

MINNESOTA JUDICIAL ETHICS OUTLINE

I. OVERVIEW OF OUTLINE.

A. Purposes and Limitations of This Outline.

1. *Author.* William J. Wernz, member of the Board on Judicial Standards (2011-), is the principal author of this outline. He is also the author of an online treatise and an online guide. William J. Wernz, *Minnesota Legal Ethics* (Minn. St. Bar Ass'n) (6th ed. 2016), <http://minnesotalawyering.com>; William J. Wernz, *Dealing With and Defending Ethics Complaints* (Minn. St. Bar Ass'n) (2017) (to be posted April 2017).
2. *Education.* The Board has a twofold mission – dealing with complaints of judicial misconduct and disability, and providing education in judicial ethics. R. Bd. Jud. Standards 2 (2016). This outline serves both purposes.
3. *Limits.* The outline itself does not reflect Board policy, does not confer any procedural or substantive rights, and is not intended to be a comprehensive discussion of the Minnesota Code of Judicial Conduct or Rules of Board on Judicial Conduct.
4. *Work in Progress.* This outline is principally a collection of cases, opinions, and commentary that have come to the author's attention during Board service. The outline is expected to grow and to become more comprehensive as new developments occur.
5. *Organization.* Most of the outline is organized by Rules of the Minnesota Code of Judicial Conduct, as amended effective July 1, 2016. The outline is not the product of systematic or academic research. The outline incorporates some research that has been done regarding cases and opinions.
6. *Improvements Solicited.* Suggested additions, corrections, and other improvements are earnestly solicited for this outline.

- B. **Confidentiality.** Board Rule 21 provides for a Supreme Court-appointed committee to periodically review Board activities. The rule provides that a committee report may disclose information regarding public matters. In addition, the report “may present information about the board as long as it contains no specific information that would easily identify a judge, witness, or complainant.” This outline will follow these confidentiality principles. Likewise, the outline will provide the name of a judge only if the disciplinary action or procedure was made public. If a judge was privately disciplined, such as by admonition, the judge's name will not be disclosed.

II. SHORTHAND REFERENCES.

- A. **“Board.”** Board refers to the Minnesota Board on Judicial Standards. The Board's website provides information about the Board and about many of the topics addressed in this outline. <http://www.bjs.state.mn.us>.

- B. **“Canons.”** Canons refer to “overarching principles of judicial ethics that all judges must observe.” Code, Scope. “Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules.” *Id.* In Codes before 2009, violations of Canons could create a basis for discipline.
- C. **“Code.”** Code refers to the Minnesota Code of Judicial Conduct (2016), adopted by the Minnesota Supreme Court. Minnesota Supreme Court Advisory Committee Reports in 2007 and 2004 are instructive regarding the policy reasons for various Code provisions. These reports are posted on the Board’s website. <http://www.bjs.state.mn.us/file/code-of-judicial-conduct/advisory-comm-code-report-oct-2007.pdf>;
<http://www.bjs.state.mn.us/file/code-of-judicial-conduct/bjs-final-report-apr-2004.pdf>.
- D. **“Judge.”** Judge refers to Minnesota state court judges, referees, and others who are covered by the “Application” section of the Code. This section is discussed in Section VIII below.
- E. **“Model Code.”** Model Code refers to the ABA Model Code of Judicial Conduct (2007). The Model Code is the principal basis for the Minnesota Code, but the Minnesota Code has variations. The October 31, 2007 Report of the Ad Hoc Advisory Committee to Review the Minnesota Code of Judicial Conduct addresses most of these variations, but some variations were introduced by the Supreme Court and are not explained by the Report. <http://www.bjs.state.mn.us/file/code-of-judicial-conduct/advisory-comm-code-report-oct-2007.pdf>.
- F. **“Board Rules.”** Board Rules refers to the procedural Rules of the Board on Judicial Standards (2016), adopted by the Minnesota Supreme Court. On February 24, 2016, the Supreme Court amended the Board Rules, effective July 1, 2016. File No. ADM10-8032. The Rules were previously amended, in substantive ways, in 2009. The March 14, 2008 Report and Proposed Amendments to the Minnesota Rules, by a Supreme Court Advisory Committee, provides useful background to the 2009 amendments. <http://www.bjs.state.mn.us/file/code-of-judicial-conduct/bjs-final-report-mar-2008.pdf>.
- G. **Statutory Citations.** Statutory citations below are generally to Minnesota Statutes chapter 490A, which replaced Minnesota Statute chapter 490 in 2006. However, where the citation to chapter 490 is in a Minnesota Supreme Court opinion issued before 2006, the citation is unchanged.
- H. **“Terminology.”** Terminology refers to the Code section which provides definitions of many terms used in the Code.

