 Code into a single Canon
18 was based on the premise that they are directed toward essentially the same end: to
19 articulate a limited number of general, overarching principles that should govern a
20 judge's conduct. Former Canons 1 and 2 were inextricably linked: avoiding "impropriety
21 and the appearance of impropriety" in former Canon 2 was instrumental to upholding
22 "the independence and integrity of the judiciary" in former Canon 1. Moreover, the
23 former Code blurred the distinction between its Canons 1 and 2 by including in Canon
24 2A a duty to act in a manner that "promotes public confidence in the integrity and
25 impartiality of the judiciary," which essentially paraphrased Canon 1's directive to
26 "uphold the integrity and independence of the judiciary." Although one could argue that
27 former Canon 1 was concerned with protecting independence and integrity in fact, while
28 former Canon 2 concentrated upon protecting appearances and public perception, the
29 overlap between them was so great that in the Commission's view preserving the two as
30 discrete canons was unnecessarily confusing. Accordingly, the two Canons have been
31 combined to underscore the instrumental relationship between them, and thereby
32 reinforce the importance of both.

33
34 2. Addition of "promote" to Canon 1

35
36 As an overarching objective, the Commission deemed it desirable to speak in
37 terms of an ethical duty to promote as well as uphold judicial independence, integrity and
38 impartiality.

39
40 3. "Appearance of impropriety" standard

41
42 At the center of the Commission's deliberations over Canon 1 was the
43 "appearance of impropriety." The discussions reflected two competing tensions. On the
44 one hand, a primary purpose of the Code is to advise and inspire judges to adhere to the
45 highest standards of ethical conduct. To preserve public confidence in the courts, it is not
46 enough that judges avoid actual improprieties; they must avoid the appearance of

1 impropriety as well. On the other hand, another purpose of the Rules is to serve as the
2 basis for discipline. To discipline judges for appearing to act improperly—even if they
3 did not act improperly in fact—creates the potential for an undesirably vague
4 enforcement standard.

5
6 To address the concern that a duty to avoid the appearance of impropriety was too
7 vague to be independently enforceable, the Commission considered making the standard
8 hortatory rather than mandatory. In an initial draft circulated for public comment, the
9 Commission proposed to leave the appearance of impropriety as it found it: as a standard
10 in the Canon itself. To address the concern that a duty to avoid the appearance of
11 impropriety was too vague to be independently enforceable, the preliminary draft
12 included a Comment to the effect that “ordinarily,” when judges are disciplined for
13 violating their duty to avoid the appearance of impropriety, it is in combination with
14 other, more specific rule violations that give rise to the appearance problem.

15
16 When the preliminary draft was circulated for public comment, it was criticized
17 for diluting the “appearance of impropriety” standard unnecessarily. Of particular
18 concern was the preliminary draft’s deletion of former Canon 2A’s directive that “a judge
19 shall . . . act at all times in a manner that promotes public confidence in the integrity and
20 impartiality of the judiciary” (the “act at all times” clause), which had been a rule through
21 which the appearance of impropriety was commonly enforced. In addition, the draft
22 Comment that disciplinary authorities will not “ordinarily” enforce the appearance of
23 impropriety was criticized as inappropriate for a Comment and more suitably discussed—
24 if at all—in the Preamble or Application sections.

25
26 In a subsequent draft, the Commission responded by deleting the offending draft
27 Comment, restoring the “act at all times clause,” and adding the duty to avoid the
28 appearance of impropriety as a freestanding rule. Eventually, the Commission was
29 persuaded to eliminate the black letter rule, which could prove a lightning rod for court
30 challenge, and to retain “Avoidance of Impropriety and the Appearance of Impropriety”
31 in the Canon. The Comments to Rule 1.2 cumulatively focus on conduct that undermines
32 independence, integrity, and impartiality of the judiciary, a more identifiable
33 measurement standard than “appearance of impropriety.”

34
35 4. Use of “independence, integrity, and impartiality”

36
37 In the prior Code, “impartiality” did not appear in the titles of Canons 1 or 2, even
38 though it did appear in underlying sections, such as Canon 2A. In the Commission’s
39 view, independence, integrity, and impartiality are overarching, fundamental values that
40 the Rules promote, which warrant mention in the title of Canon 1. The term
41 “impartiality” has been added to integrity and independence throughout the Rules, and
42 the Rules have been revised throughout to preserve consistency.

43
44 The importance of judicial independence, integrity, and impartiality is
45 underscored by the recurrence of the phrase throughout the Rules. Although it was used

1 in earlier Codes as well, the Commission took pains to ensure that the three terms appear
2 together wherever appropriate, and in the same sequence whenever they are employed.

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RULE 1.1

Compliance with the Law

A judge shall comply with the law,* including the Code of Judicial Conduct.

RULE 1.1

REPORTER'S EXPLANATION OF CHANGES

1990 CODE COMPARISON:

The Rule is the first clause of Canon 2A.
The Commentary to Canon 1A.

EXPLANATION OF BLACK-LETTER:

1. Creation of a new rule

This Rule reproduces the first clause of former Canon 2A. The former Canon linked the duty to respect and comply with the law to the duty to act at all times in a manner that promoted public confidence in the independence, integrity, and impartiality of the judiciary, which the Commission regarded as distinct and discrete concepts. To be sure, the judge who does not comply with the law diminishes public confidence in judges, but the "act at all times" clause encompasses a far broader range of conduct that deserved to be singled out and articulated at the front of the Canon. The reference to a judge's duty to "respect" the law was deleted because it was believed to be both impossible to define and unnecessary.

2. Addition of "including the Rules of Judicial Conduct"

The Commission wanted to leave no room for doubt that the scope of "law" within the meaning of this rule, apply to the Rules themselves.

3. Canon 1A's pronouncement that a judge "should participate in establishing, maintaining and enforcing high standards of conduct" has been revised and was moved to the Preamble. The Commission concluded that such hortatory language should not be confused with enforceable standards and that to avoid such confusion, it should not appear in black letter rules.

EXPLANATION OF COMMENTS:

The Commentary to Canon 1A was deleted as unnecessary. Integrity and independence, which were discussed in the deleted comment, are defined terms in the revised Terminology Section.

1 **RULE 1.2**

2 ***Promoting Confidence in the Judiciary***

3
4 **A judge shall act at all times in a manner that promotes public confidence in the**
5 **independence,* integrity,* and impartiality* of the judiciary.**

6
7 **COMMENT**

8
9 [1] Public confidence in the judiciary is eroded by improper conduct and conduct that
10 creates the appearance of impropriety. This principle applies to both the professional and
11 personal conduct of a judge.

12
13 [2] A judge should expect to be the subject of public scrutiny that might be viewed as
14 burdensome if applied to other citizens, and must accept the restrictions imposed by the
15 Code.

16
17 [3] Conduct that compromises or appears to compromise the independence, integrity,
18 and impartiality of a judge undermines public confidence in the judiciary. Because it is
19 not practicable to list all such conduct, the Rule is necessarily cast in general terms.

20
21 [4] Judges should participate in activities that promote ethical conduct among judges
22 and lawyers. Judges should also implement and enforce codes of conduct, support
23 professionalism within the judiciary and the legal profession, and promote access to
24 justice for all.

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RULE 1.2
REPORTER'S EXPLANATION OF CHANGES

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5 **1990 CODE COMPARISON:**

6
7 The Rule is Canon 2A.

8 Comment [1] is based upon the first two sentences of Commentary to Canon 2A, with the
9 first sentence of the second paragraph of Commentary to Canon 2A inserted as a second
10 sentence.

11 Comment [2] is taken from the first paragraph of Commentary to Canon 2A.

12 Comment [3] is taken from the first two paragraphs of Commentary to Canon 2A.

13 The third paragraph of Commentary to Canon 2A was deleted.

14 Comment [4] is new.

15
16 **EXPLANATION OF BLACK-LETTER:**

17
18 Creation of a new rule

19
20 Rule 1.2 is taken from Canon 2. This language was formerly included in the text
21 of Canon 2A and is now a free-standing rule, for reasons explained above in the general
22 discussion of Canon 1.

23
24 **EXPLANATION OF COMMENTS:**

25
26 [1], [2], [3]. The substance of Comments [1], [2], and [3] are derived from
27 Commentary to former Canon 2A. Language from the former Commentary that was
28 deemed self-evident, redundant, or otherwise unnecessary was deleted.

29
30 [4]. Comment [4] is new. The Commission heard from a number of witnesses who
31 underscored the importance of encouraging judges to promote professionalism among
32 lawyers and judges—to make it clear that doing so was a part of their jobs. Although it
33 was never suggested that judges be subject to discipline for failing to undertake such
34 activities, the Commission agreed that judges should strive to promote professionalism
35 and access to justice and that the aspirational objectives of the Code were well served by
36 including this Comment.

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RULE 1.3

Avoiding Abuse of the Prestige of Judicial Office

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests* of the judge or others, or allow others to do so.

COMMENT

[1] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment when stopped by a police officer for a traffic offense. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.

[2] A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and not the view of the court and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

[3] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office.

[4] Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law. In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

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3 **RULE 1.3**
4 **REPORTER'S EXPLANATION OF CHANGES**

5 1990 CODE COMPARISON:

6
7 The Rule and its Comment come from Canon 2B and its Commentary.

8
9 EXPLANATION OF BLACK-LETTER:

10
11 1. Creation of separate Rule on abusing prestige of office

12
13 This Rule was segregated from former Canon 2B for treatment as a stand-alone
14 Rule because it relates directly to a judge's personal conduct. Former Canon 2B's
15 prohibition on a judge allowing family, social, and political relationships to influence
16 judicial conduct and its prohibition on a judge conveying or allowing others to convey the
17 impression that other persons are in a position to influence the judge related directly to a
18 judge's judicial decision-making responsibilities. For that reason, these provisions
19 belonged more logically in proposed Canon 2. Former Canon 2B's limitation on a judge
20 serving as a character witness, on the other hand, related to a judge's personal conduct
21 and has been moved to Rule 3.3.

22
23 2. Substitution of "abuse" for "lend"

24
25 The term "abuse" has been substituted for "lend." In the Commission's view, the
26 term "lend" created unnecessary confusion. For example, a judge who wrote a letter of
27 recommendation for a law clerk "lent" the prestige of the judge's office to the
28 recommendation, and some judges told the Commission that they declined to write letters
29 on their clerks' behalf as a consequence. In the Commission's view, however, the
30 problem that Rule 1.3 seeks to address is more accurately characterized as "abuse" of the
31 office.

32
33 3. Addition of "economic" interests

34
35 Although a judge's "personal" interests might commonly be thought to include
36 "economic" interests, the Commission wanted to avoid any possibility of confusion, and
37 thus made it clear that a judge may not abuse the prestige of office to advance either.

38
39 4. Addition of prohibition on others' abuse

40
41 The Rule has been revised to prohibit judges from allowing others to abuse the
42 prestige of the judge's office to advance the judge's or others' personal or economic
43 interests. In the Commission's view, judges should not be permitted to look the other way
44 if friends or relatives seek to trade on the judge's position to benefit themselves or others.
45 "Personal" replaced "private" for stylistic reasons not intended to change substantive
46 meaning.

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EXPLANATION OF COMMENTS:

[1] This Comment elaborates on the core objective underlying the Rule by making plain that a judge should not use his or her position as a judge to gain personal advantage in business or daily life. The last sentence was changed to limit the admonition that a judge should not use his or her judicial letterhead for personal business to situations in which the use of letterhead could “gain advantage.” There are times when a judge might draft a personal note on stationery that includes the judge’s title that could not conceivably enable the judge to “gain advantage,” as, for example, when the judge corresponds with a long-time acquaintance who is well aware of the judge’s position. Material from the 1990 comment regarded as too general to be helpful was deleted.

[2] The Commission was in accord that judges should be permitted to use their titles and office letterheads when writing references for people with respect to whom the judge’s experience as a judge was relevant. The prohibition on abusing the prestige of judicial office to advance the interests of another is intended to prevent inappropriate exploitation of judges’ positions, and there is nothing inappropriate about judges identifying themselves as such when judicial experience is germane to the recommendation. The Comment thus clarifies that a judge may write letters on the basis of a judge’s experience on the job (e.g., law clerks) or general expertise in the law (e.g., a neighbor applying for admission to law school). This Comment does not admonish judges to avoid writing letters of reference on behalf of someone with respect to whom the judge’s status as a judge is irrelevant, rather, it merely advises judges to consider whether their position as a judge might be perceived as exerting pressure by reason of their office and to refrain if it would.

[3] Changes were stylistic and not intended to change substantive meaning

[4] Deleted material was redundant of the text and otherwise not illuminating.

CANON 2

**A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY,
COMPETENTLY, AND DILIGENTLY.**

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CANON 2

REPORTER'S EXPLANATION OF CHANGES

1990 CODE COMPARISON:

The Canon is former Canon 3.
Canon 2 addresses solely the judge's professional duties as a judge, which constitute part of Canon 3 in the 1990 Code.

EXPLANATION OF BLACK-LETTER:

This Canon is at the heart of the Rules, in that it governs core judicial functions. It bears emphasis, however, that the judicial function has changed over time and logically reaches such matters as administration, discipline, and some forms of outreach. Judicial activities or conduct, therefore, are not limited to the adjudication of cases, but are intended to reach the broader duties of judicial office. Thus, this Canon on the duties of judicial office includes rules governing judicial discipline, administration, and reporting.

The element of "competence" was added to the Canon in recognition of the importance that competence plays in a judge's discharge of his or her duties.

1 **RULE 2.1**

2 ***Giving Precedence to the Duties of Judicial Office***

3
4 **The duties of judicial office, as prescribed by law,* shall take precedence over all a**
5 **judge's personal and extrajudicial activities.**

6
7 **COMMENT**

8
9 [1] To ensure that judges are available to fulfill their judicial duties, judges must
10 conduct their personal and extrajudicial activities to minimize the risk of conflicts that
11 would result in frequent disqualification. See Canon 3.

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RULE 2.1

REPORTER'S EXPLANATION OF CHANGES

1990 CODE COMPARISON:

The Canon is Canon 3A.

The Comment is new.

EXPLANATION OF BLACK-LETTER:

1. Deletion of heading

2. Change "judicial duties" to "duties of judicial office"

The wording was changed to emphasize that its application goes beyond adjudicative functions to reach the broader scope of responsibilities that accompany the judicial office.

3. Addition of "shall"

The Commission wanted to make clear that this rule was doing more than making the descriptive point that judicial functions do take precedence; by inserting the term "shall," the Code clearly imposes an ethical duty on judges to give priority to the duties of judicial office.

4. Replace "all the judge's other activities" with "all of the judge's personal and extrajudicial activities"

This change was made to avoid confusion. Judges should give priority to their judicial duties, broadly defined to reach not only the adjudication but the other duties of judicial office as well (such as administration and discipline), and the Commission wanted to be clear that the matters of secondary importance were limited to personal and extrajudicial activities.

5. Deletion of third sentence

This sentence was deleted as unnecessary.

EXPLANATION OF COMMENTS:

[1] New Comment

This comment has been added to highlight the relationship between Canon 2 and Canon 4: Because judges must disqualify themselves from cases in which they have a conflict of interest, they must conduct their extrajudicial activities in ways that minimize their need to disqualify themselves.

1 **RULE 2.2**

2 ***Impartiality and Fairness***

3
4 **A judge shall uphold and apply the law,* and shall perform all duties of judicial**
5 **office fairly and impartially.***

6
7 **COMMENT**

8
9 [1] To ensure impartiality and fairness to all parties, a judge must be objective and
10 open-minded.

11
12 [2] Although each judge comes to the bench with a unique background and personal
13 philosophy, a judge must interpret and apply the law without regard to whether the judge
14 approves or disapproves of the law in question.

15
16 [3] When applying and interpreting the law, a judge may on occasion make a good-
17 faith error of fact or law. An error of this kind does not violate this Rule. Intentional
18 disregard of the law, however, may constitute a violation of this Rule.

19
20 [4] It is not a violation of this Rule for a judge to make reasonable accommodations
21 to ensure pro se litigants the opportunity to have their matters fairly heard.

RULE 2.2

REPORTER'S EXPLANATION OF CHANGES

1990 CODE COMPARISON:

The Rule is the first half of the first sentence of Canon 3B(2).
Comments [1] – [3] are new.

EXPLANATION OF BLACK-LETTER:

New Rule on upholding the law

This Rule is taken from the first half of the first sentence of Canon 3B(2), which spoke in terms of judges being “faithful” to the law. In its stead, the Commission substituted the phrase “uphold and apply the law.” In the Commission’s view, “fidelity” lacked clear meaning; the essential point was and remains that judges should interpret and apply the law as they understand it to be written, and the Rule has been revised to make that point more clearly.

Although there is some similarity between this Rule and Rule 1.1, their purposes are fundamentally different. Whereas Rule 1.1 addresses the judge’s duty to comply with the law, this Rule directs the judge to follow the rule of law when deciding cases. The duty to follow the law is inextricably linked to a corresponding duty to be fair and impartial. Although the duty to decide cases with impartiality was implicit in numerous provisions in the former Code, it was not stated explicitly. This Rule corrects that oversight and does so by linking the judge’s obligation to decide cases with impartiality to a corresponding duty to apply the law.

EXPLANATION OF COMMENTS:

[1] This new Comment defines impartiality with reference to the two definitions of impartiality accepted by the Supreme Court in *Republican Party of Minnesota v. White*, lack of bias toward a participant in the judicial process, and open mindedness.

[2] Comment [2] was inserted to underscore the distinction between the judge whose honest understanding of the law is influenced by upbringing, education, and life experience, which is neither avoidable nor improper, and the judge who disregards understanding of the law

[3] Comment [3] was inserted to underscore the difference between judges who may occasionally commit good faith errors of fact or law and judges who deliberately or repeatedly disregard court orders or other clear requirements of law.

[4] Throughout the life of the Commission, some witnesses urged the Commission to create special rules enabling judges to assist pro se litigants, while others urged the Commission to disregard calls for such rules. This Comment makes clear that judges do

1 not compromise their impartiality when they make reasonable accommodations to pro se
2 litigants who may be completely unfamiliar with the legal system and the litigation
3 process. To the contrary, by leveling the playing field, such judges ensure that pro se
4 litigants receive the fair hearing to which they are entitled. On the other hand, judges
5 should resist unreasonable demands for assistance so as to give an unrepresented party an
6 unfair advantage.

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1 **RULE 2.3**

2 ***Bias, Prejudice, and Harassment***

3
4 (A) A judge shall perform the duties of judicial office, including
5 administrative duties, without bias or prejudice.

6
7 (B) A judge shall not, in the performance of judicial duties, by words or
8 conduct manifest bias or prejudice, or engage in harassment, including but
9 not limited to bias, prejudice, or harassment based upon race, sex, gender,
10 religion, national origin, ethnicity, disability, age, sexual orientation, marital
11 status, socioeconomic status, or political affiliation, and shall not permit
12 court staff, court officials, or others subject to the judge's direction and
13 control to do so.

14
15 (C) A judge shall require lawyers in proceedings before the court to
16 refrain from manifesting bias or prejudice, or engaging in harassment, based
17 upon attributes including but not limited to race, sex, gender, religion,
18 national origin, ethnicity, disability, age, sexual orientation, marital status,
19 socioeconomic status, or political affiliation, against parties, witnesses,
20 lawyers, or others.

21
22 (D) The restrictions of paragraphs (B) and (C) do not preclude judges or
23 lawyers from making legitimate reference to the listed factors, or similar
24 factors, when they are relevant to an issue in a proceeding.

25
26 **COMMENT**

27
28 [1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of
29 the proceeding and brings the judiciary into disrepute.

30
31 [2] Examples of manifestations of bias or prejudice include but are not limited to
32 epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based
33 upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections
34 between race, ethnicity, or nationality and crime; and irrelevant references to personal
35 characteristics. Even facial expressions and body language can convey to parties and
36 lawyers in the proceeding, jurors, the media, and others an appearance of bias or
37 prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or
38 biased.

39
40 [3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical
41 conduct that denigrates or shows hostility or aversion toward a person on bases such as
42 race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation,
43 marital status, socioeconomic status, or political affiliation.

44
45 [4] Sexual harassment includes but is not limited to sexual advances, requests for
46 sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

RULE 2.3

REPORTER'S EXPLANATION OF CHANGES

1990 CODE COMPARISON:

Paragraph (A) is taken from the first sentence of Canon 3B(5)

Paragraph (B) is taken from the second sentence of Canon 3B(5)

Paragraph (C) is taken from Canon 3B(6)

Comment [1] is the second sentence of the second paragraph of Commentary to Canon 3B(5).

Comment [2] is the third and fourth sentences of the second paragraph of Commentary to Canon 3B(5).

Comments [3] and [4] are new.

The first paragraph of Commentary to Canon 3B(5) was deleted.

EXPLANATION OF BLACK-LETTER:

1. Paragraphs (B) and (C): Addition of "harassment"

Canon 3B(5) required judges to avoid bias and prejudice, but included nothing in the black letter about harassment, which it relegated to a discussion in the Commentary, limited to sexual harassment. The Commission agreed that harassment was a form of bias or prejudice that the Rules proscribed but wanted to expand it beyond sexual harassment to reach other forms of harassment as well, for which reason it deleted the term "sexual" from the Commentary in an early draft. Witnesses, however, argued that the proposed change could be construed to have an unintended consequence. By deleting the reference to "sexual" harassment per se, the change could be construed as deleting sexual harassment from the range of behaviors barred by the Rules, or at least diminishing its significance. The Commission remained of the view that harassment—including but not limited to sexual harassment—should be proscribed by the Rules. It was, however, persuaded both that sexual harassment deserved special mention, given the significance of the problem, and that harassment per se was sufficiently distinct from bias and prejudice to deserve separate mention in the black letter of the Rule.

2. Paragraphs (B) and (C): Additions to list of factors upon which bias, prejudice, or harassment can be based

Although the Rule prohibits bias, prejudice, or harassment on any basis, it includes an illustrative list, to which four new items were added: gender ("sex" is a term of art employed in sex discrimination statutes, but may not capture bias, prejudice, or harassment against trans-gendered individuals); ethnicity (which the Commission regarded as distinct from national origin; for example, in the case of an Arab-Canadian, discrimination on the basis of Arab ancestry would relate to ethnicity, while discrimination based on Canadian derivation would relate to national origin); marital status (the Commission was made aware of instances in which judges had berated a party for cohabiting or having a child outside of wedlock); and political affiliation (as, for

1 example, when a judge displays animus toward plaintiffs affiliated with a particular
2 political party).

3
4 3. Paragraph (D): Legitimate reference to listed factors

5
6 When a case before the judge raises issues of bias or prejudice, the judge must be
7 in a position to discuss such issues without fear of violating this rule, for which reason an
8 exception has been created in the text. The substance of this provision formerly was in
9 Canon 3B(6).

10
11 EXPLANATION OF COMMENTS:

12
13 The first paragraph of Commentary to Canon 3B(5) was deleted given the new
14 black letter provision prohibiting harassment and new Comments [2] – [4].

15
16 [1] Comment [1] is the second sentence of the second paragraph of Commentary to
17 Canon 3B(5). The phrase “or prejudice” was added to reach not only favoritism or
18 opposition by a judge to an idea, which is the more common understanding of “bias,” but
19 also specially favoring or opposing individuals, which is generally contemplated by the
20 term “prejudice.”

21
22 [2] The new language was added after several witnesses urged the Commission to
23 provide some illustrations of bias and to better inform judges of what bias entails and
24 what some of the most common bias-related problems are. The list is explicitly non-
25 exclusive and self-explanatory. The last two sentences are taken from the second
26 paragraph of the comment to Canon 3B(5). The terms “on any basis” and “in addition to
27 oral communication” and “judicial” were deleted as excess language.

28
29 The term “behavior” was replaced with “conduct” in the last sentence for
30 consistency with the rest of the Rules. The last sentence now instructs judges to avoid
31 conduct that may be perceived as “prejudiced or biased” in order to be more
32 comprehensive and consistent with the thrust of the Rule. The addition of the term
33 “reasonably” in the last sentence is consistent with Title VII jurisprudence, which
34 separates the merely vulgar from the deeply offensive.

35
36 [3] This new Comment defines harassment and underscores that the prohibition in the
37 black letter includes, but is not limited to, sexual harassment.

38
39 [4] This new Comment separately elaborates on the meaning of “sexual harassment.”
40 Although the Rule forbids all forms of harassment, witnesses before the Commission
41 were emphatic about the need to single out sexual harassment for special mention, given
42 the nature, extent, and history of the problem.

1 **RULE 2.4**

2 *External Influences on Judicial Conduct*

3
4 (A) A judge shall not be swayed by public clamor or fear of criticism.

5
6 (B) A judge shall not permit family, social, political, financial, or other
7 interests or relationships to influence the judge's judicial conduct or
8 judgment.

9
10 (C) A judge shall not convey or permit others to convey the impression
11 that any person or organization is in a position to influence the judge.

12
13 **COMMENT**

14
15 [1] An independent judiciary requires that judges decide cases according to the law
16 and facts, without regard to whether particular laws or litigants are popular or unpopular
17 with the public, the media, government officials, or the judge's friends or family.
18 Confidence in the judiciary is eroded if judicial decision making is perceived to be
19 subject to inappropriate outside influences.

RULE 2.4

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON:

Paragraph (A) is the second sentence of Canon 3B(2).

Paragraph (B) is the first sentence of Canon 2B.

Paragraph (C) is the second half of the second sentence of Canon 2B.

Comment [1] is new.

EXPLANATION OF BLACK-LETTER:

1. Paragraph (B): Addition of "financial"

Paragraph (B) is the first sentence of Canon 2B.

"Financial" relationships were added to the list on influences that judges should avoid. Although the pre-existing rule referred to "other" relationships, the Commission regarded financial relationships as important enough to warrant separate mention.

2. Paragraph (C): Expansion of scope of Rule

The scope of the Rule was expanded slightly. As previously drafted, the rule forbade a judge from permitting others to convey the impression "they," meaning the "others," were in a position to influence the judge. As a technical matter, that prohibition did not reach the situation in which "others" conveyed the impression that a third person was in a position to influence the judge, and the change has been made to cover that scenario.

The Commission felt that the term "special," modifying position, was at best a redundancy and at worst added confusion by creating the impression that there might be persons who are in a position to influence the court.

EXPLANATION OF COMMENTS:

[1] Comment [1] is new.

This new Comment is intended to underscore the general purpose underlying paragraphs (A) and (B) by linking the duty not to be swayed by public, friends, or family to the judge's primary obligation to follow the law and facts impartially.

1 **RULE 2.5**

2 ***Competence, Diligence, and Cooperation***

3
4 (A) A judge shall perform judicial duties, including administrative duties,
5 competently and diligently.

6
7 (B) A judge shall cooperate with other judges and court officials in the
8 administration of court business.

9
10 **COMMENT**

11
12 [1] Competence in the performance of judicial duties requires the legal knowledge,
13 skill, thoroughness, and preparation reasonably necessary to perform a judge's
14 responsibilities of judicial office.

15
16 [2] A judge should seek the necessary docket time, court staff, expertise, and
17 resources to discharge all adjudicative and administrative responsibilities.

18
19 [3] Prompt disposition of the court's business requires a judge to devote adequate
20 time to judicial duties, to be punctual in attending court and expeditious in determining
21 matters under submission, and to take reasonable measures to ensure that court officials,
22 litigants, and their lawyers cooperate with the judge to that end.

23
24 [4] In disposing of matters promptly and efficiently, a judge must demonstrate due
25 regard for the rights of parties to be heard and to have issues resolved without
26 unnecessary cost or delay. A judge should monitor and supervise cases in ways that
27 reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

28
29 [5] Both judicial competence and diligence may be diminished when a judge is
30 impaired by drugs or alcohol, or by factors affecting the judge's mental, emotional, or
31 physical condition. See Rule 2.14.

RULE 2.5

REPORTER'S EXPLANATION OF CHANGES

1990 CODE COMPARISON:

The Rule is the second half of the first sentence of Canon 3B(2) and the first half of the first sentence in Canon 3C(1)
Comments [1], [2], and [5] are new.
Comment [3] is the second paragraph of Commentary to Canon 3B(8).
Comment [4] is the first three sentences of Commentary to 3B(8).

EXPLANATION OF BLACK-LETTER:

1. New Rule combining duties of competence and diligence

This Rule governs competence, formerly governed by Canon 3B(2), and diligence, formerly governed by Canon 3C. The duty of competence is analogous to a lawyer's professional duty of competence, while the duty to apply the law is discussed elsewhere (the term "fidelity" is no longer used). Corresponding Commentary was moved accordingly. The phrasing was changed from passive to active tense for stylistic reasons.

2. Expansion of Rule

The black letter rule was clarified to make plain that the duty at issue was one of diligence, and expanded slightly to extend the duty of diligence to all judicial duties and not just "judicial matters," which is generally understood to be limited to case adjudication.

3. Change Rule standard

The obligation to cooperate with others in judicial administration was upgraded from hortatory to mandatory. Efficient and effective administration is a duty of the judicial office, the proper execution of which necessitates cooperation among the judges of the court.

EXPLANATION OF COMMENTS:

[1] Comment [1] was added simply to define competence and underscore its fundamental importance in relation to core judicial functions.

[2] New Comment [2] was added to emphasize that the duty to perform judicial and administrative duties competently and diligently requires judges to devote time to proper time management and use of court resources and personnel.

1 [5] The Committee devoted considerable deliberation to the issue of impairment and
2 considered it among the most serious concerns confronting the judiciary. This new
3 Comment highlights the relationship between impairment and the duty of competence. It
4 is to be noted, however, that the issue of impairment is relevant to a wide array of judicial
5 duties beyond competence, including diligence and a judge's obligation to take action
6 with respect to other judges who may be impaired.

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1 **RULE 2.6**

2 ***Ensuring the Right to Be Heard***

3
4 (A) A judge shall accord to every person who has a legal interest in a
5 proceeding, or that person's lawyer, the right to be heard according to law.*

6
7 (B) A judge may encourage parties to a proceeding and their lawyers to
8 settle matters in dispute, but shall not act in a manner that coerces any party
9 into settlement.

10
11 **COMMENT**

12
13 [1] The right to be heard is an essential component of a fair and impartial system of
14 justice. Substantive rights of litigants can be protected only if procedures protecting the
15 right to be heard are observed.

16
17 [2] The judge plays an important role in overseeing the settlement of disputes, but
18 should be careful that efforts to further settlement do not undermine any party's right to
19 be heard according to law. The judge should keep in mind the effect that the judge's
20 participation in settlement discussions may have, not only on the judge's own views of
21 the case, but also on the perceptions of the lawyers and the parties if the case remains
22 with the judge after settlement efforts fail. Among the factors that a judge should
23 consider when deciding upon an appropriate settlement practice for a case are (1) whether
24 the parties have requested or voluntarily consented to a certain level of participation by
25 the judge in settlement discussions, (2) whether the parties and their counsel are relatively
26 sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4)
27 whether the parties participate with their counsel in settlement discussions, (5) whether
28 any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

29
30 [3] Judges must be mindful of the effect settlement discussions can have, not only on
31 their objectivity and impartiality, but also on the appearance of their objectivity and
32 impartiality. Despite a judge's best efforts, there may be instances when information
33 obtained during settlement discussions could influence a judge's decision making during
34 trial, and, in such instances, the judge should consider whether disqualification may be
35 appropriate. See Rule 2.11(A)(1).

RULE 2.6

REPORTER'S EXPLANATION OF CHANGES

1990 CODE COMPARISON:

Paragraph (A) is the first sentence of Canon 3B(7)The Rule is Canon 3B(8).
Comments [1], [2], and [3] are new.

EXPLANATION OF BLACK-LETTER:

1. Paragraph (B): New paragraph on settlements

This new paragraph was added in recognition of the fact that out-of-court settlement is a commonly used method of case resolution. It is important for judges to remember that a litigant's right to be heard can inadvertently be impaired by a judge who is overzealous in encouraging an out-of-court resolution. Accordingly, the Rule draws a line between encouraging settlement, which is permitted, and coercing settlement, which is not. The Commission heard testimony from some witnesses who went further, urging the adoption of rules that would prohibit judges from presiding at trial over cases with respect to which they had previously conducted settlement negotiations that ultimately failed. Although several members of the Commission agreed that, as a general matter, it was the better practice for judges not to try cases they had attempted to settle given the risk that statements the judge made during settlement negotiations might later be construed as lack of impartiality, the Commission declined to adopt such a rule. The Commission ultimately concluded that such an issue was better left for rules of practice and procedure than ethics.

EXPLANATION OF COMMENTS:

[1] New Comment [1] emphasizes what is implicit in the Rule, that judges' duties include ensuring that those entitled have their day in court. In so doing, the Comment underscores the relationship between substantive and procedural justice, i.e. that protection of substantive rights depends in part on respecting procedural rights to be heard.

[2] This new Comment provides judges with guidance in conducting settlement talks. It undertakes to sensitize judges to concerns that can arise when they lead settlement discussions and to advise judges on what factors to take into account when deciding how to oversee settlement.

[3] New Comment [3] underscores the point that sometimes, events transpiring during settlement talks may bias judges toward a party or create an appearance of bias that necessitates disqualification.

1 **RULE 2.7**

2 ***Responsibility to Decide***

3
4 **A judge shall hear and decide matters assigned to the judge, except when**
5 **disqualification is required by Rule 2.11 or other law.***

6
7 **COMMENT**

8
9 [1] Judges must be available to decide the matters that come before the court.
10 However, there are times when disqualification is necessary to protect the rights of
11 litigants and preserve public confidence in the independence, integrity, and impartiality
12 of the judiciary. Unwarranted disqualification may bring public disfavor to the court and
13 to the judge personally. The dignity of the court, the judge's respect for fulfillment of
14 judicial duties, and a proper concern for the burdens that may be imposed upon the
15 judge's colleagues require that a judge not use disqualification to avoid cases that present
16 difficult, controversial, or unpopular issues.

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RULE 2.7

REPORTER'S EXPLANATION OF CHANGES

1990 CODE COMPARISON:

The Rule is Canon 3B(1).
Comment [1] is new.

EXPLANATION OF BLACK-LETTER:

Clarification of instances requiring disqualification

1. The Rule is Canon 3B(1), with a slight modification to cross-reference the disqualification rule explicitly and to acknowledge that in some instances disqualification may be required by other state law.

EXPLANATION OF COMMENTS:

[1] This Comment was added to emphasize that although disqualification remains an important and at times essential option for a judge, it should not be misused as a tool to avoid deciding cases that the judge may regard as unpleasant or unpopular. The effective administration of justice depends on judges remaining available to hear the cases that parties file, and this Comment is intended to remind judges of that concern when they approach issues of disqualification.

1 **RULE 2.8**

2 ***Decorum, Demeanor, and Communication with Jurors***

3
4 (A) A judge shall require order and decorum in proceedings before the
5 court.

6
7 (B) A judge shall be patient, dignified, and courteous to litigants, jurors,
8 witnesses, lawyers, court staff, court officials, and others with whom the
9 judge deals in an official capacity, and shall require similar conduct of
10 lawyers, court staff, court officials, and others subject to the judge's direction
11 and control.

12
13 (C) A judge shall not commend or criticize jurors for their verdict other
14 than in a court order or opinion in a proceeding.

15
16 **COMMENT**

17
18 [1] The duty to hear all proceedings with patience and courtesy is not inconsistent
19 with the duty imposed in Rule 2.5 to dispose promptly of the business of the court.
20 Judges can be efficient and businesslike while being patient and deliberate.

21
22 [2] Commending or criticizing jurors for their verdict may imply a judicial
23 expectation in future cases and may impair a juror's ability to be fair and impartial in a
24 subsequent case.

25
26 [3] A judge who is not otherwise prohibited by law from doing so may meet with
27 jurors who choose to remain after trial, but should use caution in discussing the merits of
28 the case.

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RULE 2.8

REPORTER'S EXPLANATION OF CHANGES

1990 CODE COMPARISON:

Paragraph (A) is Canon 3B(3).

Paragraph (B) is Canon 3B(4).

Paragraph (C) is the first sentence of Canon 3B(11).

Comment [1] is the Commentary to Canon 3B(4).

Comment [2] is the Commentary to Canon 3B(11).

Comment [3] is new.

EXPLANATION OF BLACK-LETTER:

1. Paragraph (B): Extension of duty of courtesy

Paragraph (B) is Canon 3B(4), modified to extend the duty of courtesy was extended to court staff, where episodes of abusive behavior occasionally have arisen. "Court officials" was added to be consistent with the list used later in the same paragraph.

3. Paragraph (C): Expressing appreciation to jurors

The Commission moved discussion permitting judges to express appreciation to jurors from the text to the Comment on the grounds that it was advice not needed in the text.

EXPLANATION OF COMMENTS:

[3] New Comment [3] was added in light of the growing recognition that judicial outreach is a valued part of the judicial role and includes outreach to jurors. The Comment makes clear that judges can commend jurors for their service and that the prohibition on judges commending or criticizing the jury for their verdict does not foreclose other communications between judges and jurors. To the contrary, the Commission saw real value in creating an opportunity for the judge to learn more about the jury's experience, as long as the merits of the case were not discussed.

1 **RULE 2.9**

2 ***Ex Parte Communications***

3
4 (A) A judge shall not initiate, permit, or consider ex parte
5 communications, or consider other communications made to the judge
6 outside the presence of the parties or their lawyers, concerning a pending* or
7 impending matter,* except as follows:

8
9 (1) When circumstances require it, ex parte communication for
10 scheduling, administrative, or emergency purposes, which does not
11 address substantive matters, is permitted, provided:

12
13 (a) the judge reasonably believes that no party will gain a
14 procedural, substantive, or tactical advantage as a result of the
15 ex parte communication; and

16
17 (b) the judge makes provision promptly to notify all other
18 parties of the substance of the ex parte communication, and
19 gives the parties an opportunity to respond.

20
21 (2) A judge may obtain the written advice of a disinterested expert
22 on the law applicable to a proceeding before the judge, if the judge
23 gives advance notice to the parties of the person to be consulted and
24 the subject matter of the advice to be solicited, and affords the parties
25 a reasonable opportunity to object and respond to the notice and to
26 the advice received.

27
28 (3) A judge may consult with court staff and court officials whose
29 functions are to aid the judge in carrying out the judge's adjudicative
30 responsibilities, or with other judges, provided the judge makes
31 reasonable efforts to avoid receiving factual information that is not
32 part of the record, and does not abrogate the responsibility personally
33 to decide the matter.

34
35 (4) A judge may, with the consent of the parties, confer separately
36 with the parties and their lawyers in an effort to settle matters
37 pending before the judge.

38
39 (5) A judge may initiate, permit, or consider any ex parte
40 communication when expressly authorized by law* to do so.

41
42 (B) If a judge inadvertently receives an unauthorized ex parte
43 communication bearing upon the substance of a matter, the judge shall make
44 provision promptly to notify the parties of the substance of the
45 communication and provide the parties with an opportunity to respond.
46

1 **(C) A judge shall not investigate facts in a matter independently, and shall**
2 **consider only the evidence presented and any facts that may properly be**
3 **judicially noticed.**

4
5 **(D) A judge shall make reasonable efforts, including providing**
6 **appropriate supervision, to ensure that this Rule is not violated by court**
7 **staff, court officials, and others subject to the judge's direction and control.**

8
9 **COMMENT**

10
11 [1] To the extent reasonably possible, all parties or their lawyers shall be included in
12 communications with a judge.

13
14 [2] Whenever the presence of a party or notice to a party is required by this Rule, it is
15 the party's lawyer, or if the party is unrepresented, the party, who is to be present or to
16 whom notice is to be given.

17
18 [3] The proscription against communications concerning a proceeding includes
19 communications with lawyers, law teachers, and other persons who are not participants in
20 the proceeding, except to the limited extent permitted by this Rule.

21
22 [4] A judge may initiate, permit, or consider ex parte communications expressly
23 authorized by law, such as when serving on therapeutic or problem-solving courts, mental
24 health courts, or drug courts. In this capacity, judges may assume a more interactive role
25 with parties, treatment providers, probation officers, social workers, and others.

26
27 [5] A judge may consult with other judges on pending matters, but must avoid ex
28 parte discussions of a case with judges who have previously been disqualified from
29 hearing the matter.

30
31 [6] The prohibition against a judge investigating the facts in a matter extends to
32 information available in all mediums, including electronic.

33
34 [7] A judge may consult ethics advisory committees, outside counsel, or legal experts
35 concerning the judge's compliance with this Code. Such consultations are not subject to
36 the restrictions of paragraph (A)(2).

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RULE 2.9

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON:

Paragraph (A) is the second sentence of Canon 3B(7).

Paragraph (A)(1) is Canon 3B(7)(a).

Paragraph (A)(1)(a) is Canon 3B(7)(a)(i).

Paragraph (A)(1)(b) is Canon 3B(7)(a)(ii).

Paragraph (A)(2) is a modified version of Canon 3B(7)(b)

Paragraph (A)(3) is Canon 3B(7)(c).

Paragraph (A)(4) is Canon 3B(7)(d).

Paragraph (A)(5) is Canon 3B(7)(e).

Paragraph (B) is new.

Paragraph (C) is new.

Paragraph (D) is from the eighth paragraph of Commentary to Canon 3B(7).

Comment [1] is the second paragraph of Commentary to Canon 3B(7).

Comment [2] is the third paragraph of Commentary to Canon 3B(7).

Comment [3] is the first paragraph of Commentary to Canon 3B(7).

Comments [4] – [7] are new.

The fourth, fifth, seventh and ninth paragraphs of Commentary to Canon 3B(7) were deleted.

EXPLANATION OF BLACK-LETTER:

1. "Issues on the merits" was deleted as duplicative; the Rule's exclusion of "substantive matters" from the scope of permissible ex parte communications would necessarily subsume all "issues on the merits." Replacing "authorized" with "permitted" is stylistic reasons and does not change the substantive of the provision.

2. Paragraph (A)(1)(a): Addition of "substantive"

"Substantive" was added in recognition of the fact that a scheduling, administrative, or emergency ex parte communication that is unrelated to substantive matters per se could nonetheless, in some instances, enable a party to gain an inappropriate advantage related to the substance or merits of the case.

3. Paragraph (A)(1)(b): Addition of delegation

Paragraph (A)(1)(b) is Canon 3B(7)(a)(ii), but reworded to clarify that the judge may delegate the task of notifying other parties of ex parte communications undertaken for administrative and scheduling purposes. Eliminating the opportunity for the judge to delegate the task, would be unnecessarily onerous.

4. Paragraph (A)(2): Addition of requirement of advance notice

1
2 Paragraph (A)(2) is Canon 3B(7)(b), but modified to add the requirement of
3 advance notice. Under the 1990 Code, a judge could consult with an outside legal expert
4 ex parte before notifying the parties. If such a consultation was problematic for reasons
5 that had not occurred to the judge, post-consultation notification to the parties would
6 come too late to prevent the problem from arising. As revised, the Rule calls upon the
7 judge to notify the parties before the ex parte contact is made.

8
9 5. Paragraph (A)(3): Addition of limitation on consultation

10
11 Paragraph (A)(3) is a modified version of Canon 3B(7)(c). The permissibility of a
12 judge's consultation on a case with other court personnel was qualified to include the
13 common sense limitations that the judge must not relinquish ultimate responsibility for
14 deciding the case and, in the course of such consultation, should be careful not to acquire
15 improper factual information.

16
17 6. Paragraph (B): Creation of new paragraph on inadvertent communications

18
19 This new paragraph addresses an issue not covered by the former Code. In
20 situations where a judge inadvertently receives an unauthorized ex parte communication,
21 the new Rule directs the judge to notify all the other parties of the substance of the
22 communication and give them an opportunity to respond. In an age when misdirected
23 faxes and email are common, the need for some provision to deal with inadvertent
24 disclosures of ex parte information impressed the Commission as necessary.

25
26 7. Paragraph (C): Creation of new paragraph prohibiting investigation

27
28 In the Commission's view, former Commentary prohibiting a judge from
29 undertaking independent factual investigations was largely unsupported by the Rule itself
30 and warranted inclusion as part of the Rule. Moreover, the judge's duty to consider only
31 the evidence presented is a defining feature of the judge's role in an adversarial system
32 and warrants explicit mention in the black letter. The term "must" was replaced with
33 "shall," both for consistency and to make clear that compliance with the proscription is
34 absolute. Specific acknowledgement of the category of evidence or facts that are
35 judicially noticed was considered a beneficial clarification, and was therefore added to
36 this paragraph.

37
38 8. Paragraph (D): Creation of new paragraph on avoiding communication through
39 staff

40
41 Paragraph (D) was moved to the black letter from the eighth paragraph of
42 Commentary to Canon 3B(7). In the Commission's view, a judge's duty to take steps to
43 avoid violating the Rule against ex parte communications through staff could not be
44 inferred from the black letter of the former Rule.

1 EXPLANATION OF COMMENTS:
2

3 [3] Comment [3] is the first paragraph of Commentary to Canon 3B(7), with the
4 addition of "by this Rule," a revision made for stylistic reasons and not intended to
5 change substantive meaning.
6

7 [4] New comment dealing with problem-solving and therapeutic courts
8

9 The Commission heard a great deal of testimony about therapeutic or problem
10 solving courts. In these non-traditional courts that hear matters on an increasingly broad
11 array of issues ranging from drugs to juvenile justice, domestic relations, and crime,
12 judges communicate with parties, service providers (such as social workers), and others
13 in ways that can be in tension with traditional rules governing ex parte communications.
14 Several witnesses thus urged the Commission to create special rules for such courts. The
15 Commission was reluctant to go down that path because therapeutic courts were too
16 many and varied for the Commission to devise rules of general applicability. Instead, the
17 Commission drafted this new Comment, which calls special attention to the exception for
18 ex parte communications authorized by law and notes that this exception enables
19 individual states to devise special rules for the therapeutic courts in their jurisdictions.
20

21 [5] New comment regarding judge-to-judge consultations
22

23 New Comment [5] was added to clarify that while a judge may consult with other
24 judges about a case, the judge should not consult with judges who have been disqualified
25 from hearing the case. If, for whatever reason, a judge is disqualified from hearing a
26 given matter, it would defeat the purpose of the disqualification rules to permit another
27 judge to confer with the disqualified colleague.
28

29 [6] New Comment containing prohibition against independently investigating facts
30 extended to judge's staff
31

32 Given the ease with which factual investigation can now be accomplished via
33 electronic databases and the Internet, the risk that a judge or the judge's staff could
34 inadvertently violate Rules 2.10(B) and (C) has heightened considerably. The need for
35 vigilance on the part of judges has increased accordingly.
36

37 [7] New Comment regarding judges seeking ex parte guidance regarding compliance
38 with Rules
39

40 The Commission wanted to make clear that judges may seek ex parte guidance
41 concerning their compliance with the Rules without violating this Rule. Judges routinely
42 consult ethics advisory committees, counsel and outside experts concerning their
43 obligations under the Code in a given context. Because such consultations are not
44 problematic, this Comment was added accordingly.
45

1 [Deletion of the fourth, fifth, seventh and ninth paragraphs of Commentary to](#)
2 [Canon 3B\(7\)](#)

3
4 The Commission deleted the reference to requests for amicus briefs in the fourth
5 paragraph of Canon 3B(7) Commentary as being “often desirable procedures,” because it
6 is not an ethical concern.

7
8 The fifth paragraph of Canon 3(B)(7) Commentary concerning clearly acceptable
9 purposes for ex parte communications was deleted because it is redundant of the black
10 letter Rule.

11
12 The Commission decided to delete Commentary language in the seventh
13 paragraph of Canon 3B(7) authorizing a judge to request that a party submit proposed
14 findings of fact and conclusions of law as long as the other party was given an
15 opportunity to respond to the submission. In the Commission’s view, the permissibility
16 of the practice was so free from doubt as to render the Comment unnecessary.

17
18 The Commission deleted the ninth paragraph of Canon 3B(7) Commentary. The
19 subject matter, keeping records of communications, is an administrative, rather than an
20 ethical, matter.

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RULE 2.10

Judicial Statements on Pending and Impending Cases

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial* performance of the adjudicative duties of judicial office.

(C) A judge shall require court staff, court officials, and others under the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

COMMENT

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

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RULE 2.10
REPORTER'S EXPLANATION OF CHANGES

1990 CODE COMPARISON:

- Paragraph (A) is the first sentence of Canon 3B(9).
- Paragraph (B) is Canon 3B(10).
- Paragraph (C) is the second sentence of Canon 3B(9).
- Paragraph (D) is the third and fourth sentences of Canon 3B(9).
- Paragraph (E) is new.
- Comment [1] is the first sentence of the Commentary to Canon 3B(10).
- Comment [2] is the fifth through seventh sentences of the Commentary to Canon 3B(10).

EXPLANATION OF BLACK-LETTER:

1. Paragraphs (A) and (C): Separation of former Canon

Former Canon 3B(9) was subdivided into two separate subsections (addressing the judge's statements and the statements of staff, court officers, and others). Paragraph (A) is the first sentence of Canon 3B(9), but was reworded to improve clarity.

In Paragraph (C), the phrase "court personnel" was replaced with "staff, court officers, and others" to broaden the judge's duty to prohibit others from making inappropriate comment on pending cases to include all persons within the judge's control regardless of whether such persons technically qualified as court personnel.

2. In Paragraph (B), "judicial" was inserted before "duties" for clarity.

3. Paragraph (E): Adding language concerning responding to media

Judges are justifiably reluctant to speak about pending cases. However, the Commission wanted to make clear that when a judge's conduct is called into question, the judge may respond as long as the response will not affect the fairness of the proceeding.

EXPLANATION OF COMMENTS:

Deletion of reference to Model Rules of Professional Conduct

In the of the Commentary to Canon 3B(10), the cross-reference to the Model Rules of Professional Conduct was deleted as unnecessary.

Substance of Canon 3B(11) and its Commentary moved

1 The Commission moved Canon 3B(11) and its Comment[2], relating to judges
2 commending or criticizing jurors, to Rule 2.8, the Rule devoted to judicial decorum,
3 demeanor, and communication with jurors.

4
5 The definitions of “pending” and “impending” in Commentary to Canon 3B(10)
6 were moved to Terminology

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1 **RULE 2.11**

2 ***Disqualification***

3
4 **(A) A judge shall disqualify himself or herself in any proceeding in which**
5 **the judge's impartiality* might reasonably be questioned, including but not**
6 **limited to the following circumstances:**

7
8 **(1) The judge has a personal bias or prejudice concerning a party**
9 **or a party's lawyer, or personal knowledge* of facts that are in**
10 **dispute in the proceeding.**

11
12 **(2) The judge knows* that the judge, the judge's spouse or**
13 **domestic partner,* or a person within the third degree of**
14 **relationship* to either of them, or the spouse or domestic partner of**
15 **such a person is:**

16
17 **(a) a party to the proceeding, or an officer, director,**
18 **general partner, managing member, or trustee of a party;**

19
20 **(b) acting as a lawyer in the proceeding;**

21
22 **(c) a person who has more than a de minimis* interest that**
23 **could be substantially affected by the proceeding; or**

24
25 **(d) likely to be a material witness in the proceeding.**

26
27 **(3) The judge knows that he or she, individually or as a fiduciary,***
28 **or the judge's spouse, domestic partner, parent, or child, or any other**
29 **member of the judge's family residing in the judge's household,* has**
30 **an economic interest* in the subject matter in controversy or in a**
31 **party to the proceeding.**

32
33 **(4) The judge knows or learns by means of a timely motion that a**
34 **party, a party's lawyer, or the law firm of a party's lawyer has within**
35 **the previous [insert number] year[s] made aggregate* contributions***
36 **to the judge's campaign in an amount that is greater than [\$(insert**
37 **amount)] for an individual or \$(insert amount) for an entity] [is**
38 **reasonable and appropriate for an individual or an entity].**

39
40 **(5) The judge, while a judge or a judicial candidate,* has made a**
41 **public statement, other than in a court proceeding, judicial decision,**
42 **or opinion, that commits or appears to commit the judge to reach a**
43 **particular result or rule in a particular way in the proceeding or**
44 **controversy.**

45
46 **(6) The judge:**

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(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular case in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

COMMENT

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply.