III. SHORT HISTORY OF LEGISLATION REGARDING THE BOARD, THE CODE, AND THE RULES.

- A. **Creation of the Board.** In 1971, the Legislature established the Board and specified the powers of the Board, but the legislation did not take full effect until the Minnesota Constitution was amended. Minn. Stat. §§ 490.15-.17 (1971). In 1972, the Constitution was amended to authorize the Legislature to “provide for the retirement, removal or other

discipline of any judge who is disabled, incompetent or guilty of conduct prejudicial to the administration of justice.” Minn. Const. art. VI, § 9.

- B. **Jurisdiction.** The 1971 legislation authorized the Minnesota Supreme Court to discipline a judge “for action or inaction . . . that may constitute persistent failure to perform his duties, habitual intemperance or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.” Minn. Stat. § 490.16, subd. 3 (1971). The Legislature also authorized the Supreme Court to make rules to implement judicial discipline. *Id.* § 490.16, subd. 5 (1971).
- C. **1987 Amendment.** Legislation in 1987 changed the makeup of the Board membership to its current makeup: one judge of the court of appeals, three district court judges, two lawyers, and four public members. 1987 Minn. Laws 2657, 2662 (codified at Minn. Stat. § 490A.01, subd. 2(a) (2016)). The governor appoints all members. *Id.* § 490A.01, subd. 2(b). Senate confirmation is required for public and attorney members. *Id.*
- D. **2006 Amendment.** In 2006, the statutes governing the Board were moved from Chapter 490 to Chapter 490A.
- E. **2014 Amendment.** In 2014, the Legislature transferred primary responsibility for enforcing the “90-day rule” from the Board to the chief judges of the judicial districts. The 90-day rule generally requires a judge to rule within 90 days after a case is submitted. Minn. Stat. § 546.27 (2016). As amended, the statute provides: “Should the board receive a complaint alleging a serious violation of this section, the board’s authority to review and act shall not be limited.” *Id.* § 546.27, subd. 2.

IV. SHORT HISTORY OF THE CODE OF JUDICIAL CONDUCT.

- A. **Standards / Code.** The Minnesota Supreme Court adopted the Standards of Judicial Responsibility in 1972. The Court replaced the Standards with the Code in 1974. The Code has been frequently amended.
- B. **2009 Amendments.** The Supreme Court amended the Code in many ways in 2009. The impetus for amendment came from extensive amendments to the ABA Model Code. The 2009 revisions reorganized the Code into four Canons. Canon 1 addresses a judge’s obligations of independence, integrity, and impartiality. Canon 2 focuses on a judge’s judicial duties, while Canon 3 focuses on a judge’s extrajudicial activities. Canon 4 addresses a judge’s political activities.
- C. **Other Important Amendments.** Other significant amendments took effect in 1986, 1997, 2004, 2005, 2006, 2013, and 2016. The 1986 amendment to Canon 6(C) clarified a judge’s duty to report compensation. The 1997 amendments to Canon 5 related to political activities. The 2004 amendments to Canons 3 and 5 related to public statements and political activities. The 2005 amendment to Canon 2C prohibits a judge from knowingly holding membership in an unlawfully discriminatory organization. The 2006 amendment to Canon 5 related to political activities. The 2013 amendments related to public reporting and campaign obligations under the Campaign Finance and Public Disclosure laws.

V. SHORT HISTORY OF THE RULES OF THE BOARD ON JUDICIAL STANDARDS.

- A. **Rules of the Board.** In 1971, when the Legislature established the Board, the Legislature also directed the Supreme Court to “make rules to implement this section.” Minn. Stat. § 490.16, subd. 5 (1971). On December 16, 1971, the Supreme Court promulgated the Board’s procedural rules.
1. *Legislative Standards.* As described above, the Legislature also established standards. Some legislative standards are found in the Board Rules. For example, Rule 4(a), titled “Grounds for Discipline or Other Actions Shall Include,” was added to the Rules in 1978. Rule 4(a) is in part based on Minn. § 490A.02, subd. 3
- B. **Board Rules Amendments.** The Supreme Court has amended the Board Rules several times. Materials relating to the most important amendments are posted on the Board’s website. The broadest sets of amendments took effect in 1996 and 2009. The 1996 amendments clarified the relationship of the Board and the Lawyers Professional Responsibility Board and added procedures concerning a judge’s conduct occurring prior to the assumption of judicial office. Although the Board had issued advisory opinions on judicial conduct for many years, the 2009 amendments expressly authorized the Board to do so. The 2009 amendments also substantially changed how the Board screens and investigates complaints, amended panel hearing procedures and Supreme Court review, and modified the Board’s procedures related to cases involving disability. These amendments aligned several Board roles and procedures more closely with those of the Office of Lawyers Professional Responsibility, e.g., by providing for private appeal hearings for admonitions and by providing that the Board may appeal from, rather than overrule, hearing panel findings and conclusions regarding formal complaints. Effective July 1, 2016, the Supreme Court extensively amended the Board’s Rules. However, most of these amendments did not affect substance, but instead promoted clarity, consistency, and the perception of fairness.

VI. INTERPRETATIVE PRINCIPLES.

- A. **Case Law.** The Code “should be applied consistent with . . . decisional law.” Code, Scope. Public disciplinary decisions apply the Code. In Minnesota, there are approximately twenty-five Supreme Court discipline orders posted on the Board’s website. In addition, the Board and hearing panels are authorized to issue public reprimands. Board Rules 6(f)(5)(iii), 11(b)(1). Recent reprimands are posted on the Board’s website. In addition, some Minnesota criminal appellate cases apply the Code. A substantial number of Minnesota appellate cases have ruled on claims of criminal defendants that trial judges violated the Code’s disqualification provisions. *See* Minn. R. Crim. P. 26.03, subd. 14(3) (“A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct.”).
- B. **Canons are Guides.** The role of the Canons has changed over the years. Currently, the Code provides: “Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules.” Code, Scope. It should be noted that “[t]his is a change from the current code, in which violations of canons themselves are

grounds for discipline.” *In re Murphy*, 737 N.W.2d 355, 362 n.6 (Minn. 2007). In the period 2009-2014, Board Formal Complaints continued to allege, mistakenly, that judges “violated” certain Canons. *See, e.g.*, Compl. 24, *In re Perez*, 843 N.W.2d 562 (Minn. 2014); Compl. 5, *In re Karasov*, 805 N.W.2d 255 (Minn. 2011); Compl. 5, *In re Nordby*, No. A10-1847 (Minn. May 11, 2011).

C. **Cause for Removal (Criminal Case).** As noted above: “Cause for removal exists if the judge would be disqualified under the Code of Judicial Conduct. Minn. R. Crim. P. 26.03, subd. 14(3); *accord, State v. Burrell*, 743 N.W.2d 596, 601 (Minn. 2008).” *State v. Jacobs*, 802 N.W.2d 748, 751 (Minn. 2011).

D. **Clear and Convincing Evidence, Not Merely “Significant” Evidence.** The standard of proof for judicial discipline, whether public or private, is clear and convincing evidence.

1. “The hearing panel shall make findings of fact and conclusions of law as to whether there is clear and convincing evidence that the judge committed misconduct under the grounds for discipline in Rule 4.” Board Rule 11(a). “Clear and convincing” means “highly probable.” *In re Galler*, 805 N.W.2d 240, 251 (Minn. 2011), (quoting *In re Blakely*, 772 N.W.2d 516, 522 (Minn. 2009); *In re Miera*, 426 N.W.2d 850, 853 (Minn. 1988)). The Board erred when it argued a violation should be sustained based on “significant” evidence. *In re Galler*, 805 N.W.2d at 251.

2. The Minnesota Supreme Court has addressed application of the clear and convincing standard when testimony adverse to a judge is not corroborated: “The clear and convincing standard arises from an appreciation of the gravity of a disciplinary proceeding and the magnitude of the loss to which a disciplined judge is subjected. No mechanistic corroboration requirement is necessary; uncorroborated evidence may be clear and convincing if the trier of fact can impose discipline with clarity and conviction of its factual justification. In fact, depending on its source, uncorroborated evidence may be more reliable than that remotely corroborated by a dubious source.” *In re McDonough*, 296 N.W.2d 648, 692 (Minn. 1979). In this case, a finding that a judge made obscene phone calls was held to be clearly erroneous where it rested on one person’s testimony in circumstances that produced some doubt. *Id.* at 694-95. *See also* Board Rule 14(e) (“[T]he Court shall review the record of the proceedings, giving deference to the panel’s findings of fact . . .”).