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

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[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] "Economic interest," as set forth in the Terminology section, means ownership of more than a de minimis legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

- (1) an interest in the individual holdings within a mutual or common investment fund;
- (2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant;
- (3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
- (4) an interest in the issuer of government securities held by the judge.

RULE 2.11

REPORTER'S EXPLANATION OF CHANGES

1990 CODE COMPARISON:

- Paragraph (A) is Canon 3E(1).
- Paragraph (A)(1) is Canon 3E(1)(a).
- Paragraph (A)(2) is Canon 3E(1)(d).
- Paragraph (A)(2)(a) is Canon 3E(1)(d)(i).
- Paragraph (A)(2)(b) is Canon 3E(1)(d)(ii).
- Paragraph (A)(2)(c) is Canon 3E(1)(d)(iii).
- Paragraph (A)(2)(d) is Canon 3E(1)(d)(iv).
- Paragraph (A)(3) is Canon 3E(1)(c).
- Paragraph (A)(4) is Canon 3E(1)(e).
- Paragraph (A)(5) combines Canons 3E(1)(f), 3E(1)(f)(i), and 3E(1)(f)(ii).
- Paragraph (A)(6) is the first two words of Canon 3E(1)(b).
- Paragraph (A)(6)(a) is the remainder of the first half of Canon 3E(1)(b).
- Paragraph (A)(6)(b) is the Commentary to Canon 3E(1)(b).
- Paragraph (A)(6)(c) is the second half of Canon 3E(1)(b).
- Paragraph (A)(6)(d) is new.
- Paragraph (B) is Canon 3E(2).
- Paragraph (C) is Canon 3F.
- Comment [1] is the first paragraph of Commentary to Canon 3E(1).
- Comment [2] is new.
- Comment [3] is the third paragraph of Commentary to Canon 3E(1).
- Comment [4] is the Commentary to Canon 3E(1)(f).
- Comment [5] is the second paragraph of Commentary to Canon 3E(1).
- Comment [6] is new.

The Commentary to Canon 3F was deleted, as being largely redundant of the black letter and otherwise administrative, rather than ethical, in its recommendations.

EXPLANATION OF BLACK-LETTER:

Most changes to this Rule and its accompanying Commentary are stylistic and structural rather than substantive.

1. Paragraphs (A)(2), (A)(3), and (B): Addition of "domestic partner"

"Domestic partner" was added to treat domestic partners comparably to spouses for purposes of evaluating economic conflicts.

2. Paragraph (A)(2)(a): Addition of "general partner, managing member"

These additions were made to ensure completeness of the list

1 3. In Paragraph (A)(2)(d), "Is to the judge's knowledge" was deleted as unnecessary.

2
3 4. Paragraph (A)(6)(b): New paragraph on government lawyers

4
5 Paragraph (A)(6)(b) makes explicit in the black letter what former Canon
6 3E(1)(b) stated only in Commentary. Judges must not sit on cases concerning matters
7 with which they were involved as government lawyers, for the same reason that they
8 must not sit on cases concerning matters in which they were involved as private
9 practitioners, and the Rule has been revised to so state.

10
11 5. Paragraph A(6)(d): New paragraph on judges sitting on cases they previously
12 heard:

13
14 Trial judges sometimes sit by designation on courts of appeal, and vice versa.
15 Such judges should not hear cases over which they presided in a different court, and this
16 Rule makes that clear. This Rule, however, leaves unaffected the propriety of a judge
17 who decided a case on a panel of an appellate court from participating in the rehearing
18 the case en banc with that same court.

19
20 EXPLANATION OF COMMENTS:

21
22 [2] New Comment [2] was added to clarify that the disqualification rules apply
23 regardless of whether a motion to disqualify has been filed. The terms "recusal" and
24 "disqualification" have been defined in different and sometimes inconsistent ways to
25 apply where judges act on their own initiative or pursuant to a motion by a party. This
26 Comment is intended to render such distinctions irrelevant here.

27
28 [6] New Comment [6] was added to elaborate on the meaning of "economic interest."
29 Although the term is separately defined in the Terminology section, it is important
30 enough to bear recapitulation here.

1 **RULE 2.12**

2 ***Supervisory Duties***

3
4 (A) A judge shall require court staff, court officials, and others subject to
5 the judge's direction and control to act in a manner consistent with the
6 judge's obligations under this Code.

7
8 (B) A judge with supervisory authority for the performance of other
9 judges shall take reasonable measures to ensure that those judges properly
10 discharge their judicial responsibilities, including the prompt disposition of
11 matters before them.

12
13
14 **COMMENT**

15
16 [1] A judge is responsible for his or her own conduct and for the conduct of others,
17 such as staff, when those individuals are acting at the judge's direction or control. A
18 judge may not direct court personnel to engage in conduct on the judge's behalf or as the
19 judge's representative when such conduct would violate the Code if undertaken by the
20 judge.

21
22 [2] Public confidence in the courts depends upon timely justice. To promote the
23 efficient administration of justice, a judge with supervisory authority must take the steps
24 needed to ensure that judges under his or her supervision administer their workloads
25 promptly.

RULE 2.12
REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON:

The Rule is Canon 3C(2) and (3).
Comments [1] and [2] are new.

EXPLANATION OF BLACK-LETTER:

1. Canons 3C(2) and (3) combined

Canons 3C(2) and (3) were combined under a general rubric, "Supervisory Duties."

2. Revision to staff standards

Rule 2.12(A) was reworded to reflect a more comprehensive understanding of the standards of conduct required of judicial staffs. Judges must insist that staff act in a manner consistent with all of a judge's obligations under the Code and not simply those previously enumerated in Canon 3C(2) relating to diligence, fidelity, and lack of bias or prejudice.

3. Proper discharge of judicial responsibilities of subordinate judges

The Commission reordered the provision to emphasize the importance of proper discharge of judicial responsibilities over prompt disposition of matters.

EXPLANATION OF COMMENTS:

[1] This new Comment was added to emphasize the critical position judicial staff occupy in the justice system—not only in terms of their relevance to the administration of justice but also in terms of their role in preserving public confidence in the system as a whole. The Comment explains elaborates on the black letter to underscore that a judge must never direct staff within his or her control to engage in conduct that would violate the Code if undertaken by the judge.

[2] New Comment [2] was added to underscore that public confidence in the courts depends on judges with supervisory authority taking the steps needed to ensure that judges under their supervision administer their workloads both properly and expeditiously.

1 **RULE 2.13**

2 ***Administrative Appointments***

3
4 (A) **In making administrative appointments, a judge:**

5
6 (1) **shall exercise the power of appointment impartially* and on**
7 **the basis of merit; and**

8
9 (2) **shall avoid nepotism, favoritism, and unnecessary**
10 **appointments.**

11
12 (B) **A judge shall not appoint a lawyer to a position if the judge either**
13 **knows* that the lawyer, or the lawyer's spouse or domestic partner,* has**
14 **contributed more than \$[insert amount] within the prior [insert number]**
15 **year[s] to the judge's election campaign, or learns of such a contribution* by**
16 **means of a timely motion by a party or other person properly interested in**
17 **the matter, unless:**

18
19 (1) **the position is substantially uncompensated;**

20
21 (2) **the lawyer has been selected in rotation from a list of qualified**
22 **and available lawyers compiled without regard to their having made**
23 **political contributions; or**

24
25 (3) **the judge or another presiding or administrative judge**
26 **affirmatively finds that no other lawyer is willing, competent, and able**
27 **to accept the position.**

28
29 (C) **A judge shall not approve compensation of appointees beyond the fair**
30 **value of services rendered.**

31
32 **COMMENT**

33
34 [1] Appointees of a judge include assigned counsel, officials such as referees,
35 commissioners, special masters, receivers, and guardians, and personnel such as clerks,
36 secretaries, and bailiffs. Consent by the parties to an appointment or an award of
37 compensation does not relieve the judge of the obligation prescribed by paragraph (A).
38

39 [2] Unless otherwise defined by law, nepotism is the appointment or hiring of any
40 relative within the third degree of relationship of either the judge or the judge's spouse or
41 domestic partner, or the spouse or domestic partner of such relative.
42

43 [3] The rule against making administrative appointments of lawyers who have
44 contributed in excess of a specified dollar amount to a judge's election campaign includes
45 an exception for positions that are substantially uncompensated, such as those for which
46 the lawyer's compensation is limited to reimbursement for out-of-pocket expenses.

RULE 2.13

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON:

- Paragraph (A) is taken from Canon 3C(4).
- Paragraph (B) is taken from Canon 3C(5).
- Paragraph (B)(1) is Canon 3C(5)(a).
- Paragraph (B)(2) is Canon 3C(5)(b).
- Paragraph (B)(3) is Canon 3C(5)(c).
- Paragraph (C) is Canon 3C(4)
- Comment [1] is the Commentary to Canon 3C.
- Comments [2] and [3] are new.

EXPLANATION OF BLACK-LETTER:

1. Paragraph (A): Movement of "unnecessary appointments"

The first sentence of former Canon 3C(4) was eliminated and folded into the Rule later for largely stylistic reasons not intended to change substantive meaning..

2. Paragraph (B): Addition of "spouse or domestic partner"

EXPLANATION OF COMMENTS:

[2] The black letter directs judges to avoid nepotism, and new Comment [2] was added simply to add clarity to the meaning of nepotism with a conventional definition.

[3] The black letter prohibits a judge from awarding appointments to contributors who have given more than a specified amount to the judge's election campaign but creates an exception for "substantially uncompensated" positions. This new Comment clarifies the meaning of "substantially uncompensated" to reach positions in which the appointee is reimbursed for out of pocket expenses.

1 **RULE 2.14**

2 *Disability and Impairment*

3
4 **A judge having a reasonable belief that the performance of a lawyer or another**
5 **judge is impaired by drugs or alcohol, or by a mental, emotional, or physical**
6 **condition, shall take appropriate action, which may include a confidential referral**
7 **to a lawyer or judicial assistance program.**

8
9 **COMMENT**

10
11 [1] “Appropriate action” means action intended and reasonably likely to help the
12 judge or lawyer in question address the problem and prevent harm to the justice system.
13 Depending upon the circumstances, appropriate action may include but is not limited to
14 speaking directly to the impaired person, notifying an individual with supervisory
15 responsibility over the impaired person, or making a referral to an assistance program.

16
17 [2] Taking or initiating corrective action by way of referral to an assistance program
18 may satisfy a judge’s responsibility under this Rule. Assistance programs have many
19 approaches for offering help to impaired judges and lawyers, such as intervention,
20 counseling, or referral to appropriate health care professionals. Depending upon the
21 gravity of the conduct that has come to the judge’s attention, however, the judge may be
22 required to take other action, such as reporting the impaired judge or lawyer to an
23 appropriate authority, agency, or body. See Rule 2.15.

RULE 2.14

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON:

The Rule and Comment are new.

EXPLANATION OF BLACK-LETTER:

Creation of new Rule on impairment

This is a new Rule, governing a difficult and extremely important issue. Impairment can undermine judicial competence, diligence, and demeanor specifically, and public confidence in the courts generally. While the Rule imposes a mandatory obligation to take appropriate action when a judge learns of a colleague's impairment, the Commission did not see this new Rule as primarily a disciplinary device. Rather, its fundamental purpose is to guide and encourage judges to address impairment problems when they arise.

EXPLANATION OF COMMENTS:

[1] This Comment was added to define "appropriate action." There was some concern that disagreement could arise over whether a particular action taken in response to knowledge of impairment was sufficient; this Comment takes a functional approach, by asking whether the action taken would be reasonably likely to rectify the problem.

[2] The Commission was alert to the need for sensitivity when dealing with impairment problems and was careful not to prescribe specific action in response to specific evidence of impairment. Often, referral to a lawyer or judicial assistance referral program may be the most appropriate course, but the Commission recognized that different circumstances may warrant different responses.

1 **RULE 2.15**

2 ***Responding to Judicial and Lawyer Misconduct***

3
4 **(A) A judge having knowledge* that another judge has committed a**
5 **violation of this Code that raises a substantial question regarding the judge's**
6 **honesty, trustworthiness, or fitness as a judge in other respects shall inform**
7 **the appropriate authority.***

8
9 **(B) A judge who receives information indicating a substantial likelihood**
10 **that another judge has committed a violation of this Code shall take**
11 **appropriate action.**

12
13 **(C) A judge having knowledge that a lawyer has committed a violation of**
14 **the Rules of Professional Conduct that raises a substantial question**
15 **regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in**
16 **other respects shall inform the appropriate authority.**

17
18 **(D) A judge who receives information indicating a substantial likelihood**
19 **that a lawyer has committed a violation of the Rules of Professional Conduct**
20 **shall take appropriate action.**

21
22 **COMMENT**

23
24 [1] Taking action to address known misconduct is a judge's obligation. Paragraphs
25 (A) and (C) impose an obligation on the judge to report to the appropriate disciplinary
26 authority the known misconduct of another judge or a lawyer that raises a substantial
27 question regarding the honesty, trustworthiness, or fitness of that judge or lawyer.
28 Ignoring or denying known misconduct among one's judicial colleagues or members of
29 the legal profession undermines a judge's responsibility to participate in efforts to ensure
30 public respect for the justice system. This Rule limits the reporting obligation to those
31 offenses that an independent judiciary must vigorously endeavor to prevent.

32
33 [2] A judge who does not have actual knowledge that another judge or a lawyer may
34 have committed misconduct, but receives information indicating a substantial likelihood
35 of such misconduct, is required to take appropriate action. Appropriate action may
36 include but is not limited to communicating directly with the judge who may have
37 violated this Code, communicating with a supervising judge, or reporting the suspected
38 violation to the appropriate authority or other agency or body. Similarly, actions to be
39 taken in response to information indicating that a lawyer has committed a violation of the
40 Rules of Professional Conduct may include but are not limited to communicating directly
41 with the lawyer who may have committed the violation, or reporting the suspected
42 violation to the appropriate authority or other agency or body.

RULE 2.15
REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON:

Paragraph (A) is the second sentence of Canon 3D(1).

Paragraph (B) is the first sentence of Canon 3D(1).

Paragraph (C) is the second sentence of Canon 3D(2).

Paragraph (D) is the first sentence of Canon 3D(2).

Comment [1] is new.

Most of Comment [2] is new. The second sentence of the Comment is the Commentary to Canon 3D.

Canon 3D(3) was deleted.

EXPLANATION OF BLACK-LETTER:

Rules regulating response to lawyer and judicial misconduct were consolidated, to consolidate closely related concepts.

1. Paragraph (A): Change to parallel Rule 8.3

The Rule was reworded to parallel lawyer reporting obligations in Rule 8.3 of the Model Rules of Professional Conduct to require reporting to the "appropriate authority" whenever the judge has knowledge of another judge's violation of the Code that raises a substantial question as to the judge's "honesty, trustworthiness, or fitness as a judge in other respects."

2. Paragraph (B): Change in duty

Former Canon 3(D)(1) was revised to state that when a judge receives information indicating a substantial likelihood that another judge has violated the Rules, the judge receiving such information shall—no longer should—take "appropriate action." In the Commission's view, in situations where the judge does not "know" but receives information making it substantially likely that another judge has violated the Rules, the judge receiving such information must do something. What appropriate action is required would vary with the circumstances. In some instances, it could involve talking to the judge in question or in other instances, taking steps to verify the information received.

3. Paragraphs (C) and (D): Language changes

Changes were made to parallel those implemented in Rule 2.15.

4. Deletion of Canon 3D(3)

Former Canon 3D(3) declared that the acts of a judge in the discharge of disciplinary responsibilities were absolutely privileged. Although there was no

1 opposition to the notion that judges should be immune from suit in such situations, the
2 Commission concluded that such a provision was inappropriate for the Model Rules of
3 Judicial Conduct. Neither the ABA nor an adopting court is in a position to grant or deny
4 judicial immunity in the context of a code of ethics. Accordingly, Canon 3D(3) was
5 meaningless except as a generalized statement of support for judicial immunity, which, in
6 the Commission's view, did not belong in the Rules.

7
8 **EXPLANATION OF COMMENTS:**

9
10 [1] Language was added to underscore the connection between reporting serious
11 misconduct and the judge's responsibility to preserve public confidence in the courts.

12
13 [2] Commentary concerning "appropriate action" in response to lawyer misconduct
14 was changed for stylistic reasons, to make it consistent with the commentary concerning
15 response to judicial misconduct. The phrase "or lawyer" was deleted after
16 "communication with the judge" from former Canon 3D Commentary because this
17 Comment as it now appears is limited in its application to judicial, not lawyer,
18 misconduct.

1 **RULE 2.16**

2 *Cooperation with Disciplinary Authorities*

3
4 (A) A judge shall cooperate and be candid and honest with judicial and
5 lawyer discipline agencies.

6
7 (B) A judge shall not retaliate, directly or indirectly, against anyone
8 known* or suspected to have assisted or cooperated with an investigation of a
9 judge.

10
11 **COMMENT**

12
13 [1] Cooperation with investigations and proceedings of judicial and lawyer discipline
14 agencies, as required in paragraph (A), instills confidence in judges' commitment to the
15 integrity of the judicial system and protection of the public.

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RULE 2.16
REPORTER'S EXPLANATION OF CHANGES

1990 CODE COMPARISON:

The Rule and its Comments are new.

EXPLANATION OF BLACK-LETTER:

Creation of new Rule

Several witnesses noted that disciplinary authorities often struggle to gain the cooperation of targeted judges in disciplinary proceedings. In the Commission's view, the need for a judge's cooperation in the disciplinary process is obvious. Moreover, for a judge to retaliate against anyone for cooperating in disciplinary proceedings against him or her would be patently unethical. This Rule thus serves to fill an important gap in the prior Code.

CANON 3

**A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO
MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.**

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CANON 3
REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

This renumbered Canon 3 is drawn almost exclusively from Canon 4 of the 1990 Model Code. However, some material involving the "personal" activities of a judge has been repositioned to this Canon from Canon 2 of the 1990 Code.

EXPLANATION OF BLACK-LETTER

1. Expanded the reach of this Canon to include "personal" as well as "extrajudicial" activities.

Some activities governed by this Canon, such as accepting gifts or participating in private clubs, are "extrajudicial" in the sense that they are not part of a judge's official duties, yet they are less formal and less public than participating in a seminar or accepting an award. Accordingly, the Joint Commission added the word "personal" to the Canon title to make it more accurate and more complete.

2. Replaced "conflict with judicial obligations" with "conflict with the obligations of judicial office."

No significant substantive change is intended. The substituted phrase is used in several places in the 2006 Draft as a reminder that judges have a variety of duties—including administrative duties—that go with the judicial *office*.

1 **RULE 3.1**

2 *Extrajudicial Activities in General*

3
4 **A judge may engage in extrajudicial activities, except as prohibited by law* or this**
5 **Code. However, when engaging in extrajudicial activities, a judge shall not:**

6
7 (A) **participate in activities that will lead to frequent disqualification of**
8 **the judge;**

9
10 (B) **participate in activities that will interfere with the proper**
11 **performance of the judge's judicial duties;**

12
13 (C) **participate in activities that would appear to a reasonable person to**
14 **undermine the judge's independence,* integrity,* or impartiality;***

15
16 (D) **engage in conduct that would appear to a reasonable person to be**
17 **coercive; or**

18
19 (E) **make use of court premises, staff, stationery, equipment, or other**
20 **resources, except for incidental use for activities that concern the law, the**
21 **legal system, or the administration of justice, or unless such additional use is**
22 **permitted by law.**

23
24 **COMMENT**

25
26 [1] To the extent that time permits, and judicial independence and impartiality are not
27 compromised, judges are encouraged to engage in appropriate extrajudicial activities.
28 Judges are uniquely qualified to engage in extrajudicial activities that concern the law,
29 the legal system, and the administration of justice, such as by speaking, writing, teaching,
30 or participating in scholarly research projects. In addition, judges are permitted and
31 encouraged to engage in educational, civic, fraternal, religious, or charitable extrajudicial
32 activities not conducted for profit, even when the activities do not involve the law. See
33 Rule 3.7.

34
35 [2] Participation in both law-related and other extrajudicial activities helps integrate
36 judges into their communities, and furthers public understanding of and respect for courts
37 and the judicial system.

38
39 [3] Discriminatory actions and expressions of bias or prejudice by a judge, even
40 outside the judge's official or judicial actions, are likely to appear to a reasonable person
41 to call into question the judge's integrity and impartiality. Examples include jokes or
42 other remarks that demean individuals based upon their race, sex, gender, religion,
43 national origin, disability, age, sexual orientation, or socioeconomic status. For the same
44 reason, a judge's extrajudicial activities must not be conducted in connection or
45 affiliation with an organization that practices invidious discrimination. See Rule 3.6.

46

1 [4] While engaged in permitted extrajudicial activities, judges must not coerce others
2 or take action that would reasonably be perceived as coercive. For example, depending
3 upon the circumstances, a judge's solicitation of contributions or memberships for an
4 organization, as permitted by Rule 3.7(A), might create the risk that the person solicited
5 would feel obligated to respond favorably, or would do so to curry favor with the judge.
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RULE 3.1

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

To the extent that Rule 3.1 serves as a general list of restrictions upon a judge's participation in extrajudicial activities, it is chiefly derived from Canon 4A. However, the new set of restrictions is somewhat different, as it focuses attention more sharply upon interference with the independence, integrity, and impartiality of judges, which is thematic in the 2006 Draft.

Rule 3.1(A) is new, but is derived from Canon 4A(3), while giving it more specific content. See Rule 3.1(B).

Rule 3.1(B) is essentially the same as Canon 4A(3).

Rule 3.1(C) is based upon Canon 4A(1), but with expanded coverage and revised language.

Rule 3.1(D) is new.

Rule 3.1(E) is new, but has some overlap with aspects of Canon 2B ("lend the prestige of judicial office to advance the private interests of the judge or others").

Comment [1] is derived from the first paragraph of the Commentary following Canon 4B, although the subject matter of Canon 4B, Avocational Activities, is not addressed separately in the 2006 Draft.

Comment [2] is based upon the first paragraph of the Commentary following Canon 4A.

Comment [3] is new.

EXPLANATION OF BLACK-LETTER:

1. Rule 3.1, lead-in: restructured to permit extrajudicial activities generally, but subject to the listed prohibitions.

The restrictions set forth in Rule 3.1 are generally applicable to all of Canon 3, and are frequently cross-referenced in other Rules within Canon 3.

2. Rule 3.1(A): newly added as a specific instance of the prohibition contained in Rule 3.1(B).

One way to interfere with the proper performance of judicial duties is to become involved in extrajudicial activities that will lead to frequent disqualification.

3. Rule 3.1(B): added the italicized words interfere with the proper performance of *the judge's* judicial duties.

No substantive change is intended.

1 4. Rule 3.1(C): substituted the phrase “would appear to a reasonable person to
2 undermine” for “cast reasonable doubt on,” and broadened coverage from “act
3 impartially” to “the judge’s independence, integrity, or impartiality.”
4

5 The Joint Commission decided that the words “cast reasonable doubt on” carried too
6 much baggage from the criminal law arena, and did not accurately express the proper
7 level of certainty required. The substitute wording makes the standard turn upon the
8 thought processes of a “reasonable person,” which is a familiar standard in the law
9 generally and also suggestive of the “might reasonably be questioned” language of 28
10 U.S.C. § 455. Concern with impairment of a judge’s independence, integrity, and
11 impartiality, rather than impartiality alone, is a theme that runs throughout the 2006
12 Draft.
13

14 5. Rule 3.1(D): added a new provision to guard against overt or subtle efforts by a
15 judge to coerce others into participating in extrajudicial activities favored by the judge.
16

17 The Joint Commission heard testimony suggesting that coercion of this kind can be a
18 significant problem in small communities with only one judge or a small number of
19 judges, and a small number of lawyers who need to maintain good relations with the
20 judiciary.
21

22 6. Rule 3.1(E): added a new prohibition against using court facilities and other
23 resources for a judge’s extrajudicial activities, but with an exception for incidental use in
24 connection with a law-related event.
25

26 The rationale for the general restriction is that favoring a particular charity or other
27 extrajudicial event by providing access to facilities that are closed to others is an abuse of
28 the prestige of judicial office; see Rule 1.3. The rationale for the exception, however, is
29 that certain activities, such as opening a real courtroom for use in a moot court
30 competition or using a court’s conference room for a meeting of a bar association task
31 force that includes the judge, are not abuses of judicial office.
32

33 EXPLANATION OF COMMENTS: 34

35 [1] This Comment was reworded to confirm the special role that judges can play in
36 engaging in extrajudicial activities that involve the law, the legal system, and the
37 administration of justice, but also to approve participation in activities that are *not* law-
38 related, as long as they are undertaken in connection with not-for-profit organizations.
39

40 In both instances, the sense of the Comment is to be somewhat more encouraging than
41 was the 1990 Code, so that judges will reach out to the communities of which they are a
42 part, and avoid isolating themselves.
43

44 Specific examples in the 1990 Code, both in black letter (avocational activities such as
45 speaking and writing) and in the Commentary (improving criminal and juvenile justice

1 and expressing opposition to the persecution of lawyers and judges in other countries),
2 were removed as unnecessarily restrictive or of insufficiently general application.

3
4 [2] This Comment is a slightly revised version of the first paragraph of the existing
5 Commentary to Canon 4A.

6
7 No substantive change is intended.

8
9 [3] This Comment is modified from the second paragraph of the Commentary
10 following Canon 4A.

11
12 The cross-reference to Section 2C in the 1990 Code was to the provision on
13 discriminatory organizations, although the Commentary did not make that sufficiently
14 clear. In the 2006 Draft, the provision regarding discriminatory organizations has been
15 repositioned to Canon 3; accordingly, the cross-reference is to Rule 3.6.

16
17 [4] This is a new Comment to flesh out the intendment of Rule 3.1(D), which is also
18 new.