E. **Comments.**

1. *Adoption.* The Minnesota Supreme Court order adopting Code amendments effective July 1, 2009, expressly adopted the comments, as well as the rules. Order Promulgating Revised Minnesota Code of Judicial Conduct at 2, No. ADM08-8004 (Minn. Dec. 18, 2008).

2. *Discretion and Aspiration.* Terms like “may” and “should” indicate discretion, rather than obligation. “Where a Rule contains a permissive term, such as ‘may’ or ‘should,’ the conduct being addressed is committed to the personal and professional discretion

of the judge or candidate in question.” Code, Scope. In addition, “the comments identify aspirational goals for judges.” *Id.*

3. *Not Mandatory.* “[T]he use of the word ‘should’ indicates that the comment is not mandatory.” *In re Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011); *see also* Code, Scope; *State v. Dahlin*, 753 N.W.2d 300, 306-07 (Minn. 2008).

F. Lawyer Ethics Rules and Discipline Procedures Rules. In judicial discipline cases, the Minnesota Supreme Court has sometimes cited discipline procedural rules and disciplinary principles that are applicable to lawyers. *See, e.g., In re Gillard*, 271 N.W.2d 785 *passim* (Minn. 1978); *In re Kirby*, 354 N.W.2d 410, 415 (Minn. 1984); *In re Ginsberg*, 690 N.W.2d 539, 549 (Minn. 2004). In *Gillard* and in *In re Finley*, File No. 97-65 (1998) (public reprimand), the court imposed judicial discipline for misconduct committed when the judge was a lawyer. *Gillard*, 271 N.W.2d at 787; *Finley*, File No. 97-65 at 1.

G. Procedural Rules and Variations.

1. *Harmless Departures.* Although the Court “cannot condone less than strict compliance with procedural rules,” harmless departures by the Board from the rules will not prevent discipline. *In re McDonough*, 296 N.W.2d 648, 688 (Minn. 1979), *modified*, 296 N.W.2d at 699 (Minn. 1980).
2. *Unsuccessful Due Process Challenges.* Several judges who were subjects of discipline proceedings alleged “due process” violations by the Board. The Supreme Court rejected all these challenges, even where the Board did not follow every procedural rule. *In re Pendleton*, 870 N.W.2d 367, 386 (Minn. 2015); *In re Karasov*, 805 N.W.2d 255, 271-75 (Minn. 2011) (citing *In re Kirby*, 354 N.W.2d 410, 416 (Minn. 1984)); *In re McDonough*, 296 N.W.2d 648, 688 (Minn. 1979); *In re Gillard*, 271 N.W.2d 785, 812-13 (Minn. 1978). Among other deficiencies, the judges failed to show that any procedural imperfection caused actual prejudice. *Karasov*, 805 N.W.2d at 274 n.19; *McDonough*, 296 N.W.2d at 689-90; *Gillard*, 271 N.W.2d at 811. In addition, a dissent in one case would have found a due process violation relating to the selection of special justices in the matter, but the majority rejected the claimed violation, as untimely and unfounded. *In re Todd*, 359 N.W.2d 24, 25-26, 28 (1984).

H. Code Violations and Discipline. Two overlapping principles guide the Board’s discretion in determining whether a rule violation warrants discipline. On one hand, a private admonition may be issued for misconduct “of an isolated and non-serious nature.” Rule 6(f)(5)(ii). On the other hand, a non-disciplinary disposition may be issued, depending on the circumstances relating to the rule violation. “Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rule(s), and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.” Code, Scope. Deferred dispositions,

dismissals, admonitions, or other dispositions, are among the options available to the Board. Rule 6(f)(5)(i).

VII. WORD USAGES, TERMINOLOGY.

A. “Family” / “Third Degree of Relationship.”

1. **“Family” is not defined in the Terminology section, but it is used in the Code.** Guidance regarding these terms is available in an article. Cynthia Gray, *Defining Family*, Jud. Conduct Rep., Summer 2015, at 1, http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR_Summer_2015.ashx. The terms “member of the judge’s family,” “member of a judge’s family residing in the judge’s household,” and “third degree of relationship” are defined in the Terminology section of the Code.