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1 **RULE 3.2**

2 *Appearances before Governmental Bodies and Consultation with*
3 *Government Officials*

4
5 **A judge shall not appear voluntarily at a public hearing before, or otherwise consult**
6 **with, an executive or a legislative body or official, except:**

7
8 (A) **in connection with matters concerning the law, the legal system, or the**
9 **administration of justice;**

10
11 (B) **in connection with matters about which the judge acquired knowledge**
12 **or expertise in the course of the judge's judicial duties; or**

13
14 (C) **when the judge is acting pro se in a matter involving the judge's legal**
15 **or pecuniary interests, or when the judge is acting in a fiduciary* capacity.**

16
17 **COMMENT**

18
19 [1] Judges possess special expertise in matters of law, the legal system, and the
20 administration of justice, and may properly share that expertise with governmental bodies
21 and executive or legislative branch officials.

22
23 [2] In appearing before governmental bodies or consulting with government officials,
24 judges must be mindful that they remain subject to other provisions of this Code, such as
25 Rule 1.3, prohibiting judges from using the prestige of office to advance their own or
26 others' interests, Rule 2.10, governing public comment on pending and impending
27 matters, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that
28 would appear to a reasonable person to undermine the judge's independence, integrity, or
29 impartiality.

30
31 [3] In general, it would be an unnecessary and unfair burden to prohibit judges from
32 appearing before governmental bodies or consulting with government officials on matters
33 that are likely to affect them as private citizens, such as zoning proposals affecting their
34 real property. In engaging in such activities, however, judges must not refer to their
35 judicial positions, and must otherwise exercise caution to avoid using the prestige of
36 judicial office.

RULE 3.2

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 3.2 is derived from Canon 4C(1). Minor revisions and additions have been made.

Rule 3.2(A) is essentially the same as the middle clause of Canon 4C(1).

Rule 3.2(B) is new.

Rule 3.2(C) is essentially the same as the last clause of Canon 4C(1), but with some minor modifications..

All the Comments are new; Canon 4C(1) had no substantive Commentary.

EXPLANATION OF BLACK-LETTER:

1. Rule 3.2 lead-in: added the word "voluntarily."

This was a minor but necessary addition, to make clear that judges who are formally summoned to appear before various governmental bodies may not refuse to appear on the ground that it would be "unethical" to do so.

2. Rule 3.2(A): no substantive change is intended.

3. Rule 3.2(B): a new paragraph.

This provision was added to reflect the growing recognition that in the course of carrying out their judicial duties, judges often gain expertise and special insight into legal and social problems and matters of public policy. The point of this provision is to establish that judges are permitted to share this information with other governmental bodies and officials.

4. Rule 3.2(C): modified the existing language by substituting "the judge's legal or pecuniary interests" for "the judge's interests," and by extending the exception to situations in which a judge is "acting in a fiduciary capacity."

EXPLANATION OF COMMENTS:

[1] This new Comment simply explains the rationale of Rule 3.2(A) and, implicitly, of Rule 3.2(B).

[2] This new Comment serves as a reminder that even when it is permissible under Rules 3.2(A) or 3.2(B) for a judge voluntarily to consult with other branch personnel, the judge remains subject to other restrictions of this Code, some of which are given as examples.

[3] This new Comment more narrowly describes the types of interests judges may address in their appearances before or consultations with government bodies. Under the

1 original language, the Commission believed, a judge might act pro se in connection with
2 any social, political, or social matter that “interested” the judge, which would allow the
3 exception to swallow the rule. Without resorting to legalistic definitions of legally
4 protected interests sufficient to justify formal intervention, the Comment distinguishes
5 between matters that affect judges directly as private citizens and more general causes.
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1 **RULE 3.3**

2 *Testifying as a Character Witness*

3
4 **A judge shall not testify as a character witness, or otherwise vouch for the character**
5 **of a person in a legal proceeding, except when duly summoned.**

6
7 **COMMENT**

8
9 [1] A judge who, without being subpoenaed, testifies as a character witness abuses
10 the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in
11 unusual circumstances where the demands of justice require, a judge should discourage a
12 party from requiring the judge to testify as a character witness.

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RULE 3.3

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 3.3 is derived from the last sentence of Canon 2B.

Comment [1] is based upon the last paragraph of the Commentary to Canon 2B.

EXPLANATION OF BLACK-LETTER:

1. Rule 3.3: substituted the phrase "except when duly summoned" for "testify voluntarily," and added the phrase "otherwise vouch for the character of a person in a legal proceeding."

Regarding the first revision, similar language ("properly summoned") appeared in the Commentary in the 1990 Code; thus, no substantive change was intended. The Joint Commission added the language about "vouching" because testimony under oath is not the only mode in which judges might abuse the prestige of judicial office when the character of a person is in issue in a legal proceeding.

EXPLANATION OF COMMENTS:

[1] This Comment is essentially the last sentence of the Commentary to Canon 2B.

Inasmuch as the Rule permits testifying as a character witness only upon receipt of a subpoena or other process, the Comment discourages testimony that is voluntary.

1 **RULE 3.4**

2 *Appointments to Governmental Positions*

3
4 **Except as required or permitted by law,* a judge shall not accept appointment to a**
5 **governmental committee, board, commission, or other governmental position, unless**
6 **it is one that concerns the law, the legal system, or the administration of justice.**

7
8 **COMMENT**

9
10 [1] A judge must assess the appropriateness of accepting extrajudicial assignments, in
11 terms of availability and allocation of resources, and with due regard for the requirements
12 of independence and impartiality of the judiciary. A judge should not serve on a
13 governmental commission that would require an excessive time commitment. A judge
14 should also consider whether the governmental body is addressing controversial subject
15 matter or is advocating only one side in a policy debate.

16
17 [2] A judge may represent his or her country, state, or locality on ceremonial
18 occasions in connection with historical, educational, or cultural activities. Such
19 representation on a single ceremonial occasion would not generally be considered to
20 constitute an "appointment," and does not present the risks that other appointments might
21 entail.

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RULE 3.4
REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 3.4 is derived from the first sentence of Canon 4C(2). It has been recast and simplified. The introductory phrase "except as required or permitted by law" was also added.

Comment [1] is based upon the first paragraph of the Commentary to Canon 4C(2), but again reworded and simplified. (The second paragraph of the Commentary to Canon 4C(2) was deleted as unnecessary and somewhat confusing.)

Comment [2] has been moved into the Comments from the last sentence of the black letter of Canon 4C(2).

EXPLANATION OF BLACK-LETTER:

1. Rule 3.4 lead-in: added the introductory phrase "except as required or permitted by law."

In some situations, a judicial officer is required to serve ex officio on certain boards or commissions, and in others judges are permitted to do so. In both situations, it must be assumed that the law in question has survived constitutional challenge based upon separation of powers concerns.

2. Rule 3.4: add the word "board" to the list of governmental entities for completeness. As has been done throughout the 2006 Draft, "improvement in the law, [etc.]" has been changed to "concerns the law, [etc.]," because what constitutes an "improvement" is almost always debatable.

EXPLANATION OF COMMENTS:

[1] The Commentary to Canon 4C(2) was modified by removing language that was merely repetitive of the black-letter text, and by deleting as infelicitous the reference to the need to "protect" the courts from controversy.

Comment [1] as revised more clearly reflects the point that service on governmental bodies should not be allowed to distract judges from their judicial duties or otherwise compromise their independence, impartiality, or integrity.

[2] This new Comment was moved from the black-letter text of Canon 4C(2) of the 1990 Code.

In the Joint Commission's view, the provision was of insufficiently general applicability to warrant treatment in the text.

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RULE 3.5

Use of Nonpublic Information

A judge shall not intentionally disclose or use nonpublic information* acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

COMMENT

[1] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to his or her judicial duties.

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RULE 3.5
REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 3.5 is based upon Canon 3B(12), with minor revisions, including addition of the word “intentionally” in the first line of the black-letter text.

Comment [1] is new.

EXPLANATION OF BLACK-LETTER:

1. Rule 3.5: In the 1990 Code, this provision (Canon 3B(12)) was found in the Canon on the performance of *judicial* duties. It was repositioned in the 2006 Draft to the Canon on personal and extrajudicial activity, because it is a form of misuse of judicial office for *personal* gain or advantage. The word “intentionally” was added so as not to impose discipline for mere carelessness.

EXPLANATION OF COMMENTS:

[1] This Comment is new, providing a link between using nonpublic information for personal advantage and abuse of judicial office.

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RULE 3.6

Affiliation with Discriminatory Organizations

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows* or should know that the organization practices invidious discrimination on one or more of the bases identified in paragraph (A). A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

COMMENT

[1] A judge's public manifestation of approval of invidious discrimination on any basis gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.

[2] An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or 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 be constitutionally 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.

1
2 **RULE 3.6**
3 **REPORTER'S EXPLANATION OF CHANGES**
4

5 **1990 MODEL CODE COMPARISON**
6

7 Rule 3.6 is based upon Canon 2C of the 1990 Code and its extensive Commentary. The
8 Commentary was revised substantially, including some substantive changes. Some
9 aspects of the Commentary in the 1990 Code were reworked and moved to the black-
10 letter text of Rule 3.6(B).

11
12 **EXPLANATION OF BLACK-LETTER:**
13

14 1. Rule 3.6(A): text is identical to Canon 2C of the 1990 Code, except expanded the
15 list of prohibited bases of invidious discrimination by adding gender, ethnicity, and
16 sexual orientation.

17
18 2. Rule 3.6(B): derived chiefly from the last paragraph of the Commentary to Canon
19 2C of the 1990 Code, revised to somewhat change its focus, and then moved to the black-
20 letter text because of its practical importance.

21
22 The older Commentary permitted a judge who was already a member of an organization
23 that engaged in invidious discrimination to remain a member for up to one year, if during
24 that year the judge took steps to change the organization's policy. Rule 3.6(B) instead
25 focuses upon the extent to which the judge actually *uses* the benefits or facilities provided
26 by the organization. Building upon ideas found earlier in the Commentary to Canon 2C,
27 the new Rule effectively provides that a judge cannot be the *initiating party* in scheduling
28 an event or taking advantage of the facilities, but is permitted to attend an isolated event
29 that has been scheduled or arranged by someone else, as long as it is clear that merely
30 attending cannot reasonably be seen as an endorsement of the organization and its
31 policies. A hypothetical that informed the Joint Commission's deliberations concerned a
32 wedding reception held at a discriminatory club that the judge could not join according to
33 Rule 3.6(A): the judge could not schedule his or her *own* child's reception at the club, but
34 could attend the reception of a friend or relative's child.

35
36 Because Rule 3.6(B) does not allow any active engagement with an organization that
37 practices invidious discrimination, the one-year "grace period" to try to effect change has
38 been eliminated. The Joint Commission concluded that any active involvement would
39 constitute too much of an endorsement of the organization; even good-faith behind-the-
40 scene activities would not sufficiently negate the public's perception of bias.

41
42 See Comment [3], which confirms that the lack of any black-letter exception regarding
43 membership means that a judge must resign immediately upon learning of the
44 organization's practices.
45
46

1 EXPLANATION OF COMMENTS:

2
3 [1] This Comment blends the first sentence of the Commentary to Canon 2C of the
4 1990 Code with language found in the long second paragraph of that Commentary.
5 Revised in part for style and in part for more completeness, the new Comment stresses
6 that support for invidious discrimination generally, and especially through participation
7 in organizations engaging in it, calls into question a judge's integrity and impartiality,
8 and creates an appearance of impropriety.
9

10 [2] Based closely upon the first paragraph of the Commentary to Canon 2C, this
11 Comment provides guidelines—but no hard-and-fast rules—to help determine when an
12 organization engages in invidious discrimination, thus falling under the ban of Rule
13 3.6(A). The key test is a functional one: whether an excluded applicant (not possessing
14 one of the listed characteristics) *would otherwise be eligible for admission to*
15 *membership*. In addition, the Comment explains that certain organizations practicing
16 some forms of discrimination cannot be said to be practicing *invidious* or *improper*
17 discrimination, either because the discrimination is based upon rationales that are not
18 socially harmful, or because the members of the organization have a constitutional right
19 to associate without governmental interference.
20

21 Although the Joint Commission received a large number of submissions arguing that a
22 particular organization either did or did not practice invidious discrimination, it
23 determined not to cast any judgments in stone. Policies of an organization might change
24 over time, as might the constitutional standard for judging whether an organization is
25 sufficiently “private” to be immune from governmental regulation of its membership
26 policies.
27

28 [3] This is a new Comment, replacing Commentary in the 1990 Code suggesting that
29 as an alternative to resigning, a judge might instead remain with the organization for up
30 to one year, while attempting to effect change from within. The Joint Commission chose
31 not to add such language to the text of Rule 3.6. Thus, Comment [3] requires immediate
32 resignation to comply with Rule 3.6(A).
33

34 [4] This is a new Comment, but its tenor was implicit in the Commentary to Canon
35 2C of the 1990 Code. Comment [4] makes clear that while many religious organizations
36 engage in some forms of discrimination, and some religious organizations may engage in
37 some invidious discrimination, participation by a judge in any bona fide religious
38 organization cannot be prohibited or punished by governmental authorities because of the
39 constitutional guarantee of the free exercise of religion.
40

41 [5] This is a new Comment, adopted by the Joint Commission after receiving
42 considerable commentary and after considerable debate. Like religious organizations,
43 military organizations often engage in discrimination and sometimes engage in
44 discrimination that would be found to be invidious in other contexts. The Joint
45 Commission concluded, however, that the practical difficulties involved in enforcing a
46 ban on holding membership in military organizations, and the necessity for uniform rules

1 across the military services, justified an interpretation that service in state and national
2 military organizations does not violate this Rule.

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1 **RULE 3.7**

2 ***Participation in Educational, Religious, Charitable, Fraternal, or Civic***
3 ***Organizations and Activities***

4
5 (A) Subject to the requirements of Rule 3.1, a judge may participate in
6 activities sponsored by organizations or governmental entities concerned
7 with the law, the legal system, or the administration of justice, and those
8 sponsored by or on behalf of educational, religious, charitable, fraternal, or
9 civic organizations not conducted for profit, including the following
10 activities:

11
12 (1) assisting such an organization or entity in planning related to
13 fund-raising, and participating in the management and investment of
14 the organization's or entity's funds;

15
16 (2) soliciting* contributions* for such an organization or entity,
17 but only from members of the judge's family,* or from judges over
18 whom the judge does not exercise supervisory or appellate authority;

19
20 (3) soliciting membership for such an organization or entity, even
21 though the membership dues or fees generated may be used to
22 support the objectives of the organization or entity, but only if the
23 organization or entity is concerned with the law, the legal system, or
24 the administration of justice;

25
26 (4) appearing or speaking at, receiving an award or other
27 recognition at, being featured on the program of, and permitting his
28 or her title to be used in connection with an event of such an
29 organization or entity, but if the event serves a fund-raising purpose,
30 the judge may participate only if the event concerns the law, the legal
31 system, or the administration of justice;

32
33 (5) making recommendations to such a public or private fund-
34 granting organization or entity in connection with its programs and
35 activities, but only if the organization or entity is concerned with the
36 law, the legal system, or the administration of justice; and

37
38 (6) serving as an officer, director, trustee, or nonlegal advisor of
39 such an organization or entity, unless it is likely that the organization
40 or entity:

41
42 (a) will be engaged in proceedings that would ordinarily
43 come before the judge; or

44
45 (b) will frequently be engaged in adversary proceedings in
46 the court of which the judge is a member, or in any court

1 **subject to the appellate jurisdiction of the court of which the**
2 **judge is a member.**

3
4 **(B) A judge may encourage lawyers to provide pro bono publico legal**
5 **services.**

6
7 **COMMENT**

8
9 [1] The activities permitted by paragraph (A) generally include those sponsored by or
10 undertaken on behalf of public or private not-for-profit educational institutions, and other
11 not-for-profit organizations, including law-related, charitable, and other organizations.

12
13 [2] Even for law-related organizations, a judge should consider whether the
14 membership and purposes of the organization, or the nature of the judge's participation in
15 or association with the organization, would conflict with the judge's obligation to refrain
16 from activities that reflect adversely upon a judge's independence, integrity, and
17 impartiality.

18
19 [3] Mere attendance at an event, whether or not the event serves a fund-raising
20 purpose, does not constitute a violation of paragraph 4(A). It is also generally permissible
21 for a judge to serve as an usher or a food server or preparer, or to perform similar
22 functions, at fund-raising events sponsored by educational, religious, charitable, fraternal,
23 or civic organizations. Such activities are not solicitation and do not present an element
24 of coercion or abuse the prestige of judicial office.

25
26 [4] In addition to appointing lawyers to serve as counsel for indigent parties in
27 individual cases, a judge may promote broader access to justice by encouraging lawyers
28 to participate in pro bono publico legal services, if in doing so the judge does not employ
29 coercion, or abuse the prestige of judicial office. Such encouragement make take many
30 forms, including providing lists of available programs, training lawyers to do pro bono
31 publico legal work, and participating in events recognizing lawyers who have done pro
32 bono publico work.

33
34 [5] Identification of a judge's position in educational, religious, charitable, fraternal,
35 or civic organizations on letterhead used for fund-raising or membership solicitation does
36 not violate this Rule. The letterhead may list the judge's title or judicial office if
37 comparable designations are used for other persons.

RULE 3.7

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 3.7(A) and its Comments are based upon Canon 4C(3) and its subparagraphs and their Commentary. The 1990 material has been thoroughly reorganized in the 2006 Draft, however, making line-by-line comparison difficult. Virtually all the concepts in Canon 4C(3) have been retained, although some have been made more expansive or more restrictive. Moreover, some aspects of Canon 4C(3) were moved to Rule 3.1 because of their general applicability.

The specific reference in Rule 3.7(B) to pro bono publico lawyering is new.

EXPLANATION OF BLACK-LETTER:

1. Rule 3.7(A) lead-in: added “[s]ubject to the requirements of Rule 3.1,” and included law-related public and private organizations and entities, as well as most nonprofit organizations, even if not law related, within the reach of this paragraph; eliminated specific reference to service as an officer, director, or nonlegal advisor, and placed discussion of those specific situations in the subparagraphs.

This provision is integral to the reorganization of the material on participation in extrajudicial activities, and of Canon 3 generally. Canon 4C(3) of the 1990 Code referred at the outset to service as an officer or a director of various not-for-profit organizations, and then used several subparagraphs to deal with activities in which such officers or directors engaged. The lead-in to Rule 3.7(A) establishes its coverage of essentially the same organizations—public and private, law related and not law related—but then deals in the following subparagraphs with *all* activities related to those organizations, *including* service as an officer or a director.

The opening phrase, “[s]ubject to the requirements of Rule 3.1,” is not greatly different in meaning from “subject to the other requirements of this Code,” which appeared at the end of Canon 4C(3). Organizationally, however, the specific cross-reference in the 2006 Draft focuses attention upon particular problems especially closely associated with extrajudicial and personal activities—such as coercion, undue influence, or interference with the primacy of judicial duties—which is why they were gathered together in a single Rule at the beginning of Canon 3.

2. Rule 3.7(A)(1): repositioned, but substantially the same as the first clause of Canon 4C(3)(b)(i) of the 1990 Code.

The difference, however, as explained above in connection with the lead-in to Rule 3.7(A), is that the 1990 Code allowed these activities (assistance in planning fund-raising and management and investment of an organization's funds) *only* in connection with service as an officer, director, trustee, or nonlegal advisor, or the somewhat nebulous “as

1 a member or otherwise.” In the 2006 Draft, these activities are permissible without more,
2 if participation in the activities of the organization or entity itself is permissible.

3
4 3. Rule 3.7(A)(2): substantially the same as the second clause of Canon 4C(3)(b)(i),
5 except added soliciting funds from family members as permissible activity.

6
7 The repositioning of this provision into one of the subparagraphs of Rule 3.7(A) has the
8 same significance as described above: it will apply to all judges who engage in this form
9 of extrajudicial activity, not just those who serve as officers, directors, and the like.
10 Judges were already permitted by the 1990 Code to solicit contributions for charities
11 from judges over whom they did not exercise supervisory or appellate authority, because
12 the element of coercion is largely missing, and there is little likelihood that the judge
13 making the contribution would be perceived as attempting to influence the judge making
14 the solicitation. The same rationales support extending permission to judges to solicit this
15 kind of contribution from their own family members.

16
17 4. Rule 3.7(A)(3): based upon some aspects of Canon 4C(3)(b)(iii), but with other
18 elements added or deleted (or repositioned elsewhere in Canon 3 of the 2006 Draft).

19
20 The basic idea of prohibiting a judge from soliciting membership in an organization
21 (where charging membership dues is essentially a fund-raising device) is retained. The
22 rationale is essentially the same as that in the 1990 Code: the risk that persons contacted
23 will feel coerced into joining, or will attempt to curry favor with a sitting judge by
24 joining.

25
26 In the 2006 Draft, however, it is not necessary to advert specifically to the element of
27 coercion—that is covered by the cross-reference to Rule 3.1. Beyond this, the Joint
28 Commission decided to limit the permission granted to solicit membership to
29 membership in law-related organizations—one of several places in Canon 3 where this
30 line is drawn. It was felt that solicitation of membership in a law-related organization,
31 such as a bar association or Moot Court Society, would be perceived as more natural or
32 more appropriate than soliciting membership in a fine arts society or the American Red
33 Cross. This perception is related, at least indirectly, to the thematic requirement of
34 avoiding abuse of the prestige of judicial office. A person who loves opera or is a
35 dedicated member of an environmental protection organization, and who also happens to
36 be a judge, should not use that position as an added reason for someone else to join the
37 cause. On the other hand, it is not inappropriate for judges to use their positions as leaders
38 in the legal community to increase membership in law-related organizations.

39
40 5. Rule 3.7(A)(4): a new provision for the Model Code of Judicial Conduct, based
41 upon Commentary to Canons 5B(2) and 5B(3) of the Code of Conduct for United States
42 Judges, and reversing the thrust of Commentary to Canon 4C(3)(b).

43
44 The Code of Conduct for United States Judges provides that as a general matter, judges
45 may *not* participate in the fund-raising activities of charitable and other civic
46 organizations (other than by attending), which is similar to Commentary in the 1990

1 Code. In context, however, the federal provision appears to be limited to non-law-related
2 organizations and activities. The Joint Commission adopted the same general stance in
3 Rule 3.7(A)(4), but made the implicit exception explicit: a judge *is* permitted to be a
4 featured speaker or participant at an event that has a fund-raising purpose, *but only if the*
5 *organization or entity is a law-related one*. The rationale for making this distinction is the
6 same as that for Rule 3.7(A)(3).
7

8 6. Rule 3.7(A)(5): essentially the same as Canon 4C(3)(b)(ii) of the 1990 Code,
9 except that the authority to make recommendations to fund-granting organizations and
10 entities is not limited to officers, directors, and others directly associated with the
11 organization or entity.
12

13 This is consistent with the revised organization of Canon 3 generally, and Rule 3.7
14 specifically, as noted above in connection with the lead-in to Rule 3.7(A) and Rule
15 3.7(A)(1).
16

17 7. Rule 3.7(A)(6): essentially identical to Canon 4C(3)(a) of the 1990 Code.
18

19 In the 1990 Code, there was some redundancy between this provision and Canon 4C(3)
20 itself. The main paragraph already dealt generally with service as officer, director, and
21 the like, while subparagraph (a) dealt with restrictions on such service. Rule 3.7(A)(6)
22 makes no substantive change in the combined effect of those two provisions, but makes
23 explicit that service is allowed in both private organizations and public entities, *whether*
24 *or not they are law related*, as long as the two caveats are satisfied.
25

26 Unlike situations in which a judge is soliciting funds or members, participating as an
27 officer or a director does not present the dangers of coercion or abuse of the prestige of
28 judicial office; accordingly, neither the 1990 Code nor the 2006 Draft differentiate in this
29 area along that axis.
30

31 8. Rule 3.7(B): a new provision, encouraging judges to provide leadership in
32 increasing *pro bono publico* lawyering in their respective jurisdictions.
33

34 This provision is consistent with the thrust of Rule 3.7(A). It was placed in a separate
35 paragraph because paragraph (A) deals with a large variety of organizations and entities,
36 with varied goals and programs, whereas paragraph (B) perforce must refer to specific
37 activities, whether or not conducted in connection with a particular organization or entity.
38

39 EXPLANATION OF COMMENTS: 40

41 [1] This new Comment clarifies that the restructuring of Rule 3.7(A) was intended to
42 make it applicable to all public and private not-for-profit organizations and entities.
43 Previously, there was some confusion about the status of public and private universities,
44 including their law schools (which are obviously law related). Thus, it is permissible, for
45 example, for a judge to serve as a trustee of a private university (rather than merely its
46 law school), as long as it is not conducted for profit.

1
2 [2] This Comment is derived from Commentary to Canon 4C(3) of the 1990 Code,
3 but it has been thoroughly revised to provide more clarity. The revised Comment serves
4 as a reminder that participation in law-related activities is permitted more often than is
5 participation in non-law-related activities, *but that even in connection with the former*,
6 other requirements of the 2006 Draft may counsel caution or even abstention from the
7 activity. Obvious examples include participating in activities sponsored by organizations
8 that practice invidious discrimination, or serving as the president of a major university
9 (the time commitment associated with the latter making it impossible for a judge to attend
10 to judicial duties).

11
12 [3] This is a new Comment designed to provide a safe harbor for certain minor and
13 noncoercive activities undertaken in connection with an organization's or entity's fund-
14 raising efforts. When a judge donates time to make pancakes at a pancake breakfast, for
15 example, or serves as an usher or other facilitator at an event, the dangers associated with
16 direct solicitation of funds are not present. It is fanciful to imagine that someone will
17 make a larger donation, merely because a judge is tending the barbeque pit at a charity
18 picnic.

19
20 The Joint Commission stopped short, however, of giving as specific examples situations
21 involving the handling of money, such as when a judge serves as ticket taker or cashier
22 (at a charity bingo night, for example, or a charity auction). At the same time, these
23 activities were not specifically excluded, either. Whether such activities are appropriate
24 depends upon analysis of the overall event, and the significance of the judge's
25 participation. As long as there is no coercion—even subtle and unstated coercion—and as
26 long as the judge's position as a judge is not being exploited, the activity is permissible.

27
28 [4] This new Comment, responsive to new Rule 3.7(B), makes clear that judges may
29 encourage lawyers to engage in *pro bono publico* service generally, quite apart from
30 situations in which judges may appoint counsel for indigent parties in individual cases.
31 Although the Joint Commission assumed that participation in organizations that promote
32 *pro bono publico* lawyering would generally be permissible under rule 3.7(A), it wanted
33 to stress the importance of such service by including a specific provision on this topic.