B. “Integrity,” “Fairness,” “Honesty,” Etc.

1. *Integrity*. “‘Integrity’ means probity, fairness, honesty, uprightness, and soundness of character. See Canon 1 and Rule 1.2.” Code, Terminology.
2. *Honesty*. In general, the Code does not have an express counterpart to Rule 8.4(c), Minnesota Rules of Professional Conduct, which states: “It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” However, Rule 1.2 of the Code requires a judge to act “in a manner that promotes public confidence in the . . . integrity . . . of the judiciary” The definition of “integrity” entails that a judge’s knowingly false statement violates Rule 1.2. The Court in *In re Karasov*, 805 N.W.2d 255, 268 (Minn. 2011), found Rule 1.2 violations when Judge Karasov made false and misleading statements and material omissions to the Board. “Honesty is a minimum qualification expected of every judge.” *Id.* at 276 (quotation omitted). A judge was removed from office for failing to maintain residence and for filing an affidavit of candidacy that included a knowingly false statement of residence. *In re Pendleton*, 870 N.W.2d 367, 389 (Minn. 2015).
3. *False or Misleading Campaign Statement*. Rule 4.1(A)(9) forbids a judge or judicial candidate to “knowingly, or with reckless disregard for the truth, make any false or misleading statement.” See *In re Pendleton*, 870 N.W.2d 367, 381 (Minn. 2015).
4. *Cheating on Bar Examination*. Justice Todd, while sitting on the Supreme Court, took the multi-state bar examination in a private room. *In re Todd*, 359 N.W.2d 24, 30 (1984). He brought with him, and used, law reference books, in violation of rules. *Id.* After investigation, the Board and Justice Todd entered into a stipulation for public reprimand. *Id.* at 25. After public comment, however, the stipulation was rejected, with one dissent, by a panel of the court of appeals, acting as Supreme Court. *Id.* at 25-26. The matter was remanded to a three-judge panel for hearing on whether Justice Todd cheated or merely should have known the exam was not open-book. *Id.* at 25. After trial, the panel found that Justice Todd cheated. William J. Wernz, *Minnesota Legal Ethics* 25 (Minn. St. Bar Ass’n) (6th ed. 2016). Justice Todd then resigned from

the Supreme Court. *Id.* Further information regarding these proceedings is available in the chapter, “What Minnesota Legal Ethics is All About,” in *Minnesota Legal Ethics*.

5. *Public Expectations.* “The public at large, and in particular, those appearing before the tax court could have reason to question whether a judge who fails to comply with Minnesota law and makes a substantial number of false statements will respect and follow the law.” *In re Perez*, 843 N.W.2d 562, 568 (Minn. 2014). *See also In re Karasov*, 805 N.W.2d 255, 276 (Minn. 2011) (citing *In re Ginsberg*, 690 N.W.2d 539, 549-50 (Minn. 2004) and *In re Winton*, 350 N.W.2d 337, 340 (Minn. 1984)).

C. **“Reasonable,” “Reasonably,” “Reasonable Person,” “Reasonable Examiner.”** “Reasonable” and variants are used approximately fifty times in the Code. These terms and “reasonable examiner” are used in case law. The Supreme Court has given guidance by explaining the meaning of a “reasonable examiner.” The tests for this standard relate to disqualification where “a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge’s impartiality.” *In re Jacobs*, 802 N.W.2d 748, 753 (Minn. 2011). The “reasonable examiner” is “an objective unbiased layperson with full knowledge of the facts and circumstances.” *State v. Pratt*, 813 N.W.2d 868, 876 n.8 (Minn. 2012) (quoting *Jacobs*, 802 N.W.2d at 753). Where “reasonable” pertains to a judge, the definition used for lawyers may be of some guidance, viz. “the conduct of a reasonably prudent and competent lawyer.” Minn. R. Prof. Conduct 1.0(i).

D. **“Should.”**

1. The word “should,” when used in the Code, as amended effective July 1, 2009, addresses conduct that “is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.” Code, Scope.
2. This principle has been applied by the Supreme Court, “But the use of the word ‘should’ indicates that the comment is not mandatory.” *State v. Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011). “Where a Rule contains a permissive term, such as ‘may’ or ‘should,’ the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question” Code, Scope; *see also Jacobs*, 802 N.W.2d at 754; *State v. Dahlin*, 753 N.W.2d 300, 306-07 (Minn. 2008).

E. **“Will” or “Would,” Used More Than “Might.”** The Code much more frequently uses “would” and “will” than “might” or “could.” Even where “might” is used in the rules, it is paired with “reasonably,” so that it is given an objective limit. The rules use “might” only twice, in Rules 2.10(A) and 2.11(A). The comments use “might” more frequently, often so as to present rule application issues.

F. **“The Law, the Legal System, or the Administration of Justice.”** The Code uses this phrase several times. An article discusses this phrase in relation to several rules. Cynthia Gray, *Nexuses and Tangents: The Law, the Legal System, or the Administration of Justice*, *Jud. Conduct Rep.*, Spring 2015, at 1, http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR_Spring_2015.ashx. The rules discussed

include Model Rules 3.2, 3.4 and Rule 3.7(A)(4) and (5). *Id.* at 1, 5, 6, 9, 11. Canon 4 is also discussed. *Id.* at 1, 5-9. The article also cites, without discussion, usages of the phrase in Rules 3.1(E), 3.7(A)(3), and 3.13(C)(2)(A), as well as in comments. *Id.* at 11.

VIII. APPLICATIONS / COVERED PERSONS / JUDGES, JUDICIAL OFFICERS, REFEREES.

- A. **Code “Application” Section.** The “Application” section of the Code deals with four topics: (1) “Applicability of This Code,” (2) “Retired Judge Subject to Recall” (usually called “Senior Judge”), (3) “Continuing Part-Time Judge,” and (4) “Periodic Part-Time Judge.” This Code section is the primary source for determining who is subject to the Code and for determining some exceptions of Code application for judges who are on senior status or are part-time.
- B. **Board Jurisdiction Over All State Court Judges, Judicial Officers, Referees.** “The provisions of sections 490A.01 and 490A.02 apply to all judges, judicial officers, and referees.” Minn. Stat. § 490A.03 (2016). The cited statutes pertain to creation of the board, the board’s powers, etc.
- C. **Judicial Branch Definition.** “[A]ll judges of the appellate courts, all employees of the appellate courts, including commissions, boards, and committees established by the Supreme Court, the Board of Law Examiners, the law library, the Office of the State Public Defender, district public defenders and their employees, all judges of all courts of law, district court referees, judicial officers, court reporters, law clerks, district administration employees under section 484.68, court administrator or employee of the court in a judicial district under section 480.181, subdivision 1, paragraph (b), guardian ad litem program employees, and other agencies placed in the judicial branch by law. Judicial branch does not include district administration or public defenders or their employees in the Second and Fourth Judicial Districts, court administrators not under section 480.181, subdivision 1, paragraph (b), or their staff under chapter 485, or other employees within the court system whose salaries are paid by the county, other than employees who remain on the county payroll under section 480.181, subdivision 2.” Minn. Stat. § 43A.02, subd. 25 (2016).
- D. **Retired or Senior Judge.** The Minnesota Constitution provides: “As provided by law a retired judge may be assigned to hear and decide any cause over which the court to which he is assigned has jurisdiction.” Minn. Const. art. VI, § 10. The Board has issued an opinion to address ethics issues when a retired judge is appointed to serve. Board Formal Opinion 2015-1, “Activities of Retired Judge Appointed to Service as Senior Judge.” A senior judge is a “Retired Judge Subject to Recall” within the meaning of Part II of the Application section of the Code. Regarding ADR services, the Board has stated: “The prohibition in Rule 3.9, against acting ‘as an arbitrator or mediator during the period of any judicial assignment,’ applies only ‘while serving as a judge.’ Retired judges who are merely certified to act as retired judges, but are not actually ‘serving’ in particular cases, are not prohibited from acting as arbitrator or mediator. The Board’s opinion is, further, that the prohibition against serving as a judge takes effect only when the arbitration or mediation has actually commenced; the prohibition would not be in place when the retired judge has merely accepted an offer to mediate or arbitrate or simply negotiated his or her

fee for this service. The prohibition would be lifted when the judge has completed his or her involvement in the arbitration or mediation.” Minn. Bd. on Jud. Standards, Formal Op. 2015-1, 5 (2015) (quoting Letter from Bd. on Jud. Standards to State Court Adm’r (Sept. 28, 2012).