34
35 [5] This Comment is based upon parts of the second paragraph of the Commentary to
36 Canon 4C(3)(b) of the 1990 Code, but simplified. Letterhead including a judge's name
37 and position, even when used for fund-raising or membership solicitation purposes, is not
38 coercive and does not abuse the prestige of judicial office, as long as the judge is
39 identified in the same way as other persons on the letterhead. It must be assumed, of
40 course, that the judge's service in some official position in the organization or entity is
41 itself appropriate under other provisions of Rules 3.7 and 3.1.

1 **RULE 3.8**

2 ***Appointments to Fiduciary Positions***

3
4 (A) A judge shall not accept appointment to serve in a fiduciary* position,
5 such as executor, administrator, trustee, guardian, attorney in fact, or other
6 personal representative, except for the estate, trust, or person of a member of
7 the judge's family,* and then only if such service will not interfere with the
8 proper performance of judicial duties.

9
10 (B) A judge shall not serve in a fiduciary position if the judge as fiduciary
11 will likely be engaged in proceedings that would ordinarily come before the
12 judge, or if the estate, trust, or ward becomes involved in adversary
13 proceedings in the court on which the judge serves, or one under its appellate
14 jurisdiction.

15
16 (C) A judge acting in a fiduciary capacity shall be subject to the same
17 restrictions on engaging in financial activities that apply to a judge
18 personally.

19
20 **COMMENT**

21
22 [1] If a person who is serving in a fiduciary position becomes a judge, he or she must
23 comply with this Rule as soon as reasonably practicable, but in no event later than one
24 year after becoming a judge. See Application section, Part VI.

25
26 [2] A judge should recognize that other restrictions imposed by this Code may
27 conflict with a judge's obligations as a fiduciary; in such circumstances, a judge should
28 resign as fiduciary. For example, serving as a fiduciary might require frequent
29 disqualification of a judge under Rule 2.11.

RULE 3.8

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 3.8(A) is essentially identical to Canon 4E(1), with only minor stylistic revisions.

Rule 3.8(B) is essentially identical to Canon 4E(2), also with only minor revisions.

Rule 3.8(C) bears the same relationship to Canon 4E(3).

Comment [1] is based upon the first paragraph of the Commentary to Canon 4E, modified only in relation to the timing of the applicability of the Rule.

Comment [2] is similar to the second paragraph of Commentary to Canon 4E, but recast.

EXPLANATION OF BLACK-LETTER:

1. Rule 3.8(A): changed the phrase "A judge shall not serve" to "A judge shall not accept appointment to."

No significant substantive change is intended. The new language hints at more of a *choice* on the judge's part—a choice which must be rejected, except in the case of family members.

2. Rule 3.8(B): changed the phrase "shall not serve as a fiduciary" to "shall not serve in a fiduciary position."

No substantive change is intended, except that serving in a fiduciary *position* connotes a formal appointment and acceptance, as in Rule 3.8(A).

3. Rule 3.8(C): changed the phrase "the same restrictions that apply" to "shall be subject to the same restrictions."

The change is stylistic only.

EXPLANATION OF COMMENTS:

[1] There is no significant change from the first paragraph of the 1990 Commentary. The purpose in each case is to cross-reference the Application section, to determine when a newly elected or appointed judge, who is *already* serving in a fiduciary capacity, must comply with this Rule.

[2] This is a slight recasting of the second paragraph of the 1990 Commentary. The Comment serves as a reminder that in addition to the restrictions set forth in Rule 3.8, other provisions of the 2006 Draft may implicate the permissibility of serving in a fiduciary capacity. For example, if serving as a fiduciary (even for a family member, which is generally permitted) would cause the judge frequently to be disqualified under Rule 2.11, the judge must resign as fiduciary to avoid violation of Rule 3.1(A).

1 **RULE 3.9**

2 *Service as Arbitrator or Mediator*

3
4 **A judge shall not act as an arbitrator or a mediator or perform other judicial**
5 **functions apart from the judge's official duties unless expressly authorized by law.***

6
7 **COMMENT**

8
9 [1] This Rule does not prohibit a judge from participating in arbitration, mediation, or
10 settlement conferences performed as part of assigned judicial duties. Rendering dispute
11 resolution services apart from those duties, whether or not for pecuniary gain, is
12 prohibited unless it is expressly authorized by law.

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1 **REPORTER'S EXPLANATION OF CHANGES**

2
3 **1990 MODEL CODE COMPARISON**

4
5 Rule 3.9 is based upon Canon 4F, slightly recast.

6
7 Comment [1] is the same as the Commentary to Canon 4F, except that an additional
8 sentence was added.

9
10 **EXPLANATION OF BLACK-LETTER:**

11
12 1. Rule 3.9: changed the phrase "in a private capacity" to "apart from the judge's
13 official duties," and slightly revised the text in other respects.

14
15 The only substantive change was made in recognition of the fact that a judge could be
16 called upon to provide dispute resolution services *for another governmental entity*. Thus,
17 the phrase "in a private capacity" was deemed to be insufficiently broad.

18
19 **EXPLANATION OF COMMENTS:**

20
21 [1] The first sentence of this Comment is carried forward from the 1990
22 Commentary, and is obvious. The second sentence explains that the prohibition extends
23 to judges going outside their regular judicial duties to assist in dispute resolution, whether
24 or not for pecuniary gain, unless doing so is expressly authorized by law, such as by court
25 rule.

26
27 The Joint Commission heard considerable testimony and received a large number of
28 comments on this issue. Some objected that allowing judges to participate in private
29 "rent-a-judge" programs for pecuniary gain would be tantamount to allowing judges to
30 trade on their status as judges, thus abusing the prestige of judicial office. Others feared
31 that if judges routinely performed extrajudicial "judicial" services, even without
32 compensation, it would create public confusion about the true role of the judiciary as an
33 independent branch of the government, thus diminishing respect for the judicial system.
34 Still others were concerned that extrajudicial participation even in *pro bono publico*
35 mediation and arbitration would distract judges from their primary obligations, and might
36 even lead some judges to use the judicial office as a kind of training program to launch
37 post-judicial careers.

38
39 At the same time, several judges were enthusiastically in favor of permitting judges to
40 provide alternative dispute resolution services to other court systems or to private parties,
41 but without compensation. In their view, this would provide an important public service
42 to the community, demystify the law, and integrate judges into the community as Canon
43 3 generally encourages.

44
45 The Joint Commission was sympathetic to the latter view, but was uneasy about creating
46 a blanket exception that could have the downsides described above. Thus, the

1 compromise position stated in Canon 4F of the 1990 Code (but not explained in
2 Commentary) was continued in the 2006 Draft, and explained in the second sentence of
3 Comment [1]: the default rule is that all such activities are prohibited, whether or not
4 compensation is involved, but it is still open to individual courts or jurisdictions to
5 authorize such activities as conditions warrant.

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1 **RULE 3.10**

2 *Practice of Law*

3
4 **A judge shall not practice law, except that a judge may act pro se and may, without**
5 **compensation, give legal advice to and draft or review documents for a member of**
6 **the judge's family.***

7
8 **COMMENT**

9
10 [1] A judge may act pro se in all legal matters, including matters involving litigation
11 and matters involving appearances before or other dealings with governmental bodies. A
12 judge must not use the prestige of office to advance the judge's personal or family
13 interests. See Rule 1.3.

14
15 [2] Although a judge is permitted to provide uncompensated legal advice and
16 counseling to a member of the judge's family, the judge is prohibited from serving as the
17 family member's lawyer in any forum.

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RULE 3.10

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 3.10 is essentially identical to Canon 4G.

Comment [1] is based upon the first paragraph of the Commentary to Canon 4G.

Comment [2] is based upon the second paragraph of the Commentary to Canon 4G.

EXPLANATION OF BLACK-LETTER:

1. Rule 3.10: blended the two sentences of Canon 4G into one, replacing "notwithstanding" with "except that."

No substantive change is intended.

EXPLANATION OF COMMENTS:

[1] The first paragraph of the Commentary to Canon 4G was revised slightly and recast. "A judge must not abuse the prestige of office" was replaced with "A judge must not use the prestige of office to advance." No substantive change is intended.

[2] The second paragraph of the Commentary was shortened and recast: "so long as the judge receives no compensation" was replaced by "uncompensated legal advice." In addition, the reminder that this provision does not extend beyond giving legal advice to or reviewing documents for family members was changed by substituting "serving as the family member's lawyer in any forum" for "act as an advocate or negotiator . . . in a legal matter." The Joint Commission took the view that in some informal settings, such as a dispute in a neighborhood association or a purely private and minor commercial dispute, a judge may serve as an "advocate" for a family member without becoming his or her lawyer and thus practicing law in violation of Rule 3.10.

1 **RULE 3.11**

2 ***Financial, Business, or Remunerative Activities***

3
4 **(A) A judge may hold and manage investments of the judge and members**
5 **of the judge's family.***

6
7 **(B) A judge shall not serve as an officer, director, manager, general**
8 **partner, advisor, or employee of any business entity except that a judge may**
9 **manage or participate in:**

10
11 **(1) a business closely held by the judge or member of the judge's**
12 **family; or**

13
14 **(2) a business entity primarily engaged in investment of the**
15 **financial resources of the judge or members of the judge's family.**

16
17 **(C) A judge shall not engage in financial activities permitted under**
18 **paragraphs (A) and (B) if they will:**

19
20 **(1) interfere with the proper performance of judicial duties;**

21
22 **(2) lead to frequent disqualification of the judge;**

23
24 **(3) involve the judge in frequent transactions or continuing**
25 **business relationships with lawyers or other persons likely to come**
26 **before the court on which the judge serves; or**

27
28 **(4) result in violation of other provisions of this Code.**
29

30 **COMMENT**

31
32 [1] Judges are generally permitted to engage in financial activities, including
33 managing real estate and other investments for themselves or for members of their
34 families. Participation in these activities, like participation in other extrajudicial
35 activities, is subject to the requirements of this Code. For example, it would be improper
36 for a judge to spend so much time on business activities that it interferes with the
37 performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge
38 to use his or her official title or appear in judicial robes in business advertising, or to
39 conduct his or her business or financial affairs in such a way that disqualification is
40 frequently required. See Rules 1.3 and 2.11.

41
42 [2] As soon as practicable without serious financial detriment, the judge must divest
43 himself or herself of investments and other financial interests that might require frequent
44 disqualification or otherwise violate this Rule.

RULE 3.11
REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 3.11(A) is derived from Canon 4D(2), excluding the last two clauses.

Rule 3.11(B) is essentially the same as Canon 4D(3).

Rule 3.11(C) combines some new provisions with elements of Canon 4D(1)(b) and Canon 4D(4).

Comment [1] is largely new, but incorporates several aspects of the Commentary to Canon 4D.

Comment [2] is derived from the black-letter text of Canon 4D(4).

EXPLANATION OF BLACK-LETTER:

1. Rule 3.11(A): retained the core language of Canon 4D(2), but deleted the lead-in phrase "subject to the requirements of this Code," as well as the references to "real estate" holdings and "other remunerative activities."

Rule 3.11 represents a reorganization of most of the material governing extrajudicial financial activities found in Canon 4D of the 1990 Code, except for the gift-related provisions in Canon 4D(5).

In Rule 3.11(A), the initial "subject to the requirements of this Code" was deleted as no longer necessary, in light of Rule 3.11(C)(4), as well as Comment [1]. The reference to "real estate" was deemed too specific for inclusion in the black-letter text, and moved to Comment [1] as an example of the kinds of investments that a judge might hold or manage. The last clause, "engage in other remunerative activity," was removed as far too broad, and thus inconsistent with other aspects of Rule 3.11. For example, the remunerative activity of being a director or employee of a for-profit business entity is prohibited by Rule 3.11(B), unless the business is closely held by the judge or the judge's family.

2. Rule 3.11(B): identical to Canon 4D(3) of the 1990 Code, except eliminated the caveat "subject to the requirements of this Code" as unnecessary, for the reasons stated immediately above.

The Joint Commission discussed the substantive point of Rule 3.11(B), which is to prohibit judges from engaging in off-bench remunerative activity, except in the case of closely held family businesses, including the investment of financial resources. This exception has been criticized as inconsistent with the rationale for the basic prohibition, and as discriminating against judges who do not have family businesses.

Two alternatives were considered, but ultimately rejected. First, it would have been possible to allow judges broadly to engage in remunerative extrajudicial activities, as long as they did not interfere with the performance of judicial duties, lead to frequent

1 disqualification, or otherwise violate the restrictions now found in Rule 3.11(C). The
2 other possibility would have been to eliminate the family business exception, and require
3 all judges equally to endure whatever financial hardship comes with ascending the bench.
4 After considerable discussion, the Joint Commission elected to maintain the status quo of
5 the 1990 Code as a reasonable middle ground.

6
7 3. Rule 3.11(C): a new provision that gathers in one place some of the caveats about
8 extrajudicial financial activities found throughout Canon 4D of the 1990 Code, while
9 adding additional caveats. These caveats are meant to apply as restrictions on otherwise
10 permissible activities.

11
12 The specific language of Rule 3.11(C)(1) is taken from the fourth paragraph of the
13 Commentary following Canon 4D(1); the concept is also drawn in part from the second
14 paragraph of the Commentary to Canon 4D(3): otherwise appropriate business activities
15 (falling within the family business exception) would become improper if “participation
16 requires significant time away from judicial duties.”

17
18 Rule 3.11(C)(2) is a paraphrase of Canon 4D(4), which requires a judge to minimize the
19 number of cases in which the judge is disqualified. (The phraseology used in the 2006
20 Draft, “will lead to frequent disqualification of the judge,” is used elsewhere in the
21 Code—most significantly for present purposes in Rule 3.1(A).)

22
23 Rule 3.11(C)(3) is taken from Canon 4D(1)(b), and Rule 3.11(C)(4) is a catchall that
24 makes some other caveats found in Canon 4D unnecessary. (For example, the Canon
25 4D(1)(a) provision, “may reasonably be perceived to exploit the judge’s judicial
26 position,” was not retained in the 2006 Draft, because of the prohibition against abusing
27 the prestige of judicial office already found in Rule 1.3.)

28
29 **EXPLANATION OF COMMENTS:**

30
31 [1] This Comment is new, but restates the rationale of several of the provisions
32 gathered into Rule 3.11(C), giving some practical examples.

33
34 [2] This Comment is new, but is essentially the same as the black-letter text of Canon
35 4D(4).

1 **RULE 3.12**

2 ***Compensation for Extrajudicial Activities***

3
4 **A judge may accept reasonable compensation for extrajudicial activities permitted**
5 **by this Code or other law* unless such acceptance would appear to a reasonable**
6 **person to undermine the judge's independence,* integrity,* or impartiality.***
7

8 **COMMENT**

9
10 [1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties,
11 or other compensation for speaking, teaching, writing, and other extrajudicial activities,
12 provided the compensation is reasonable and commensurate with the task performed. The
13 judge should be mindful, however, that judicial duties must take precedence over other
14 activities. See Rule 2.1.

15
16 [2] Compensation derived from extrajudicial activities may be subject to public
17 reporting. See Rule 3.15.
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RULE 3.12
REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 3.12 is based upon Canon 4H(1), but only as it relates to compensation, not reimbursement of expenses associated with extrajudicial activities. (Reimbursement is governed by Rule 3.14 in the 2006 Draft.)

Comment [1] is based upon the black-letter text of Canon 4H(1)(A) and some aspects of the Commentary following Canon 4H, but substantially revised.

Comment [2] is new, and serves as a cross-reference to the public reporting provisions of the 2006 Draft. (Public reporting was addressed in Canon 4H(2), but in connection with compensation only, not reimbursement of expenses. Rule 3.15 of the 2006 Draft addresses all forms of public reporting—compensation, gifts, other things of value, reimbursement of expenses, and waivers of fees.)

EXPLANATION OF BLACK-LETTER:

1. Rule 3.12: removed references to reimbursement of expenses, and substituted “reasonable compensation” for “shall not exceed for a person who is not a judge would receive for the same activity”; replaced the phrase “give the appearance of influencing the judge’s performance of judicial duties or otherwise give the appearance of impropriety” with “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

The Joint Commission completely reorganized the material on compensation, reimbursement for expenses, acceptance of gifts and the like, and public reporting of all these. After the reorganization, Rule 3.12 deals only with compensation for permissible extrajudicial activities. (Public reporting of the compensation received, as well as all other reporting, is governed by Rule 3.15.)

The language measuring the reasonableness of compensation by what a non-judge would receive was deleted as unsound: if a judge were to be compensated for teaching a law school course on judicial ethics, or giving a lecture on evidentiary rulings, for example, the judges services would in fact likely be more valuable than those of a non-judge. On the other hand, it was recognized that significant overcompensation could be a mask for an improper gift or an attempt to influence the judge’s conduct in office. Accordingly, the language in Canon 4H(1) about appearances was not jettisoned altogether, but was instead replaced by the language used throughout Canon 3 of the 2006 Draft: “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

1 EXPLANATION OF COMMENTS:

2
3 [1] This Comment is new, but is based in part upon some of the language in Canon
4 4H of the 1990 Code and Rule 3.12 of the 2006 Draft.

5
6 [2] This Comment is new, and makes a cross-reference to the public reporting
7 requirement. Some aspects of public reporting were treated in Canon 4H(2), but now all
8 are treated in Rule 3.15.

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1 **RULE 3.13**

2 ***Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other***
3 ***Things of Value***

4
5 (A) A judge shall not accept any gifts, loans, bequests, benefits, or other
6 things of value, if acceptance is prohibited by law* or would appear to a
7 reasonable person to undermine the judge's independence,* integrity,* or
8 impartiality.*
9

10 (B) Unless otherwise prohibited by law, or by paragraph (A), a judge may
11 accept the following without publicly reporting such acceptance:

12
13 (1) items with little intrinsic value, such as plaques, certificates,
14 trophies, and greeting cards;

15
16 (2) gifts, loans, bequests, benefits, or other things of value from
17 friends, relatives, or other persons, including lawyers, whose
18 appearance or interest in a proceeding pending* or impending*
19 before the judge would in any event require disqualification of the
20 judge under Rule 2.11;

21
22 (3) ordinary social hospitality;

23
24 (4) commercial or financial opportunities and benefits, including
25 special pricing and discounts, and loans from lending institutions in
26 their regular course of business, if the same opportunities and benefits
27 or loans are made available on the same terms to similarly situated
28 persons who are not judges;

29
30 (5) rewards and prizes given to competitors or participants in
31 random drawings, contests, or other events that are open to persons
32 who are not judges;

33
34 (6) scholarships, fellowships, and similar benefits or awards, if
35 they are available to similarly situated persons who are not judges,
36 based upon the same terms and criteria;

37
38 (7) books, magazines, journals, audiovisual materials, and other
39 resource materials supplied by publishers on a complimentary basis
40 for official use; or

41
42 (8) gifts, awards, or benefits associated with the business,
43 profession, or other separate activity of a spouse, a domestic partner,*
44 or other family member of a judge residing in the judge's household,*
45 but that incidentally benefit the judge.
46

1 **(C) Unless otherwise prohibited by law or by paragraph (A), a judge may**
2 **accept the following items, and must report such acceptance to the extent**
3 **required by Rule 3.15:**

4
5 **(1) gifts incident to a public testimonial;**

6
7 **(2) invitations to the judge and the judge's spouse, domestic**
8 **partner, or guest to attend without charge:**

9
10 **(a) an event associated with a bar-related function or other**
11 **activity relating to the law, the legal system, or the**
12 **administration of justice; or**

13
14 **(b) an event associated with any of the judge's educational,**
15 **civic, or charitable activities permitted by this Code, if the**
16 **same invitation is offered to nonjudges who are engaged in**
17 **similar ways in the activity as is the judge; and**

18
19 **(3) gifts, loans, bequests, benefits, or other things of value, if the**
20 **source is a party or other person, including a lawyer, who has come or**
21 **is likely to come before the judge, or whose interests have come or are**
22 **likely to come before the judge.**

23
24 **(D) A judge shall urge a spouse, a domestic partner, or members of the**
25 **judge's family residing in the judge's household not to accept gifts or other**
26 **things of value that the judge is prohibited from accepting.**

27
28 **COMMENT**

29
30 [1] Whenever a judge accepts a gift or other thing of value without paying fair market
31 value, there is a risk that the benefit might be viewed as intended to influence the judge's
32 decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits,
33 according to the magnitude of the risk. Paragraph (B) identifies circumstances in which
34 the risk that the acceptance would appear to undermine the judge's independence,
35 integrity, or impartiality is low, and explicitly provides that such items need not be
36 publicly reported. As the value of the benefit or the likelihood that the source of the
37 benefit will appear before the judge increases, the judge is either prohibited under
38 paragraph (A) from accepting the gift, or required under paragraph (C) to publicly report
39 it.

40
41 [2] Gift-giving between friends and relatives is a common occurrence, and ordinarily
42 does not create an appearance of impropriety or cause reasonable persons to believe that
43 the judge's independence, integrity, or impartiality has been compromised. In addition,
44 when the appearance of friends or relatives in a case would require the judge's
45 disqualification under Rule 2.11, there would be no opportunity for a gift to influence the
46 judge's decision making. Paragraph (B)(2) places no restrictions upon the ability of a

1 judge to accept gifts or other things of value from friends or relatives under these
2 circumstances, and does not require public reporting.

3
4 [3] Businesses and financial institutions frequently make available special pricing,
5 discounts, and other benefits, either in connection with a temporary promotion or for
6 preferred customers, based upon longevity of the relationship, volume of business
7 transacted, and other factors. A judge may freely accept such benefits if they are available
8 to the general public, or if the judge qualifies for the special price or discount according
9 to the same criteria as are applied to persons who are not judges. As an example, loans
10 provided at generally prevailing interest rates are not gifts, but a judge could not accept a
11 loan from a financial institution at below-market interest rates unless the same rate was
12 being made available to the general public for a certain period of time or only to
13 borrowers with specified qualifications that the judge also possesses.

14
15 [4] If a gift or other benefit is given to a judge's spouse, domestic partner, or member
16 of the judge's family residing in the judge's household, it might be viewed as an attempt
17 to evade the restrictions of Rule 3.13 and to influence the judge indirectly. Therefore, a
18 judge must inform these individuals of the ethical limitations placed upon the judge in
19 this regard and discourage them from accepting gifts or other benefits that the judge
20 cannot accept. The situation is different when the gift is being made primarily to the other
21 person, and the judge is merely an incidental beneficiary.

22
23 [5] Rule 3.13 does not apply to contributions to a judge's campaign for judicial
24 office. Such contributions are governed by other Rules of this Code, including Rules 4.3
25 and 4.4.

RULE 3.13

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 3.13 is based upon Canon 4D(5), its subsections (a) through (h), and the related Commentary. The Joint Commission so thoroughly reorganized this material, however, that it is virtually impossible to make meaningful line-by-line or paragraph-by-paragraph comparisons. (In the analysis of the Text and Comments that follows, the source of the language used in the 2006 Draft will be identified, where germane.)

EXPLANATION OF BLACK-LETTER:

1. Rule 3.13(A): expanded the universe of coverage to include "other things of value," and linked the overall prohibition of acceptance to what "would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."

This paragraph has some surface similarity to Canon 4D(5), but ultimately establishes a different organization and a different mode of analysis. Canon 4D(5) established a general prohibition against a judge accepting gifts or loans or similar items from anyone, but then proceeded to make exceptions in subsections (a) through (h). This was a plausible organization, but the exceptions were often stated infelicitously, the relationship between accepting an item and publicly reporting it was not clearly stated, and subsection (h) in particular was so broad that it called into question the meaningfulness of the earlier exceptions.

For example, Canon 4D(5)(d) permitted acceptance of gifts from relatives or friends "for a special occasion," if the gift was "fairly commensurate with the occasion and the relationship." But what if the occasion is not "special," and who defines that term? It would be intolerable for later discipline of a judge to turn upon whether the gift was "commensurate" with the occasion, besides being a needless intrusion into the privacy of the judge and his or her friends. Subsection (h) appeared to allow any other gift or loan, as long as the donor was not likely to come before the judge. Theoretically, this would permit acceptance of a gift from a friend that was not for a special occasion—but then what was the point of making that distinction in Canon 5D(d)?

Rule 3.13(A) also begins with a list of gifts and things of value that judges are prohibited from accepting. There are no exceptions. The later provisions in Rule 3.13 permit acceptance of some items, sometimes accompanied by public reporting and sometimes not, but in each instance permission is granted only after it has been determined that acceptance has not already been barred by paragraph (A).

This different relationship between earlier and later provisions within Rule 3.13 is characteristic of the Joint Commission's tiered approach to this subject matter. In essence, paragraph (A) establishes a first tier of situations in which acceptance is not permitted at all, paragraph (B) deals with acceptance of items that are so non-problematic

1 that they do not require the transparency of public reporting, and paragraph (C) deals
2 with the tier of items that are not so troublesome as to call for the flat ban of paragraph
3 (A), but where public reporting is required to maintain the public's confidence in the
4 judiciary.

5
6 The dividing line between gifts and other items that cannot be accepted at all and those
7 that may be accepted, possibly subject to the requirement of public reporting, is when
8 acceptance "would appear to a reasonable person to undermine the judge's independence,
9 integrity, or impartiality." The language is new, and is used thematically throughout
10 Canon 3 of the 2006 Draft. It requires judges in the first instance to put themselves in the
11 shoes of a hypothetical "reasonable person," subject to later oversight by disciplinary
12 authorities. Although postulating what an undefined "reasonable person" would think
13 about a situation introduces considerable uncertainty of its own, such a standard is
14 commonly used in the law, and is glossed by significant case law and other authority.

15
16 2. Rule 3.13(B): established a "tier" of gifts and other things of value that may be
17 accepted without limitation and without public reporting, borrowing several items from
18 the exceptions set forth in the subsections of Canon 5D(5), but with an eye toward
19 classifying them according to the 2006 Draft's organizational scheme.