E. Part Time Judge. Application, Part III(B) – Executive Secretary Advisory Opinion (June 19, 2014).

1. *Facts.* A judge was hired as a continuing three-quarter time referee in state district court. The judge therefore falls under Applications, Part III(B). May the judge continue to handle federal bankruptcy cases?
2. *Opinion.* The answer is yes. “Practice in federal court does not fall within the prohibition that a part-time judge ‘[shall] not practice law in the district court of the county in which the judge serves, or, if the court is divided into divisions, in the division of the court on which the judge serves, or in any court subject to the appellate jurisdiction of the court on which the judge serves.’ Minn. Code Jud. Cond., Application, Part III(B).”

F. “Judicial Officer.”

1. *Definition.* A “Judicial Officer” is defined as “a judge, court commissioner, referee, or any other person appointed by a judge or court to hear or determine a cause or controversy.” Minn. Stat. § 609.415, subd. 1(3) (2016).
2. *Code Application.* The Code applies to judicial officers. “A judge, within the meaning of this Code, is anyone who is employed by the judicial branch of state government to perform judicial functions, including an officer such as a magistrate under Minnesota Statutes, section 484.702, court commissioner under Minnesota Statutes, section 489.01, referee, or judicial officer under Minnesota Statutes, section 487.08.” Code, Application, Part I(B).

G. Administrative Law Judges (ALJs) and Workers’ Compensation Judges.

1. The Chief ALJ is subject to the Board’s jurisdiction. Minn. Stat. 14.48, subs. 2, 3(d) (2016). Although other ALJs and workers’ compensation judges are also subject to the Code, they are not subject to the Board’s jurisdiction. *Id.* The Board refers complaints against ALJs and workers’ compensation judges to the chief ALJ.

H. Consensual Special Magistrate (CSM).

1. A CSM is a neutral who presides over “[a] forum in which each party and their counsel present their positions to a neutral in the same manner as a civil lawsuit is presented to a judge. This process is binding and includes the right of appeal to the Minnesota Court of Appeals.” Minn. Gen. R. Prac. 114.02(a)(2).
 - a. “The Supreme Court shall adopt rules governing practice, procedure, and jurisdiction for alternative dispute resolution programs.” Minn. Stat. § 484.76,

subd. 1 (2016). The Minnesota Supreme Court appoints the ADR Ethics Board to “promote the ethical use of ADR in the court system. The Board reviews complaints and may issue sanctions against neutrals in accordance with Rule 114 Code of Ethics.” Minn. Jud. Branch, *ADR Ethics Board*, (July 25, 2015), <http://www.mncourts.gov/Help-Topics/AlternativeDisputeResolution.aspx#tab02ADREthicsBoard>.

- b. “A qualified neutral is subject to this complaint procedure when providing any ADR services. . . . The Board will consider the full context of the alleged misconduct, including whether the neutral was subject to other applicable codes of ethics.” Minn. R. Gen. Prac. 114 app., advisory committee’s note to Code of Ethics Enforcement Procedure, Rule I. *Code of Ethics Enforcement Procedure* Rule I. Advisory Comment.
2. The ADR Code of Ethics contains two types of rules. One deals with ethics standards regarding impartiality, conflicts of interest, competence, confidentiality, quality of the process, advertising and solicitation, fees, and self-determination. The other type of rule deals with sanctions. *See* Minn. R. Gen. Prac. 114 apps. Code of Ethics, Code of Ethics Enforcement Procedure.
 - a. A CSM derives authority from “the parties’ agreement to submit the case for such adjudication.” *See In re Marriage of Lundquist*, No. A07-1625, slip op. at 7 (Minn. Ct. App. July 1, 2008). In *Lundquist*, the appellant challenged the neutral’s authority to act as a CSM. *Id.* slip op. at 6.
 - b. The Board will generally refer complaints against CSMs to the ADR Ethics Board.

I. Tax Court and Workers’ Compensation Court of Appeals Judges.

1. “The judges of the Tax Court shall be subject to the provisions of the Minnesota Constitution, article VI, section 6, the jurisdiction of the commission on judicial standards, as provided in sections 490A.01 and 490A.02, and the provisions of the Code of Judicial Conduct.” Minn. Stat. § 271.01, subd. 1 (2016). *In re Perez*, 843 N.W.2d 562 (Minn. 2014) found Code violations during Judge Perez’s service on the Tax Court.
2. “The judges of the Workers’ Compensation Court of Appeals shall be subject to the provisions of the Minnesota Constitution, article VI, section 6, the jurisdiction of the Commission on Judicial Standards, as provided in sections 490A.01 and 490A.02, and the provisions of the Code of Judicial Conduct.” Minn. Stat. § 175A.01, subd. 4 (2016).