20
21 In the 1990 Code, the exceptions to the basic rule were set out serially, without further
22 classification, and—except in the catchall provision of Canon 5D(5)(h)—without
23 advertent to whether public reporting was a condition of acceptance. In the 2006 Draft,
24 the Joint Commission gathered in Rule 3.13(B) the items it judged were sufficiently non-
25 threatening to the integrity of the system to warrant no further regulation, including
26 public reporting.

27
28 For example, subparagraphs (4), (5), and (6) deal with situations in which the listed
29 benefits are equally available to similarly situated persons who are not judges, thus
30 allaying any fears that the benefit is being extended as a subtle or overt attempt to
31 influence the judge's decision making or to curry favor with the judge. Subparagraph (2)
32 is similar to Canon 4D(5)(e), but describes the category more clearly. If someone's
33 appearance or interest in a case pending or impending before a particular judge would
34 require the disqualification of the judge, then any gift or favor from that person could not
35 influence the judge—because by definition the judge would no longer be sitting on the
36 case.

37
38 3. Rule 3.13(C): established the third "tier" of items that may be accepted by a
39 judge—still assuming the item is not one that is prohibited altogether by Rule 3.13(A);
40 these items, while not causing a reasonable person to fear that the judge's independence,
41 integrity, or impartiality would be undermined, are sufficiently troublesome that public
42 reporting is required.

43
44 Placement of these items in Rule 3.13(C) rather than paragraphs (A) or (B) represents the
45 Joint Commission's assessment of the level of suspicion that attends the acceptance of
46 various benefits. In subparagraph (C)(2), for example, the judgment was made that the

1 gift of a free ticket to attend a law-related event must be reported, so that others might be
2 able to assess whether a particular judge had a closer-than-usual association with a
3 particular bar association or organization. On the other hand, if a judge is invited to
4 attend, free of charge, an event sponsored by a non-law-related organization, the judge
5 cannot accept *at all* unless the additional condition of equal treatment is met. If that
6 condition is met, however, then public reporting should be sufficient to allay fears about
7 possible lack of impartiality. (This distinction between events and organizations that are
8 or are not law related is another theme that occurs throughout Canon 3 in the 2006 Draft.)
9

10 An even better example is provided by Rule 3.13(C)(3), which addresses the same issue
11 as Canon 4D(5)(h), but according to the more discriminating analysis of the 2006 Draft.
12 Under the 1990 Code, a judge cannot accept any gift or favor from a lawyer or party who
13 has come or is likely to come before the judge. (The further requirement of publicly
14 reporting items over \$150 appears to apply to other gifts, not the above.) If this literally
15 means to impose a lifetime ban once a lawyer or the lawyer's firm "has appeared," even
16 once, before the judge, it is far more stringent than necessary, and unworkable in practice,
17 as a judge's career lengthens.
18

19 Under Rule 3.13(C)(3), however, the default rule is that such gifts may be accepted as
20 long as they are reported—which will give another party in litigation an opportunity to
21 consider whether disqualification of the judge is required. More important, placement of
22 this item in paragraph (C) assumes that the size of a particular gift or other circumstances
23 will not cause a reasonable person to fear that the judge's impartiality will be impaired. If
24 a reasonable person would take that view, then the gift is wholly impermissible to accept,
25 because it will have first failed the test of Rule 3.13(C)(A).
26

27 4. Rule 3.13(D): substantially similar to Canon 4D(5), except added "spouse" and
28 "domestic partner," and made reference to "other things of value."
29

30 No significant substantive change is intended. These adjustments conform this Rule to
31 other usages throughout the 2006 Draft.
32

33 EXPLANATION OF COMMENTS:

34
35 [1] This is a new Comment, explaining the three-tiered approach adopted in the 2006
36 Draft and the rationale for it.
37

38 [2] This is a new Comment, explaining the classification in Rule 3.13 of gifts and
39 other things of value given to a judge. This subject was treated in both Canon 4D(5)(d)
40 (gifts for special occasions) and Canon 4D(5)(E) (judge would be disqualified in any
41 event), but without an explanation of the rationale. Rule 3.13(B)(2) does not distinguish
42 between different types of gifts from this category of donor, and Comment [2] provides
43 the common rationale.
44

45 [3] This is a new Comment, providing the rationale for and giving a concrete example
46 of the principle that acceptance of benefits and other things of value that are generally

1 available to non-judges on the same basis as they are available to judges causes no ethical
2 concerns; accordingly, these items may be freely accepted, without public reporting.

3
4 [4] This Comment builds on Canon 4D(5) and Rule 3.13(D), which replaced it. The
5 point in both instances is that while a code of judicial ethics cannot directly bind family
6 members and others close to a judge, it is still obligatory for a judge to urge such
7 individuals not to put the judge in a difficult position by accepting gifts and benefits that
8 the judge could not, because others might perceive the benefit as intended for the judge,
9 but given indirectly.

10
11 Comment [4] adds discussion of a contrasting scenario, however, which is new. Rule
12 3.13(B)(8) states that when a gift or other benefit is given to a family member, because of
13 the family member's business or other activities, and the judge benefits merely
14 incidentally, fear that the judge is being influenced or importuned is no longer realistic,
15 and those gifts need not be reported by the judge. Comment [4] explains the rationale for
16 this new provision.

17
18 [5] This Comment paraphrases the first paragraph of the Commentary following
19 Canon 4D(5). The Comment thus makes clear that gifts, donations, or contributions to a
20 judge's campaign for judicial office are governed entirely by Canon 4, which includes
21 regulation of campaign committees.

1 **RULE 3.14**

2 ***Reimbursement of Expenses and Waivers of Fees or Charges***

3
4 (A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law,* a
5 judge may accept reimbursement of necessary and reasonable expenses for
6 travel, food, lodging, or other incidental expenses, or a waiver or partial
7 waiver of fees or charges for registration, tuition, and similar items, from
8 sources other than the judge's employing entity, if the expenses or charges
9 are associated with the judge's participation in extrajudicial activities
10 permitted by this Code.

11
12 (B) Reimbursement of expenses for necessary travel, food, lodging, or
13 other incidental expenses shall be limited to the actual costs reasonably
14 incurred by the judge and, when appropriate to the occasion, by the judge's
15 spouse, domestic partner,* or guest.

16
17 (C) A judge who accepts reimbursement of expenses or waivers or partial
18 waivers of fees or charges on behalf of the judge or the judge's spouse,
19 domestic partner, or guest shall publicly report such acceptance as required
20 by Rule 3.15.

21
22 **COMMENT**

23
24 [1] Educational, civic, religious, fraternal, and charitable organizations often sponsor
25 meetings, seminars, symposia, dinners, awards ceremonies, and similar events. Judges are
26 encouraged to attend educational programs, as both teachers and participants, in law-
27 related and academic disciplines, in furtherance of their duty to remain competent in the
28 law. Participation in a variety of other extrajudicial activity is also permitted and
29 encouraged by this Code.

30
31 [2] Not infrequently, sponsoring organizations invite certain judges to attend
32 seminars or other events on a fee-waived or partial-fee-waived basis, and sometimes
33 include reimbursement for necessary travel, food, lodging, or other incidental expenses.
34 A judge's decision whether to accept reimbursement of expenses or a waiver or partial
35 waiver of fees or charges in connection with these or other extrajudicial activities must be
36 based upon an assessment of all the circumstances. The judge must undertake a
37 reasonable inquiry to obtain the information necessary to make an informed judgment
38 about whether acceptance would be consistent with the requirements of this Code.

39
40 [3] A judge must assure himself or herself that acceptance of reimbursement or fee
41 waivers would not appear to a reasonable person to undermine the judge's independence,
42 integrity, or impartiality. The factors that a judge should consider when deciding whether
43 to accept reimbursement or a fee waiver for attendance at a particular activity include:

44
45 (a) whether the sponsor is an accredited educational institution or bar
46 association rather than a trade association or a for-profit entity;

- 1 (b) whether the funding comes largely from numerous contributors rather than
- 2 from a single entity and is earmarked for programs with specific content;
- 3 (c) whether the content is related or unrelated to the subject matter of
- 4 litigation pending or impending before the judge, or to matters that are likely to
- 5 come before the judge;
- 6 (d) whether the activity is primarily educational rather than recreational, and
- 7 whether the costs of the event are reasonable and comparable to those associated
- 8 with similar events sponsored by the judiciary, bar associations, or similar groups;
- 9 (e) whether information concerning the activity and its funding sources is
- 10 available upon inquiry;
- 11 (f) whether the sponsor or source of funding is generally associated with
- 12 particular parties or interests currently appearing or likely to appear in the judge's
- 13 court, thus possibly requiring disqualification of the judge under Rule 2.11;
- 14 (g) whether differing viewpoints are presented; and
- 15 (h) whether a broad range of judicial and nonjudicial participants are invited,
- 16 whether a large number of participants are invited, and whether the program is
- 17 designed specifically for judges.
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RULE 3.14
REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 3.14(A) is derived from Canon 4H(1), except that the provisions relating to compensation have been moved to Rule 3.12. Rule 3.14 addresses reimbursement of expenses and waivers of fees or charges only.

Rule 3.14(B) is essentially identical to Canon 4H(1)(b).

Rule 3.14(C) is new as it relates to public reporting of reimbursements and waivers of charges, but is similar to Canon 5(H)(2), which deals with public reporting of compensation received.

Comments [1] through [3] are new.

EXPLANATION OF BLACK-LETTER:

1. Rule 3.14(A): revised to apply to reimbursement of expenses only rather than both reimbursement and compensation, but added waivers of fees and charges as equivalent to reimbursement for purposes of this Rule. By cross-reference to other Rules, required judges to consider whether attending an event on a fee-waived or expenses-reimbursed basis would require later disqualification or undermine the judge's independence, integrity, or impartiality.

Rule 3.14 and its subparagraph (A) are integral to the total reorganization of Canons 4D and 4H of the 1990 Code. In the 2006 Draft, compensation for extrajudicial activity is no longer linked with reimbursement for expenses, but is addressed separately in Rule 3.12. Reimbursement, in turn, is addressed separately in Rule 3.14. (Other aspects of Canon 4D, such as engaging in financial and business activities, and receipt of gifts and other things of value, are covered by Rules 3.11 and 3.13, respectively.)

The Joint Commission recognized that attendance at tuition-waived and expenses-paid seminars and similar events has been a matter of public controversy and media attention. It heard much testimony and received numerous comments about the need for more transparency regarding both the amount of fees waived or expenses reimbursed and the nature and sponsorship of the event attended on a cost-free or reduced-cost basis. In response, the Joint Commission elected to treat *acceptance* of such benefits separately from acceptance of gifts and other things of value generally (see Rule 3.13), and to require *public reporting* of the benefits received together with other public reporting (see Rule 3.15). In truth, acceptance of reimbursements and acceptance of waivers are *both* functionally and legally the same as acceptance of gifts or other things of value, and it would have been possible to fold *all* this material into Rule 3.13. The Joint Commission concluded that separating these two particular forms of acceptance for treatment in a separate Rule (Rule 3.14) made Canon 3 more readable and easier to follow. Moreover, treatment in a separate Rule allowed more careful attention to be paid to whether the invitation to attend should be accepted at all.

1 Although Rule 3.14 applies to events other than privately funded educational seminars,
2 most of the testimony and comments received by the Joint Commission focused upon that
3 aspect of the problem, as noted above. In the Joint Commission's view, judicial education
4 of all kinds is of great value; it helps keep judges current on recent developments, alerts
5 them to future trends, and opens their minds to new ways of thinking about the law.
6 Moreover, given the strained condition of the budgets of many judicial systems across the
7 country, it may not be possible for states to provide adequate educational opportunities
8 themselves or to reimburse judges with state funds for expenses associated with privately
9 organized judicial education programs. For that reason, Rule 3.14—like Canon 4H(1)—
10 permits judges to accept reimbursement for reasonably necessary expenses associated
11 with otherwise permissible extrajudicial activities, and Rule 3.14 further permits
12 acceptance of waivers of otherwise applicable fees or charges.

13
14 A critical aspect of Canon 4H(1) is that permission to accept benefits in connection with
15 extrajudicial activities is conditioned upon the acceptance *not* giving the appearance of
16 influencing the judge in the performance of judicial duties and *not* otherwise creating the
17 appearance of impropriety. *Rule 3.14 carries this condition forward, for both*
18 *reimbursements and waivers of fees and charges, but uses language more in harmony*
19 *with other parts of Canon 3 and the entire 2006 Draft.* Thus, by cross-referencing Rules
20 3.1 and 3.13(A), Rule 3.14(A) makes clear that a judge may *not* accept the proffered
21 benefits *if doing so would appear to a reasonable person to undermine the judge's*
22 *independence, integrity, or impartiality, or if accepting would, for example, lead to*
23 *frequent disqualification or otherwise interfere with the proper performance of the*
24 *judge's judicial duties.*

25
26 2. Rule 3.14(B): substantially the same as Canon 4H(1)(b) of the 1990 Code, except
27 applies to both reimbursements and waivers of fees and charges, and applies to an
28 accompanying domestic partner as well as to a spouse or guest.

29
30 3. Rule 3.14(C): similar to the public reporting requirement set out in Canon 4H(2),
31 except applies to reimbursements and waivers *rather than* compensation. In addition, the
32 actual mechanism for reporting is not contained in Rule 3.14(C) itself; the Rule instead
33 cross-references Rule 3.15, which describes all the public reporting required by various
34 Rules in Canon 3.

35
36 EXPLANATION OF COMMENTS:

37
38 [1] This is a new Comment, stating the rationale for allowing judges to accept these
39 two forms of benefits, and also making clear that Rule 3.14 can apply to any permissible
40 extrajudicial activity, not just privately funded educational programs.

41
42 [2] This is a new Comment focusing attention upon educational programs
43 specifically. Not only must a judge consider whether accepting an invitation to attend on
44 an expenses-paid or fee-waived basis would be proper (under Rules 3.1, 3.13(A), and
45 3.14(A)), but the judge also has an affirmative duty to make reasonable inquiry into the
46 factors that should inform that decision.

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Near the end of its deliberations, the Joint Commission became aware of guidelines newly issued by the Judicial Conference of the United States on this very subject. The Guidelines contained an innovative way of helping judges make the inquiry just noted. Any program that wished to invite judges to attend on a cost-free basis was required to provide considerable information about funding, sponsorship, and program content *in advance*, and have this information available to judges receiving an invitation. The Joint Commission was of the view that this “pre-registration” approach had great merit, but that it would be awkward to put it into effect across many jurisdictions, rather than in the single federal jurisdiction for which it was designed. Thus, rather than impose an as-yet untried regime across the board, the Joint Commission thought it more prudent to wait to see how the federal program developed, and whether it would be copied by individual state jurisdictions.

[3] This is a new Comment that provides guidance to judges in making the determination required by Rule 3.14(A), as explained in Comment [2]. Comment [3] closely follows revised Advisory Opinion 67 of the Committee on Codes of Conduct of the Judicial Conference of the United States, which the Joint Commission found to be helpful. Unlike the Guidelines described immediately above, the factors discussed in Opinion 67 can usefully be employed by each individual judge who has been issued an invitation to attend a cost-free event and is considering whether to accept.

1 **RULE 3.15**

2 ***Reporting Requirements***

3
4 (A) A judge shall publicly report the amount or value of:

5
6 (1) compensation received for extrajudicial activities as permitted
7 by Rule 3.12;

8
9 (2) gifts and other things of value as permitted by Rule 3.13(C),
10 unless the value of such items, alone or in the aggregate with other
11 items received from the same source in the same calendar year, does
12 not exceed \$[insert amount]; and

13
14 (3) reimbursement of expenses and waiver of fees or charges
15 permitted by Rule 3.14(A), unless the amount of reimbursement or
16 waiver, alone or in the aggregate with other reimbursements or
17 waivers received from the same source in the same calendar year,
18 does not exceed \$[insert amount].

19
20 (B) When public reporting is required by paragraph (A), a judge shall
21 report the date, place, and nature of the activity for which the judge received
22 any compensation; the description of any gift, loan, bequest, benefit, or other
23 thing of value accepted; and the source of reimbursement of expenses or
24 waiver or partial waiver of fees or charges.

25
26 (C) The public report required by paragraph (A) shall be made at least
27 annually, except that for reimbursement of expenses and waiver or partial
28 waiver of fees or charges, the report shall be made within thirty days
29 following the conclusion of the event or program.

30
31 (D) Reports made in compliance with this Rule shall be filed as public
32 documents in the office of the clerk of the court on which the judge serves or
33 other office designated by law,* and, when technically feasible, posted on the
34 website of that court or office.
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RULE 3.15
REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 3.15 is based upon Canon 4H(2). However, consistent with the reorganization of Canon 3, this provision is no longer limited to public reporting of compensation received for extrajudicial activities, but includes public reporting of gifts and other things of value accepted pursuant to Rule 3.13, and reimbursement of expenses and waiver of fees and charges accepted pursuant to Rule 3.14.

Technical matters such as what and where to report, on what schedule, and how the information will become transparent to the general public are derived from Canon 4H(2) as well, but with several modifications.

EXPLANATION OF BLACK-LETTER:

1. Rule 3.15(A): required that in addition to mandatory reporting of compensation received, gifts and other things of value accepted, as well as reimbursements of expenses and waivers of fees and charges, also be reported; deleted a provision on treatment of a spouse's compensation or income in community property states.

An important feature of the reorganization of Canon 3 is the gathering of all the public reporting provisions in one place, now Rule 3.15(A), and then cross-referencing this Rule in the Rules where reportable events are discussed.

This organization has the important side effect of removing discussion of monetary limits (if any) from the earlier Rules, and repositioning it in Rule 3.15(A). Thus, for example, Canon 4D(5)(h) of the 1990 Code, which established a reporting threshold of \$150 per item, has been recast and moved to Rule 3.15(A)(2). Instead of establishing a threshold amount for all jurisdictions, which might have to be raised periodically in any event on account of inflation, the Joint Commission required establishment of an annual threshold amount that takes into account aggregation of items from the same source. The actual dollar amount, however, was left for each jurisdiction to supply according to conditions there.

The reminder in the 1990 Code that community property earned by a judge's spouse is not attributable to the judge for purposes of public reporting was deleted as unnecessary: all the substantive provisions in Canon 3 of the 2006 Draft speak of the judge receiving compensation or receiving gifts or reimbursement of expenses.

Canon 4I of the 1990 Code, which required disclosure of a judge's income and assets in some circumstances, was not included in the 2006 Draft. The Joint Commission concluded that this form of public reporting is already pervasively regulated, by statute or court rule, in virtually every jurisdiction; thus, its inclusion in a Code of Judicial Conduct would be superfluous.

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2. Rule 3.15(B): provided a simple (and obvious) list of what must be reported, when reporting is required under paragraph (A).

3. Rule 3.15(C): addressed the frequency of mandatory public reporting.

The default requirement of reporting no less frequently than annually is consistent with Canon 4H(2) of the 1990 Code. Reporting in connection with reimbursements and waivers of fees or charges, however, is required within thirty days of the underlying event, not on a calendar-based schedule, such as quarterly or monthly.

The Joint Commission borrowed this special reporting requirement from the guidelines recently issued by the Judicial Conference of the United States. Such a requirement can be implemented immediately, is responsive to the most pressing need for transparency, and should not be overly burdensome to judges. In situations involving reimbursement in particular, a judge will have to gather receipts for submission to the reimbursing entity anyway, and can easily make a copy to satisfy the public reporting requirement. Even with fee waivers, it should not be difficult for the judge to obtain a statement of what the fees or charges would have been for a person who was not being offered a waiver. Indeed, as this requirement becomes better known, it is likely that the sponsoring entity granting the waiver will develop this information on its own, and provide the requisite statement as a matter of course.

4. Rule 3.15(D): directed that the reports required by Rule 3.15 be located in a central place and made accessible to the public; given that transparency is the whole point animating Rule 3.15, this is an obvious requirement—it tracks Canon 4H(2), except that in light of technological advances in the last fifteen years, it refers to posting on the appropriate website when feasible, to facilitate public access.

CANON 4

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**A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR
CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR
IMPARTIALITY OF THE JUDICIARY.**

CANON 4

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Canon 4 of the 2006 Draft is derived from Canon 5 of the 1990 Code, as amended in 1997, 1999, and 2003—the last time in response to the decision of the U.S. Supreme Court in *Minnesota Republican Party v. White*, 536 U.S. 765 (2002). A high percentage of the material in Canon 5 was retained, but was reorganized along several axes. The reorganized Canon 4 differentiates more clearly between sitting judges who are and are not also judicial candidates and nonjudges who become candidates. Canon 4 continues to differentiate between judicial candidates running in public elections and those seeking appointment, and, within the former category, it further differentiates between partisan, nonpartisan, and retention elections.

EXPLANATION OF BLACK-LETTER:

1. Replaced “shall refrain from” with “shall not engage in.”

The new language is sharper, less passive, and fits more comfortably with the language of the other three Canons.

2. Replaced “political activity” with “political or campaign activity.”

This more accurately reflects the actual content of Canon 4. Canon 5 of the 1990 Code also dealt with more than just “political” activity; the incompleteness of the old Canon title has been remedied.

3. Replaced “inappropriate activity” with “activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”

The undefined term “inappropriate” was vague and insufficiently precise for use in a statement of overarching principles. Concern that the independence, integrity, or impartiality of the judiciary (including candidates who aspire to join the judiciary) will be compromised or undermined is a pervasive theme in the 2006 Draft.

1 **RULE 4.1**

2 ***Political and Campaign Activities of Judges and Judicial Candidates in***
3 ***General***

4
5 (A) Except as permitted by law,* or by Rules 4.2, 4.3, and 4.4, a judge or a
6 judicial candidate* shall not:

7
8 (1) act as a leader in, or hold an office in, a political organization;*

9
10 (2) make speeches on behalf of a political organization;

11
12 (3) publicly endorse or oppose a candidate for any public office;

13
14 (4) solicit funds for, pay an assessment to, or make a contribution*
15 to a political organization or a candidate for public office;

16
17 (5) attend or purchase tickets for dinners or other events
18 sponsored by a political organization or a candidate for public office;

19
20 (6) publicly identify himself or herself as a candidate of a political
21 organization;

22
23 (7) seek, accept, or use endorsements from a political
24 organization;

25
26 (8) personally solicit* or accept campaign contributions other than
27 through a campaign committee authorized by Rule 4.4;

28
29 (9) use or permit the use of campaign contributions for the private
30 benefit of the judge, the candidate, or others;

31
32 (10) use court staff, facilities, or other court resources in a
33 campaign for judicial office;

34
35 (11) knowingly,* or with reckless disregard for the truth, make any
36 false or misleading statement;

37
38 (12) make any statement that would reasonably be expected to
39 affect the outcome or impair the fairness of a matter pending* or
40 impending* in any court; or

41
42 (13) in connection with cases, controversies, or issues that are likely
43 to come before the court, make pledges, promises, or commitments
44 that are inconsistent with the impartial* performance of the
45 adjudicative duties of judicial office.
46

1 **(B) A judge or judicial candidate shall take reasonable measures to**
2 **ensure that other persons do not undertake, on behalf of the judge or judicial**
3 **candidate, any activities prohibited under paragraph (A).**
4

5 **COMMENT**

6
7 GENERAL CONSIDERATIONS

8
9 [1] Even when subject to public election, a judge plays a role different from that of a
10 legislator or executive branch official. Rather than making decisions based upon the
11 expressed views or preferences of the electorate, a judge makes decisions based upon the
12 law and the facts of every case. Therefore, in furtherance of this interest, judges and
13 judicial candidates must, to the greatest extent possible, be free and appear to be free
14 from political influence and political pressure. This Canon imposes narrowly tailored
15 restrictions upon the political and campaign activities of all judges and judicial
16 candidates, taking into account the various methods of selecting judges.
17

18 [2] When a person becomes a judicial candidate, this Canon becomes applicable to
19 his or her conduct.
20

21 PARTICIPATION IN POLITICAL ACTIVITIES

22
23 [3] Public confidence in the independence and impartiality of the judiciary is eroded
24 if judges or judicial candidates are perceived to be subject to political influence. Although
25 judges and judicial candidates may register to vote as members of a political party, they
26 are prohibited by paragraph (A)(1) from assuming leadership roles in political
27 organizations.
28

29 [4] Paragraphs (A)(2) and (A)(3) prohibit judges and judicial candidates from making
30 speeches on behalf of political organizations or publicly endorsing or opposing
31 candidates for public office, respectively, to prevent them from abusing the prestige of
32 judicial office to advance the interests of others. See Rule 1.3. These Rules do not
33 prohibit candidates from campaigning on their own behalf, or from endorsing or
34 opposing candidates for the same judicial office for which they are running. See Rules
35 4.2(B)(2) and 4.2(B)(3).
36

37 [5] Although members of the families of judges and judicial candidates are free to
38 engage in their own political activity, including running for public office, there is no
39 “family exception” to the prohibition in paragraph (A)(3) against a judge or candidate
40 publicly endorsing candidates for public office. A judge or judicial candidate must not
41 become involved in, or publicly associated with, a family member’s political activity or
42 campaign for public office. To avoid public misunderstanding, judges and judicial
43 candidates should take, and should urge members of their families to take, reasonable
44 steps to avoid any implication that they endorse any family member’s candidacy or other
45 political activity.
46

1 [6] Judges and judicial candidates retain the right to participate in the political
2 process as voters in both primary and general elections. For purposes of this Canon,
3 participation in a caucus-type election procedure does not constitute public support for or
4 endorsement of a political organization or candidate, and is not prohibited by paragraphs
5 (A)(2) or (A)(3).

6
7 STATEMENTS AND COMMENTS MADE DURING A CAMPAIGN FOR JUDICIAL OFFICE

8
9 [7] Judicial candidates must be scrupulously fair and accurate in all statements made
10 by them and by their campaign committees. Paragraph (A)(11) obligates candidates and
11 their committees to refrain from making statements that are false or misleading, or that
12 omit facts necessary to make the communication considered as a whole not materially
13 misleading.

14
15 [8] Judicial candidates are sometimes the subject of false, misleading, or unfair
16 allegations made by opposing candidates, third parties, or the media. For example, false
17 or misleading statements might be made regarding the identity, present position,
18 experience, qualifications, or judicial rulings of a candidate. In other situations, false or
19 misleading allegations may be made that bear upon a candidate's integrity or fitness for
20 judicial office. As long as the candidate does not violate paragraphs (A)(11), (A)(12), or
21 (A)(13), the candidate may make a factually accurate public response. In addition, when
22 an independent third party has made unwarranted attacks on a candidate's opponent, the
23 candidate may disavow the attacks, and request the third party to cease and desist.

24
25 [9] Subject to paragraph (A)(12), a judicial candidate is permitted to respond directly
26 to false, misleading, or unfair allegations made against him or her during a campaign,
27 although it is preferable for someone else to respond if the allegations relate to a pending
28 case.

29
30 [10] Paragraph (A)(12) prohibits judicial candidates from making comments that
31 might impair the fairness of pending or impending judicial proceedings. This provision
32 does not restrict arguments or statements to the court or jury by a lawyer who is a judicial
33 candidate, or rulings, statements, or instructions by a judge that may appropriately affect
34 the outcome of a matter.

35
36 PLEDGES, PROMISES, OR COMMITMENTS INCONSISTENT WITH IMPARTIAL PERFORMANCE
37 OF THE ADJUDICATIVE DUTIES OF JUDICIAL OFFICE

38
39 [11] The role of a judge is different from that of a legislator or executive branch
40 official, even when the judge is subject to public election. Campaigns for judicial office
41 must be conducted differently from campaigns for other offices. The narrowly drafted
42 restrictions upon political and campaign activities of judicial candidates provided in
43 Canon 4 allow candidates to conduct campaigns that provide voters with sufficient
44 information to permit them to distinguish between candidates and make informed
45 electoral choices.

1 [12] Paragraph (A)(13) makes applicable to both judges and judicial candidates the
2 prohibition that applies to judges in Rule 2.10(B), relating to pledges, promises, or
3 commitments that are inconsistent with the impartial performance of the adjudicative
4 duties of judicial office.

5
6 [13] The making of a pledge, promise, or commitment is not dependent upon, or
7 limited to, the use of any specific words or phrases; instead, the totality of the statement
8 must be examined to determine if a reasonable person would believe that the candidate
9 for judicial office has specifically undertaken to reach a particular result. Pledges,
10 promises, or commitments must be contrasted with statements or announcements of
11 personal views on legal, political, or other issues, which are not prohibited. When making
12 such statements, a judge should acknowledge the overarching judicial obligation to apply
13 and uphold the law, without regard to his or her personal views.

14
15 [14] A judicial candidate may make campaign promises related to judicial
16 organization, administration, and court management, such as a promise to dispose of a
17 backlog of cases, start court sessions on time, or avoid favoritism in appointments and
18 hiring. A candidate may also pledge to take action outside the courtroom, such as
19 working toward an improved jury selection system, or lobbying for more funds to
20 improve the physical plant and amenities of the courthouse.

21
22 [15] Judicial candidates may receive questionnaires or requests for interviews from the
23 media and from issue advocacy or other community organizations that seek to learn their
24 views on disputed or controversial legal or political issues. Paragraph (A)(13) does not
25 specifically address judicial responses to such inquiries. Depending upon the wording and
26 format of such questionnaires, candidates' responses might be viewed as pledges,
27 promises, or commitments to perform the adjudicative duties of office other than in an
28 impartial way. To avoid violating paragraph (A)(13), therefore, candidates who respond
29 to media and other inquiries should also give assurances that they will keep an open mind
30 and will carry out their adjudicative duties faithfully and impartially if elected.
31 Candidates who do not respond may state their reasons for not responding, such as the
32 danger that answering might be perceived by a reasonable person as undermining a
33 successful candidate's independence or impartiality, or that it might lead to frequent
34 disqualification. See Rule 2.11.

RULE 4.1

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 4.1(A)(1) is virtually identical to Canon 5A(1)(a).

Rule 4.1(A)(2) is identical to Canon 5A(1)(c).

Rule 4.1(A)(3) is essentially the same as Canon 5A(1)(b).

Rule 4.1(A)(4) is virtually identical to the first clause of Canon 5A(1)(e).

Rule 4.1(A)(5) is closely patterned on the second clause of Canon 5A(1)(e), and includes the concept embodied in Canon 5A(1)(d), which was eliminated.

Rule 4.1(A)(6) is new, but the prohibition it establishes is removed by later Rules in Canon 4 in some situations.

Rule 4.1(A)(7) is new, and is similar to Rule 4.1(A)(6) in terms of its relationship to other Rules in Canon 4.

Rule 4.1(A)(8) is derived from the first two sentences of Canon 5C(2), but employs different terminology and applies only to solicitation of campaign contributions, not "publicly stated support."

Rule 4.1(A)(9) is essentially identical to the last sentence of Canon 5C(2).

Rule 4.1(A)(10) is new, but is a corollary of one aspect of Canon 2B: lending the prestige—here the trappings—of judicial office to advance a judge's interests.

Rule 4.1(A)(11) is based upon Canon 5A(3)(d)(ii), but substantially revised.

Rule 4.1(A)(12) is new to the Canon on political and campaign activity, but is substantially similar to the first sentence of Canon 3B(9).

Rule 4.1(A)(13) is essentially identical to Canon 5A(3)(d)(i).

Rule 4.1 (B) is based upon elements of Canon 5A(3)(a) and Canon 5A(3)(b), which have been combined and recast.

Comment [1] is new.

Comment [2] is based upon Canon 5E, which has been removed from the black-letter text.

Comment [3] is new, but includes a principle taken from the first sentence of the Commentary following Canon 5A(1). See also Comment [6].

Comment [4] is new, but includes reference to the principles embodied in Canon 5C(1)(b), substantially reworded.

Comment [5] is new, but is tangentially related to the Commentary following Canon 5A(3)(a).

Comment [6] is based upon the first sentence of the Commentary following Canon 5A(1), but includes fuller treatment.

Comment [7] is a new Comment, but is based upon Canon 5A(3)(d)(ii), which is now embodied in Rule 4.1(A)(11).

Comment [8] is based upon Canon 5A(3)(e), which has been removed from the black-letter text; the new Comment is more detailed and covers slightly more ground.

Comment [9] is new, but also is based upon Canon 5A(3)(e).

1 Comment [10] is new, but is derived from aspects of Canon 3B(9) and following
2 Commentary.
3 Comment [11] is new.
4 Comment [12] is new.
5 Comment [13] is new.
6 Comment [14] is based upon the fourth sentence of the Commentary following Canon
7 5A(3)(d), but provides more detailed treatment, with examples.
8 Comment [15] is loosely based upon the last paragraph of the Commentary following
9 Canon 5C(2), but provides far more detailed discussion.

10
11 EXPLANATION OF BLACK-LETTER:

12
13 1. Rule 4.1(A) lead-in: added cross-references to specific Rules in Canon 4.

14
15 This formulation is critical to the reorganization of Canon 4. Rule 4.1(A) sets out a
16 generally applicable set of prohibitions that apply to all sitting judges and to all judicial
17 candidates (including sitting judges seeking to retain current office or to achieve other
18 judicial office). Rule 4.2 (various forms of public elections), Rule 4.3 (appointment to
19 judicial office), and Rule 4.4 (campaign committees) then selectively relax or disavow
20 these prohibitions, as appropriate to the specific situation.

21
22 2. Rule 4.1(A)(4): replaced “political organization or candidate” with “political
23 organization or a candidate for public office.”

24
25 No substantive change is intended. The Joint Commission wanted to make clear that the
26 prohibition against soliciting funds or making contributions applies to all candidates for
27 public office, not just candidates for judicial office (as is clear in other provisions of both
28 the 1990 Code and the 2006 Draft).

29
30 3. Rule 4.1(A)(5): made several stylistic revisions as Canon 5A(1)(d) and the second
31 clause of Canon 5A(1)(e) were blended.

32
33 No substantive change is intended. The earlier “attend political gatherings” was
34 eliminated as archaic, but the word “attend” was added to the blended Rule. “[D]inners or
35 other events” was substituted for “political party dinners or other functions.”

36
37 4. Rule 4.1(A)(6): added this provision prohibiting a candidate from self-identifying
38 as a “candidate of” a political organization, which, in this context, usually means a
39 political party.

40
41 Canon 5C(1)(a)(ii) of the 1990 Code permitted judges subject to public election to
42 identify themselves at any time as political party *members*. This provision has been
43 eliminated in the 2006 Draft as unnecessary: a provision *prohibiting* such identification
44 would not likely survive constitutional scrutiny.

1 The mission of Rule 4.1(A)(6) is a different one, however. In the organizational scheme
2 of Canon 4, it is necessary first to prohibit for *all* judges and judicial candidates what is to
3 be prohibited for *any*. In the later Rules, exceptions are made as appropriate, leaving in
4 place the general prohibitions that are *not* singled out for exception. For example, in
5 connection with Rule 4.1(A)(6), see Rule 4.2(C)(1): For obvious reasons, a candidate
6 running in a *partisan* public election for judicial office must be permitted to communicate
7 to voters the fact that a particular political organization or party nominated him or her.
8 Thus, because an exception to Rule 4.1(A)(6) appears *only* in Rule 4.2(C)(1), a candidate
9 running in *another* type of judicial election is still subject to Rule 4.1(A)(6).

10
11 5. Rule 4.1(A)(7): added this provision, which broadly prohibits judicial candidates
12 from seeking, accepting, or using endorsements from political organizations.

13
14 As with Rule 4.1(A)(6), the full impact of this new Rule can be judged only by
15 ascertaining the situations in which later Rules in Canon 4 make an exception to it.

16
17 6. Rule 4.1(A)(8): retained the language “personally solicit . . . campaign
18 contributions,” now defined in the Terminology section; deleted the prohibition against
19 personally soliciting “publicly stated support,” and retained the provision permitting
20 contributions to be *accepted* only through a duly established campaign committee.

21
22 The prohibition against seeking “support”—at least from political organizations—is
23 covered (and more broadly) in Rule 4.1(A)(7), and was no longer needed in this Rule.

24
25 The Joint Commission was urged to change the operative language (and the definition in
26 the Terminology section) to “solicit campaign contributions in person,” to focus more
27 clearly upon the immediacy of the situation and the possibility of subtle but real coercion.
28 By analogy to the rules regulating lawyer advertising and solicitation, a ban on “in
29 person” solicitation of campaign contributions would *permit* mailings and similar
30 communications, but would continue to forbid both hand-to-hand transfer of funds and
31 live telephone solicitation. If the original broader language was retained, even a simple
32 mailing to friends and neighbors would be prohibited.

33
34 The Joint Commission considered the two possibilities through long debate over many
35 meetings. The Joint Commission was aware, of course, that several courts have struck
36 down provisions forbidding “personal solicitation” of campaign funds—often in language
37 so broad that it appeared to “throw out the baby with the bathwater.” Ultimately, the Joint
38 Commission opted for the broader prohibition nonetheless, on the theory that the
39 Supreme Court itself has not yet weighed in on this issue, and might find solicitation of
40 campaign funds in a judicial election to be sufficiently different from lawyer advertising
41 that a somewhat less tailored approach could be justified.

42
43 Under either version, moreover, the most pernicious practice of “dialing for dollars” will
44 be prohibited, and there is every reason to think that the Supreme Court would uphold at
45 least that aspect of this Rule.

1 7. Rule 4.1(A)(9): replaced “for the private benefit of the candidate or others” (in
2 Canon 5C(2)) with “for the private benefit of the judge, the candidate, or others.”

3
4 No substantive changed is intended. Rule 4.1(A) applies to both judges who are *not*
5 currently candidates and to all current judicial candidates.

6
7 8. Rule 4.1(A)(10): added this provision, prohibiting use of official resources for a
8 judge’s campaign.

9
10 Although new to the Canon on political and campaign activity, this provision breaks little
11 new ground. Compare Rule 1.3 (abusing the prestige of judicial office) and Rule 3.1(E)
12 (using official resources in connection with extrajudicial activity).

13
14 9. Rule 4.1(A)(11): replaced “knowingly misrepresent the identity, qualifications,
15 present position or other fact” (in Canon 5A(3)(d)(ii)) with “knowingly, or with reckless
16 disregard for the truth, make any false or misleading statement.”

17
18 The 1990 Code language was too specific, yet its precise reach was unclear. The new
19 language used in the 2006 Draft is well known and generally applicable, having been
20 taken from the libel and slander area, as glossed by the First Amendment.

21
22 10. Rule 4.1(A)(12): added this provision that is new material for Canon 4 on political
23 and campaign activity, but that is, in effect, a reiteration for emphasis of Rule 2.10(A).

24
25 This reiteration is helpful, because Rule 2.10(A) can apply only to sitting judges.

26
27 11. Rule 4.1(A)(13): replaced “with respect to” (in Canon 5(A)(3)(d)(i)) with “in
28 connection with.”

29
30 This is a stylistic change only. The language is otherwise identical to language that the
31 House of Delegates adopted in 2003 in the wake of the U.S. Supreme Court’s 2002
32 decision in *Minnesota Republican Party v. White*.

33
34 The Joint Commission is confident that the Supreme Court will not strike down this so-
35 called “pledges and promises clause,” *if it is applied only to the limited circumstances*
36 *intended and interpreted in light of applicable constitutional principles*. On the other
37 hand, if this provision is given such a broad reading that it is indistinguishable, or nearly
38 so, from the “announce views clause” invalidated in *White*, it is likely to suffer the same
39 fate.

40
41 To encourage adoption of an appropriately narrow interpretation of the pledges and
42 promises clause, by disciplinary authorities and by judges and candidates assessing their
43 own conduct, the Joint Commission has included several Comments describing the
44 intended reach of Rule 4.1(A)(13). See Comments [11] through [15]. The essential key is
45 that merely because a judge or candidate has announced his or her personal views—even
46 strongly held personal views—on a matter that is likely to come before the court, there

1 has been no compromise of *impartiality*, unless the “announcement” demonstrates a
2 closed mind on the subject, or includes a pledge or a promise to rule in a particular way if
3 the matter does come before the court.
4

5 12. Rule 4.1(B): combined into a single Rule, and greatly simplified, most provisions
6 of Canon 5A(3)(a) and Canon 5A(3)(b): first, changed the separate treatment of actions
7 of members of a candidate’s family and actions of employees and others who are under
8 the control of a candidate to unitary treatment of actions of “other persons”; second,
9 explained that the judge or candidate is required to take “reasonable measures” to ensure
10 that these other persons do not undertake action “on behalf of” the judge or candidate that
11 would otherwise be prohibited; and third, eliminated the injunction to “maintain the
12 dignity appropriate to the judicial office” during a judicial campaign.
13

14 After considerable debate, the Joint Commission concluded that “maintaining appropriate
15 dignity” was too subjective a standard for use in a Rule with potential disciplinary
16 consequences. Seriously inappropriate conduct is highly likely to run afoul of some other
17 disciplinary Rule, in any event.
18

19 No significant substantive changes are intended by other adjustments in the Rule. What
20 constitutes a “reasonable measure” will obviously depend upon whether the person who
21 is attempting to act improperly *on behalf of* the judge or candidate is a family member, an
22 employee, or an appointee.
23

24 EXPLANATION OF COMMENTS: 25

26 [1] This new Comment in effect serves as a preamble to Canon 4. Two key points are
27 in tension. In the *White* decision, the Supreme Court did not deny that states have a
28 compelling interest in the quality of their judiciary and in the regularity of the selection
29 process. But the Joint Commission recognized that restrictions on political and campaign-
30 related speech must be narrowly tailored and the least restrictive possible, even when
31 serving such a compelling state interest.
32

33 [2] The jurisdictional or choice-of-law point of this Comment was originally placed
34 in Canon 5E of the 1990 Code. The Joint Commission concluded that treatment in the
35 black-letter text was not required, given that this provision does not establish independent
36 standards of conduct. In transferring this material to a Comment, the Joint Commission
37 also significantly reduced its level of detail. Prior references to the jurisdictional situation
38 when a candidate is successful or unsuccessful in obtaining judicial office were
39 eliminated as not properly within the scope of this Code of Judicial Ethics.
40

41 [3] This new Comment explains how the first line restricting political participation of
42 judges and judicial candidates was drawn: mere participation in electoral politics is not
43 sufficiently troublesome to warrant a restriction, but assuming a leadership role would
44 call into question the judge’s or candidate’s independence.
45

1 [4] This new Comment gathers in one place several provisions of Canon 5C(1) of the
2 1990 Code, and substantially revises the language. Although judicial candidates generally
3 are not permitted to endorse *other* candidates, for fear of abusing the prestige of judicial
4 office, they are of course permitted to campaign on their own behalf. Moreover, although
5 the pros and cons as a matter of policy seemed to be evenly balanced, the Joint
6 Commission elected to retain the traditional exception that permits campaigning for other
7 *judicial candidates* who are effectively running in the same race.
8

9 [5] This new Comment serves as a reminder that judges and judicial candidates must
10 avoid abusing the prestige of office when their own family members are involved in
11 politics. Thus, while family members are not and cannot be subject to this Code, the
12 people who *are* subject to it must take reasonable steps to ensure that the public does not
13 receive the impression that a judge or judicial candidate is endorsing a family member's
14 candidacy.
15

16 [6] This Comment carries forward Commentary from the 1990 Code, stating the
17 obvious point that judges and judicial candidates do not forfeit the right to vote, and adds
18 a reminder that this principle applies to both general and primary elections. For
19 jurisdictions that employ caucuses rather than secret ballot voting in primary elections,
20 the Joint Commission ultimately concluded that even though a caucus participant literally
21 "takes a public stand" in favor of a particular candidate, this should not be counted as a
22 prohibited "endorsement," because there is no other way to "vote" or express a
23 preference in such situations.
24

25 [8] This Comment carries forward and expands upon the "right to reply" provision
26 originally found in Canon 5A(3)(e) of the 1990 Code. The last sentence, an aspirational
27 standard, was added in the hope of stopping the vicious cycle of increasingly negative
28 campaign ads run by independent groups not controlled by a candidate or the candidate's
29 campaign committee.
30

31 [10] This new Comment is a reminder that Rule 4.1(A)(12) has brought into the
32 political and electoral context the traditional prohibition against making statements that
33 will improperly influence a trial. Compare Rule 2.10(A). The last sentence of Comment
34 [10] serves as an additional reminder that some statements are *designed* to affect the
35 outcome of a trial, and properly so. A lawyer making a closing argument to a jury and a
36 judge instructing that jury are prime examples.
37

38 [11] This new Comment and new Comment [12] introduce the series of Comments
39 designed to flesh out the "pledges and promises clause" carried forward from Canon
40 5A(3)(d)(i) of the 1990 Code essentially unchanged.
41

42 [13] This new Comment describes the fundamental difference between "pledges" and
43 "promises," which are prohibited, and "statements or announcements of personal views,"
44 which are not only permitted, but constitutionally protected. The key distinction is
45 between personal statements that are truly personal and that *will not interfere with future*
46 *decision making*, and improper pledges and promises that actually commit a judge or

1 judicial candidate to decide a future case in a particular way. In a nutshell, a prohibited
2 pledge or promise concerns actual future decision making.

3
4 [14] This Comment is based upon Commentary following Canon 5D(3)(d), but is more
5 complete. It makes the important point that pledges and promises regarding
6 *administration* of the judicial system, as opposed to *decision making in actual cases*, is
7 not prohibited; indeed this is an area in which candidates can offer meaningful ideas and
8 differentiate themselves from other candidates.

9
10 [15] The constitutional tension between (1) making pledges and promises about future
11 decision making, and (2) making statements or announcements about personal views, has
12 come to a head in recent years as issue advocacy and other citizen groups (as well as the
13 media) have become more aggressive in issuing questionnaires for judicial candidates to
14 answer. The Joint Commission heard much testimony and received considerable
15 commentary on this issue, and debated it at length. Comment [15] represents the Joint
16 Commission's understanding of how this tension can and must be resolved.

17
18 First, citizens generally are not subject to the Code of Judicial Conduct, and could not in
19 any event constitutionally be prevented from asking whatever questions they wish to ask.
20 Although many of the questions that have been asked seem to most members and
21 advisors of the Joint Commission to be singularly inapt in terms of identifying candidates
22 who would become good judges if elected, it is not for the Joint Commission or for any
23 state authority to rate the appropriateness of the questions. In a democracy, each citizen is
24 entitled to decide what qualities in a candidate will earn that citizen's vote. Moreover,
25 other citizens or groups of citizens are entitled to applaud or criticize the answers given,
26 or to comment, positively or negatively, on a candidate's failure or refusal to answer.

27
28 Second, judicial candidates who choose to answer the questionnaires cannot be prevented
29 from doing so, *as long as their answers take the form of constitutionally protected*
30 *statements and announcements of personal views, and do not stray into the prohibited*
31 *territory of pledges and promises about future decision making.*

32
33 Third, and critically important, judicial candidates have the right to refuse to answer, with
34 or without giving reasons, or to answer only in formats that are agreeable to them
35 (assuming they comply with Rule 4.1(A)(13)). Of course, a candidate who chooses not to
36 answer may be subjected to criticism for not answering, but assuming that risk is part of
37 the democratic process.

38
39 Thus, the Joint Commission ultimately took no hard-and-fast stand on the best response
40 to questionnaires of this kind (and explicitly noted in Comment [15] that the black-letter
41 text of Rule 4.1(A)(13) does not provide a clear answer, either). But the principles set
42 forth in this Comment and the previous Comments should be of value to judicial
43 candidates in finding their way through this difficult maze.

1 **RULE 4.2**

2 *Political and Campaign Activities of Judicial Candidates in Public*
3 *Elections*

4
5 (A) A judicial candidate* in a partisan, nonpartisan, or retention public
6 election* shall:

7
8 (1) act at all times in a manner consistent with the independence,*
9 integrity,* and impartiality* of the judiciary;

10
11 (2) comply with all applicable election, election campaign, and
12 election campaign fund-raising laws and regulations of [insert
13 jurisdiction name];

14
15 (3) review and approve the content of all campaign statements and
16 materials produced by the candidate or his or her campaign
17 committee, as authorized by Rule 4.4, before their dissemination; and

18
19 (4) take reasonable measures to ensure that other persons do not
20 undertake on behalf of the candidate activities, other than those
21 described in Rule 4.4, that the candidate is prohibited from doing by
22 Rule 4.1.

23
24 (B) A candidate for elective judicial office may, unless prohibited by law,*
25 and not earlier than [insert amount of time] before the first applicable
26 primary election, caucus, or general or retention election:

27
28 (1) establish a campaign committee pursuant to the provisions of
29 Rule 4.4;

30
31 (2) speak on behalf of his or her candidacy through any medium,
32 including but not limited to advertisements, websites, or other
33 campaign literature;

34
35 (3) publicly endorse or oppose candidates for the same judicial
36 office for which he or she is running;

37
38 (4) attend or purchase tickets for dinners or other events
39 sponsored by a political organization* or a candidate for public office;

40
41 (5) seek, accept, or use endorsements from any individual or
42 organization other than a partisan political organization; and

43
44 (6) contribute to a political organization or candidate for public
45 office, but not more than \$[insert amount] to any one organization or
46 candidate.

1
2 **(C) A judicial candidate in a partisan public election may, unless**
3 **prohibited by law, and not earlier than [insert amount of time] before the**
4 **first applicable primary election, caucus, or general election:**

5
6 **(1) identify himself or herself as a candidate of a political**
7 **organization; and**

8
9 **(2) seek, accept, and use endorsements of a political organization.**

10
11 **COMMENT**

12
13 [1] Paragraphs (B) and (C) permit judicial candidates in public elections to engage in
14 some political and campaign activities otherwise prohibited by Rule 4.1. Candidates may
15 not engage in these activities earlier than [insert amount of time] before the first
16 applicable electoral event, such as a caucus or a primary election.

17
18 [2] Despite paragraphs (B) and (C), judicial candidates for public election remain
19 subject to many of the provisions of Rule 4.1. For example, a candidate continues to be
20 prohibited from soliciting funds for a political organization, knowingly making false or
21 misleading statements during a campaign, or making certain promises, pledges, or
22 commitments related to future adjudicative duties. See Rule 4.1(A), paragraphs (4), (11),
23 and (13).

24
25 [3] In partisan public elections for judicial office, a candidate may be nominated by,
26 affiliated with, or otherwise publicly identified or associated with a political organization,
27 including a political party. Typically, this relationship is maintained throughout the
28 period of the public campaign, and may include use of political party or similar
29 designations on campaign literature and on the ballot.

30
31 [4] In nonpartisan public elections or retention elections, paragraph (B)(5) prohibits a
32 candidate from seeking, accepting, or using nominations or endorsements from a partisan
33 political organization.

34
35 [5] Judicial candidates are permitted to attend or purchase tickets for dinners and
36 other events sponsored by political organizations.

37
38 [6] For purposes of paragraph (B)(3), candidates are considered to be running for the
39 same judicial office if they are competing for a single judgeship or if several judgeships
40 on the same court are to be filled as a result of the election. In endorsing or opposing
41 another candidate for a position on the same court, a judicial candidate must abide by the
42 same rules governing campaign conduct and speech as apply to the candidate's own
43 campaign.

44
45 [7] Although judicial candidates in nonpartisan public elections are prohibited from
46 running on a ticket or slate associated with a political organization, they may group

1 themselves into slates or other alliances to conduct their campaigns more effectively.
2 Candidates who have grouped themselves together are considered to be running for the
3 same judicial office if they satisfy the conditions described in Comment [6].
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RULE 4.2

REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

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6 Rule 4.2 is derived from the specific regulation of campaign activity included in Canon
7 5C, with the exception of provisions concerning campaign committees, which are treated
8 in Rule 4.4. Rule 4.2, in tandem with Rule 4.1, has imposed a more logical, tiered
9 organization on this material, replacing the scattershot and sometimes inconsistent
10 provisions in Canon 5—and not only in Canon 5C—of the 1990 Code, but without
11 making major substantive changes.

12
13 The key to understanding the organization of Canon 4 of the 2006 Draft is to remember
14 that Rule 4.1 applies to all judges (whether or not they are also judicial candidates) and to
15 all judicial candidates (whether or not they are also sitting judges). Rule 4.2, on the other
16 hand, applies only to judicial candidates running in partisan, nonpartisan, or retention
17 public elections. Rule 4.2 adds some restrictions on the activity of judicial candidates that
18 do not appear in Rule 4.1, makes exceptions to some of the restrictions set out in Rule
19 4.1, and then makes further exceptions that apply only to judicial candidates in partisan
20 elections.

21
22 Rule 4.3 applies to the activities of judicial candidates seeking appointive judicial office,
23 but these provisions are relatively straightforward and did not require significant
24 reorganization.

25
26 The lead-in to Rule 4.2(A) is similar to that of Canon 5C(1), except that it identifies the
27 three modes of public elections to which this paragraph (and the rest of the Rule) will
28 apply.

29
30 Rule 4.2(A)(1) is based upon parts of Canon 5A(3), which was misplaced there, because
31 Canon 5A deals with both candidates *and* judges.

32
33 Rule 4.2(A)(2) is new as a separate provision, but is consistent with the pervasive
34 statement in the 1990 Code that activities prohibited by law are also prohibited by Canon
35 5.

36
37 Rule 4.2(A)(3) is a new provision in this format, but the requirement that candidates
38 actively take responsibility for campaign literature and other campaign activities is
39 implicit in many provisions of Canon 5.

40
41 Rule 4.2(A)(4) is derived from parts of Canon 5A(3)(a)–(c). This material, which governs
42 judicial candidates *only*, has been repositioned to Rule 4.2.

43
44 The lead-in to Rule 4.2(B) is based upon Canon 5C(1), but with a markedly different
45 disposition of the *timing* of the activities that are permitted for judicial candidates. In

1 addition, Rule 4.2(B), like the rest of Rule 4.2, applies only to candidates, whereas Canon
2 5C(1) applies to sitting judges as well.

3
4 Rule 4.2(B)(1) is based upon the second sentence of Canon 5C(2), except that the timing
5 provided for the establishment of campaign committees is different.

6
7 Rule 4.2(B)(2) combines and rewords Canons 5C(1)(b)(i)–(b)(iii).

8
9 Rule 4.2(B)(3) is virtually identical to Canon 5C(1)(b)(iv).

10
11 Rule 4.2(B)(4) is based upon Canon 5C(1)(a)(i), but reworded for consistency with other
12 Rules in Canon 4 of the 2006 Draft.

13
14 Rule 4.2(B)(5) takes the opposite stance from that found in Canon 5C(2), but with an
15 important caveat. The 1990 Code allows judicial candidates to solicit endorsements—
16 “publicly stated support”—only through campaign committees. The 2006 Draft permits
17 candidates to solicit such support on their own, but *not* from partisan political
18 organizations.

19
20 Rule 4.2(B)(6) is similar to Canon 5C(1)(iii), but establishes dollar limitations (to be
21 supplied by each jurisdiction) on the contributions that can be made.

22
23 Rule 4.2(C) and its two subparagraphs are new. The 1990 Code did not advert to the
24 distinction between partisan and nonpartisan or retention elections. In furtherance of the
25 organizational scheme of the 2006 Draft, Rule 4.2(C) states the additional activities that
26 are permitted *only* for candidates in partisan public elections.

27
28 Comments [1] and [2] are new; they explain the relationship of Rule 4.2 to Rule 4.1,
29 which is at the heart of the new organizational scheme. They also explain that someone
30 becomes a “judicial candidate” according to the definition in the Terminology section,
31 but that the additional activities in which a candidate may engage depend upon the
32 opening of a time window, counting back from the primary or election in question.

33
34 Comments [3] and [4] are new; the 1990 Code did not distinguish between partisan,
35 nonpartisan, and retention public elections for judicial office.

36
37 Comment [5] is similar to Canon 5C(1)(a), but with the important difference that the
38 2006 Draft provision applies *only* to judicial candidates, *while* they are candidates.

39
40 Comments [6] and [7] clarify the intended meaning of Rule 4.2(B)(3), which is based
41 upon Canon 5C(1)(b)(iv), and has some similarity to Canon 5C(5). In both instances, the
42 key is to determine when candidates are running for the *same* judicial office.

1 EXPLANATION OF BLACK-LETTER:
2

3 1. Rule 4.2(A) lead-in: substituted “a judicial candidate in a partisan, nonpartisan, or
4 retention public election” for “a [judge or] candidate subject to public election.”
5

6 This is an important element of the reorganization of Canon 4 of the 2006 Draft. By
7 distinguishing between the three modes of public elections, Rule 4.2(A) sets up the
8 possibility of applying further restrictions and permissive provisions to all three modes or
9 to some designated subset, as required. In the body of Rule 4.2(A), for example,
10 obligations *in addition to those already imposed by Rule 4.1* are imposed upon all three
11 types of candidates.
12

13 2. Rule 4.2(A)(1): substituted “act at all times in a manner” for “act in a manner,”
14 and deleted the requirement that a candidate “shall maintain the dignity appropriate to
15 judicial office.”
16

17 The first change is stylistic only. The mandatory duty to “maintain dignity” was deleted
18 because it is too amorphous and subjective.
19

20 3. Rule 4.2(A)(2): added this new “catchall” provision that is consistent with the
21 overarching principle that candidates for judicial office must obey applicable laws and
22 regulations.
23

24 Some of the specific regulations regarding campaign finance are separately referenced in
25 Rule 4.4, but Rule 4.2(A)(2) might well apply to restrictions on ballot insignia applicable
26 to nonpartisan elections, for example. Thus, although a candidate in a nonpartisan
27 election cannot be prevented from stating he or she is a member of a particular party, the
28 candidate can assuredly be prevented from stating he or she is “the candidate” of that
29 party, if the election laws do not allow party designations on the ballot. Compare Rule
30 4.1(A)(6), which prohibits all judges and judicial candidates from such self-designation,
31 and Rule 4.2(C)(1), which allows candidates in *partisan* elections to do so.
32

33 4. Rule 4.2(A)(3): added the requirement that judicial candidates personally approve
34 the contents of campaign literature and other materials.
35

36 The requirement may justly be said to be implicit in several other provisions of Canon 4.
37 For example, if a candidate is prohibited by Rule 4.1(A)(11) from making false or
38 misleading statements in a campaign, it is almost inevitable that the candidate will have a
39 duty to review campaign materials before they are disseminated under his or her name.
40

41 5. Rule 4.2(A)(4): substituted “take reasonable measures to ensure” for “shall
42 prohibit,” “shall discourage,” and “shall encourage to adhere.”
43

44 The older language variously applied to employees and officials serving at the pleasure of
45 the candidate (who can be prohibited), others under the direction and control of the
46 candidate (who can be discouraged), and family members (who can be encouraged to

1 assist the candidate in complying with the Rules). The single phrase “take reasonable
2 measures” covers all the above locutions, because what constitutes a “reasonable
3 measure” depends upon circumstances such as those noted above. Rule 4.2(A)(4), which
4 applies only to judicial candidates, is arguably already covered by Rule 4.1(B), which
5 applies to all judges *and* candidates.
6

7 6. Rule 4.2(B) lead-in: added a time window *before* the relevant primary or election,
8 during which certain activities that would or might otherwise be prohibited by Rule
9 4.1(A) are permitted.
10

11 Although the concept of a time window is not new, its use in this Rule to disconnect the
12 status of *being* a judicial candidate from being permitted to engage in the *activities* of a
13 candidate is an important feature of the reorganization of Canon 4 in the 2006 Draft.
14 During its deliberations over what became this Rule, the Joint Commission constantly
15 had in mind a scenario such as the following: A judge is elected to a ten-year term, and
16 almost immediately announces plans to run for reelection. That announcement makes the
17 judge a “judicial candidate,” and, without a time window, the judge would be permitted
18 to establish a campaign committee immediately and raise campaign funds for almost ten
19 full years. With the time window in place, the judge can continue to call himself or
20 herself a candidate for ten years, but can raise campaign funds only after the window
21 opens, which is typically set at one year before the first primary.
22

23 7. Rules 4.2(B)(1), 4.2(B)(2), and 4.2(B)(3): retained provisions allowing
24 candidates to establish campaign committees, speak on their own behalf through various
25 communications media, and endorse (or oppose) candidates running for *the same* judicial
26 office; these activities have traditionally been allowed, and the Joint Commission did not
27 modify these provisions in any substantive ways.
28

29 It is important to note that permission is granted to *all three* types of judicial election
30 candidates to engage in these activities, *but only during the period of the stated time*
31 *window*.
32

33 8. Rule 4.2(B)(4): specifically permitted what Rule 4.1(A)(5) prohibits for both
34 judges and candidates; the permission applies to all candidates, including candidates
35 running in nonpartisan and retention elections.
36

37 This is approximately the same result as would be obtained under the 1990 Code, but
38 according to a more logical organization. Under Canon 5A(1), judicial candidates are
39 prohibited from attending events of political organizations, unless otherwise permitted.
40 But Canon 5C(1) permits a candidate to “attend political gatherings” *at any time*. What is
41 the point, then, of the prohibition in Canon 5A, if it is *always* subject to an exception?
42

43 In the 2006 Draft, Rule 4.1(A)(5) generally prohibits attending such political organization
44 functions—but that is only the first layer. Rule 4.2(B)(4) permits an exception, but only
45 during a candidate’s candidacy *and after the time window opens*.
46

1 9. Rule 4.2(B)(5): provided an important distinction between judicial candidates
2 running in partisan and other types of public judicial elections; the full impact of this
3 paragraph cannot be appreciated without taking into account other parts of Rule 4.2,
4 especially Rule 4.2(C).

5
6 This provision showcases the tiered approach of the 2006 Draft. According to Rule
7 4.1(A)(7), judges and candidates may not seek, accept, or use endorsements from a
8 political organization. Rule 4.2(B)(5) continues this prohibition for *all* public election
9 judicial candidates during the time window period, because all are permitted to accept
10 endorsements *only* from organizations that are *not* political organizations.

11
12 It is only in Rule 4.2(C)(2) that this restriction is finally removed—but for judicial
13 candidates running in partisan election *only*.

14
15 The Joint Commission is aware that the U.S. Court of Appeals for the Eighth Circuit has
16 ruled that even in nonpartisan elections, candidates must be permitted to accept political
17 organization endorsements, if they are permitted to accept endorsements from other
18 individuals and organizations. Because it is uncertain whether the U.S. Supreme Court
19 will adopt this view, the Joint Commission elected to maintain Rule 4.2(B)(5) as it is for
20 purposes of a Model Code, recognizing that jurisdictions within the 8th Circuit cannot
21 adopt it in this form.

22
23 10. Rule 4.2(B)(6): representing an important compromise, allowed all candidates for
24 judicial office to make contributions to political organizations or other candidates for
25 public office, but only during the time window period.

26
27 Under the 1990 Code (Canon 5C(1)(a)), a judge who was subject to public election at
28 some later time (perhaps ten years away, as in the previous example) and any candidate
29 running in a public election could make such contributions *at any time*. This included
30 candidates running in nonpartisan and retention elections, because the 1990 Code did not
31 distinguish between different modes of public election. Under Rule 4.2(B)(6), all
32 candidates (including sitting judges who become candidates) may make contributions,
33 even to political organizations, but only during the time window period.

34
35 11. Rule 4.2(C): stated the two exceptions to the earlier prohibitions that apply *only* to
36 judicial candidates in partisan public elections.

37
38 Not surprisingly, the extra exceptions are made for partisan election candidates where, as
39 a practical matter, they cannot be avoided: identification as a candidate of a political
40 organization and acceptance of endorsements from a political organization.

41
42 EXPLANATION OF COMMENTS:

43
44 Comments [1] through [7] are all new, and help explain the relationships between the
45 several paragraphs of Rule 4.2, as well as the relationship of this Rule to other Rules in
46 Canon 4, especially Rule 4.1.

1 **RULE 4.3**

2 *Activities of Candidates for Appointive Judicial Office*

3
4 **A candidate for appointment to judicial office may:**

5
6 **(A) communicate with the appointing or confirming authority, including**
7 **any selection, screening, or nominating commission or similar agency; and**

8
9 **(B) seek endorsements for the appointment from any individual or**
10 **organization.**

11
12 **COMMENT**

13
14 [1] A candidate for appointive judicial office has no need to raise or spend campaign
15 funds. He or she is not only prohibited from soliciting campaign contributions in person
16 or personally accepting campaign contributions (see Rule 4.1(A)(8)), but is also
17 prohibited from establishing campaign committees for this purpose (see Rule 4.4(A)).

18
19 [2] When seeking support or endorsement, or when communicating directly with an
20 appointing or confirming authority, a candidate for appointive judicial office must not
21 make any pledges, promises, or commitments that are inconsistent with the impartial
22 performance of the adjudicative duties of the office. See Rule 4.1(A)(13).

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RULE 4.3
REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 4.3(A) is essentially the same as Canon 5B(2)(i), except that it includes a slightly more expansive list of those whom candidates for appointive judicial office may contact. Rule 4.3(B) is derived from Canon 5B(2)(ii), but it is significantly more generous in allowing candidates to seek endorsements for the appointment.

Comment [1] closely tracks the text of Canon 5B(1), but more explicitly cross-references earlier Rules within Canon 4 of the 2006 Draft.

Comment [2] is new.

EXPLANATION OF BLACK-LETTER:

1. Rule 4.3(A): added “or confirming authority,” and substituted “any selection, screening, or nominating commission or similar agency” for “other agency designated to screen candidates.”

The second revision is stylistic only and introduced no substantive change. The Joint Commission added a reference to a “confirming authority,” having in mind most obviously the U.S. Senate when sitting to confirm or reject presidential nominations of federal judges. Some state jurisdictions include a similar confirmation process in their overall appointment process, and in those jurisdictions candidates must be allowed to state their qualifications and views to confirming agencies as well as nominating and screening agencies.

2. Rule 4.3(B): eliminated restrictions on organizations or individuals from whom a candidate for appointive judicial office can seek support for the appointment.

Canon 5B(2)(a) of the 1990 Code limits candidates to seeking support from organizations that “regularly” make recommendations to appointing authorities, and to individuals who have been invited by the appointing (or confirming) authority to provide information.

The Joint Commission eliminated the first restriction as constituting too much of an elitist grandfathering clause. If some new organization—political or otherwise—had a particular interest in a particular vacancy in an appointive judicial office (or in a particular candidate), the candidate could not ask it to voice an opinion; the organization would have to take the initiative on its own, or wait to be asked by the appointing authority. This stingy treatment of *the candidate's* ability to press his or her candidacy forward also seemed to the Joint Commission to be constitutionally dubious.

The inability of a candidate to pick and choose his or her own sponsors or supporters was also found to be overly restrictive and constitutionally suspect by the Joint Commission. Moreover, it seemed to be especially unrealistic in today's world. Every judicial appointment carries with it a certain amount of political baggage, and *in practice* persons

1 who are known to be under consideration—candidates—almost universally call upon
2 friends and political allies to “put in a good word” with the appointing authority.

3
4 EXPLANATION OF COMMENTS:

5
6 [1] In the 1990 Code, the sensible prohibition against candidates for appointive office
7 raising campaign funds, even through a campaign committee, was stated in the black-
8 letter text (see Canon 5B(1)). The same idea is expressed satisfactorily in this Comment
9 [1], because the prohibition, *and the lack of an exception for appointive candidates*, is
10 already stated in Rules 4.1 and 4.2. Thus, Comment [1] merely serves as a reminder of
11 this obvious point.

12
13 [2] This new Comment serves as another reminder. Although candidates for
14 appointive judicial office are by definition not submitting themselves to the voting public
15 at large, they are trying to influence a much smaller “electorate.” In the federal arena, for
16 example, it will be those who screen candidates for the president, and ultimately the
17 president as an “electorate of one.” It is just as improper in these small-scale “campaigns”
18 to make pledges and promises that are inconsistent with the impartial performance of
19 judicial duties as it is in campaign for elected office, with town meetings and television
20 advertisements.

1 **RULE 4.4**

2 ***Campaign Committees***

3
4 (A) A judicial candidate* subject to public election* may establish a
5 campaign committee to manage and conduct a campaign for the candidate,
6 subject to the provisions of this Code. The candidate is responsible for
7 ensuring that his or her campaign committee complies with applicable
8 provisions of this Code and other applicable law.*

9
10 (B) A judicial candidate subject to public election shall direct his or her
11 campaign committee:

12
13 (1) to solicit and accept only such campaign contributions* as are
14 reasonable, in any event not to exceed, in the aggregate,* \$[insert
15 amount] from any individual or \$[insert amount] from any entity or
16 organization;

17
18 (2) not to solicit or accept contributions for a candidate's current
19 campaign more than [insert amount of time] before the applicable
20 primary election, caucus, or general or retention election, nor more
21 than [insert number] days after the last election in which the
22 candidate participated;

23
24 (3) to comply with all applicable statutory requirements for
25 disclosure and divestiture of campaign contributions, and to file with
26 [name of appropriate regulatory authority] a report stating the name,
27 address, occupation, and employer of each person who has made
28 campaign contributions to the committee in an aggregate value
29 exceeding \$[insert amount]. The report must be filed within [insert
30 number] days following an election, or within such other period as is
31 provided by law; and

32
33
34 **COMMENT**

35
36 [1] Judicial candidates are prohibited from personally soliciting campaign
37 contributions or personally accepting campaign contributions. See Rule 4.1(A)(8). This
38 Rule recognizes that in many jurisdictions, judicial candidates must raise campaign funds
39 to support their candidacies, and permits candidates, other than candidates for appointive
40 judicial office, to establish campaign committees to solicit and accept reasonable
41 financial contributions or in-kind contributions.

42
43 [2] Campaign committees may solicit and accept campaign contributions, manage the
44 expenditure of campaign funds, and generally conduct campaigns. Candidates are
45 responsible for compliance with the requirements of election law and other applicable
46 law, and for the activities of their campaign committees.

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[3] At the start of a campaign, the candidate must instruct the campaign committee to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law. Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make campaign contributions, the candidate should instruct his or her campaign committee to be especially cautious in connection with such contributions, lest they create grounds for disqualification if the candidate is elected to judicial office. See Rule 2.11.

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RULE 4.4
REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 4.4(A) combines aspects of the second sentence of Canon 5C(2), part of Canon 5C(4), and some of the Commentary following Canon 5C(2).

Rule 4.4(B)(1) is essentially the same as Canon 5C(3), but also includes an element from Canon 5C(2).

Rule 4.4(B)(2) is essentially the same as the fifth sentence of Canon 5C(2), but with additional language citing compliance with any applicable laws relating to divestiture of campaign funds subsequent to the campaign.

Rule 4.4(B)(3) is based upon Canon 5D(4), but includes an entirely new reference to divestiture of campaign funds.

Comment [1] is based upon the third, fourth, and fifth sentences of the Commentary following Canon 5C(2).

Comment [2] combines aspects of the second sentence of Canon 5C(2) and part of Canon 5C(4).

Comment [3] is partly new, but is based upon aspects of Canon 5C(2) and the following Commentary, plus parts of Canon 5C(4).

EXPLANATION OF BLACK-LETTER:

1. Rule 4.4(A): made explicit that campaign committees are permitted only for candidates subject to public election, deleted reference to "committees of responsible persons," and added a final sentence stating directly the candidate's responsibility for acts of his or her campaign committee.

The placement of the material on campaign committees within Canon 5C of the 1990 Code made it obvious (if not explicit) that these provisions applied only to candidates for *elective* judicial office (those "subject to public election"). Because Rule 4.4 stands alone in Canon 4 of the 2006 Draft, it was necessary to state the point explicitly.

The direction to establish committees composed only of "responsible persons" seemed both archaic and presumptuous, and was deleted. The last sentence of Rule 4.4(A) is new in this form, but merely makes explicit what is referred to indirectly or assumed throughout Canon 5C of the 1990 Code.

2. Rule 4.4(B)(1): combined and recast material from both Canon 5C(2) and Canon 5C(3) of the 1990 Code.

1 No substantive change is intended. This provision establishes that campaign contributions
2 must be “reasonable” in amount (to avoid a suggestion of undue influence) and *in*
3 *addition* are subject to aggregate limits (per campaign) for individuals and organizations,
4 limits which each jurisdiction will set according to its conditions and policy choices.

5
6 3. Rule 4.4(B)(2): added the word “current” before the word “campaign,” and left
7 only the post-election time period for ending campaign solicitation open for variation in
8 each jurisdiction.

9
10 These are minor adjustments, but could become significant in some settings. The Joint
11 Commission wanted to make it even clearer than in the 1990 Code that the time window
12 for a campaign committee to solicit funds applies to *each* campaign separately. Thus,
13 Rule 4.4(B)(2) specifies that it applies always to a candidate’s *current* campaign. To
14 prevent the early buildup of a war chest even for a single campaign, moreover, the Joint
15 Commission specified that contributions could not be solicited early than one year before
16 the election, rather than leaving the matter to the decision of each jurisdiction. The time
17 for continuing to raise campaign funds *after* the election, however, to pay off debts of the
18 campaign, was left to each state to decide, because conditions (including the size of likely
19 debts) will differ more dramatically from jurisdiction to jurisdiction.

20
21 4. Rule 4.4(B)(3): added “or within such other period as is provided by law.”

22
23 Only a minor substantive change is intended. The Joint Commission, aware that many
24 jurisdictions already have laws pervasively regulating elections, including the reporting
25 of campaign contributions and divestiture of the contributions subsequent to a campaign,
26 did not want to interfere with the operation of these laws if they applied to elections for
27 judicial office. In the 1990 Code, possible obligations, under law, to divest a campaign of
28 its funds was not addressed.

29
30
31 5. The paragraph is a follow-on to the Joint Commission’s concern, expressed as
32 well in Rule 4.4(B)(2), that candidates might take unused campaign funds and use them
33 to begin a war chest for the next campaign. Aware that many states already have similar
34 provisions in their general election and campaign finance laws, the Joint Commission
35 again deferred to local choices and existing law (if applicable) in setting the specific
36 details.

37
38 EXPLANATION OF COMMENTS:

39
40 [1]–[3] By and large, Comments [1]–[3] break no new ground, but explain the operation
41 and rationale for the black-letter text of Rule 4.4, borrowing from and recasting both
42 black-letter text and Commentary from the 1990 Code.

43
44 The treatment of contributions from *lawyers* in Comment [3] builds upon the treatment
45 given in Canon 5C(2) of the 1990 Code, but goes a step further. Canon 5C(2) merely
46 states that solicitation (by a campaign committee) of such contributions is not forbidden,

1 whereas Comment [3] to Rule 4.4 urges special caution in light of the enhanced
2 possibility that significant contributions from lawyers (and parties) who might later come
3 before the judge would be a cause for disqualification of the judge under Rule 2.11.
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1 **RULE 4.5**

2 ***Activities of Judges Who Become Candidates for Nonjudicial Office***

3
4 **(A) Upon becoming a candidate for a nonjudicial elective office, a judge**
5 **shall resign from judicial office, unless permitted by law* to continue to hold**
6 **judicial office.**

7
8 **(B) Upon becoming a candidate for a nonjudicial appointive office, a**
9 **judge is not required to resign from judicial office, provided that the judge**
10 **complies with the other provisions of this Code.**

11
12 **COMMENT**

13
14 [1] In campaigns for nonjudicial elective public office, candidates may make pledges,
15 promises, or commitments related to positions they would take and ways they would act
16 if elected to office. Although appropriate in nonjudicial campaigns, this manner of
17 campaigning is inconsistent with the role of a judge, who must remain fair and impartial
18 to all who come before him or her. The potential for misuse of the judicial office, and the
19 political promises that the judge would be compelled to make in the course of
20 campaigning for nonjudicial elective office, together dictate that a judge who wishes to
21 run for such an office must resign upon becoming a candidate.

22
23 [2] The “resign to run” rule set forth in paragraph (A) ensures that a judge cannot use
24 the judicial office to promote his or her candidacy, and prevents post-campaign
25 retaliation from the judge in the event the judge is defeated in the election. When a judge
26 is seeking appointive nonjudicial office, however, the dangers are not sufficient to
27 warrant imposing the “resign to run” rule.

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RULE 4.5
REPORTER'S EXPLANATION OF CHANGES

1990 MODEL CODE COMPARISON

Rule 4.5(A) is derived from Canon 5A(2), but has been simplified and reworded.

Rule 4.5(B) is new, but is implicit in, and thus derived from, Canon 5A(2).

Comments [1] and [2] are new.

EXPLANATION OF BLACK-LETTER:

1. Rule 4.5(A): recast text, substituted “nonjudicial elective office” for “in a primary or in a general election,” and deleted the specific exception for state constitutional conventions.

Not having encountered any opposition to the traditional “resign-to-run” rule, the Joint Commission retained it, with only minor revisions for style and clarity. Although Canon 5A(2) of the 1990 Code seemed clear that it was meant to apply to *elective* nonjudicial offices only, the 2006 Draft makes that explicit. The Joint Commission also removed the special exception for judges who campaign for election to a state constitutional convention as archaic and of insufficiently general application. The remaining language, “unless permitted by law to continue to hold judicial office” should carry the day if such a situation arises in contemporary practice.

2. Rule 4.5(B): added this paragraph to clarify what seemed implicit in Canon 5A(2)—that if a judge becomes a candidate for *appointment* to a nonjudicial office, the judge is *not* required to resign from judicial office as a general proposition.

The Joint Commission thought it sensible to make explicit that the “resign-to-run” rule applies only to nonjudicial elective offices, because it is only there that the dangers justifying the rule (as explained in Comments [1] and [2]) are at their height. In addition, because a sitting judge may become a “candidate” for an appointive nonjudicial office—an undefined term in the 2006 Draft—merely by being considered by an executive branch officer for appointment, it seemed to the Joint Commission to be unwarranted to require automatic resignation. This consideration is especially strong when the executive branch may be considering several nominees for the same position, and when the confirmation process, if any, is both lengthy and of uncertain outcome.

As a fail-safe, the Joint Commission added the reminder that a judge who remains on the bench while a candidate for appointive nonjudicial office must continue to abide by the other provisions of this Code (such as maintaining independence, integrity, and impartiality).

1 EXPLANATION OF COMMENTS:

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3 [1]–[2] Comments [1] and [2] are new, and explain the rationale for applying the “resign-
4 to-run” rule to elective nonjudicial offices, but not to appointive ones. The rationale is
5 based chiefly upon the decision in *Morial v. Judiciary Commission of Louisiana*, 565
6 F.2d 295 (5th Cir. 1997), in which a constitutional challenge to the resign-to-run rule was
7 rejected.

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