J. No Jurisdiction.

1. The Board does not have jurisdiction over complaints that concern court administrators or personnel, court reporters, or law enforcement personnel and other non-judicial persons, except insofar as the supervisory duties of a judge under Rule 2.12 may be involved.

2. The Board does not have jurisdiction over complaints that concern federal judges. Complaints against federal judges may be filed with the Eighth Circuit Court of Appeals.
3. The Board does not have jurisdiction over complaints that concern lawyers (except, in some circumstances, those who become judges or who were judges). Complaints against lawyers are filed with the Office of Lawyers Professional Responsibility.

K. Jurisdiction Regarding Conduct Prior to Becoming a Judge. Board Rule 6Z is titled, “Procedure for Conduct Occurring Prior to Assumption of Judicial Office.” Judges have been disciplined, both as lawyers and as judges, for conduct as lawyers, before assuming judicial office. *In re Finley*, File No. 97-65 (Mar. 13, 1998); 572 N.W.2d 733 (Minn. 1997); *In re Gillard*, 271 N.W.2d 785 (Minn. 1978).

L. The Office of Lawyers Professional Responsibility Jurisdiction Regarding Conduct While a Judge. When a hearing panel recommends the suspension or removal of a judge, the Office of Lawyers Professional Responsibility and the judge will be heard by the Supreme Court “on the issue of lawyer discipline.” Rule 14(f). Some judges have been disciplined both as lawyers and as judges for misconduct committed while serving as a judge. *In re Pendleton*, 876 N.W.2d 296 (Minn. 2016); *In re Pendleton*, 870 N.W.2d 367 (Minn. 2015); *In re Ginsberg*, 690 N.W.2d 539 (Minn. 2004); *In re Miera*, 426 N.W.2d 850 (Minn. 1988). In other cases, the Court has declined to impose lawyer discipline on a judge who has been suspended or removed from office. *In re Winton*, 350 N.W.2d 337 (Minn. 1984). See discussion below, Section LXII “Lawyer Discipline for Conduct Occurring While a Judge.”

IX. RULE 1.1, “A JUDGE SHALL COMPLY WITH THE LAW.”

A. Importance of a Judge’s Compliance With the Law.

1. “The integrity of the judicial system is seriously undermined when a judge not only violates his or her constitutional obligations but also flouts a discipline decision of our court. . . . In order for the public to have confidence in the integrity of the judicial system, the public must believe that there is an effective system in place to ensure judges abide by our constitution and follow their ethical obligations and to address acts of judicial misconduct. The public’s trust and confidence in the Minnesota judiciary will be eroded if the disciplinary system is unable to deter similar acts of serious misconduct by other judges.” *In re Pendleton*, 870 N.W.2d 367, 388 (Minn. 2015) (citations omitted).
2. “The public at large, and in particular, those appearing before the tax court could have reason to question whether a judge who fails to comply with Minnesota law and makes a substantial number of false statements will respect and follow the law.” *In re Perez*, 843 N.W.2d 562, 568 (Minn. 2014).
3. ““Those who come before the courts cannot reasonably be expected to respect the law if those who preside on the bench are not perceived as respectful of the law.”” *In re*

Karasov, 805 N.W.2d 255, 276 (Minn. 2011) (quoting *In re Ginsberg*, 690 N.W.2d at 549).

4. “Willful violations of law . . . bring[] the judicial office into disrepute and thereby prejudice[] the administration of justice.” *In re Winton*, 350 N.W.2d 337, 340 (Minn. 1984).

B. Statute and Rule.

1. A statute provides that, “the Supreme Court may suspend a judge from office without salary when the judge pleads guilty to or not contest to or is found guilty of a crime that is punishable as a felony under either Minnesota law or federal law or any other crime that involves moral turpitude. . . . If the judge is suspended and the conviction becomes final, the Supreme Court shall remove the judge from office.” Minn. Stat. § 490A.02, subd. 2 (2016).
2. A rule provides: “Grounds for Discipline or Other Action Shall Include: (1) Conviction of a crime punishable as a felony under state or federal law or any crime involving moral turpitude.” Board Rule 4(a).

C. Rule 2.2 Distinguished.

1. Rule 2.2 provides: “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”
2. Rule 2.2 requires judges, acting as judges, to apply the law. Although Rules 1.2 and 2.2 overlap, Rule 2.2 focuses on a judge’s adjudicative duties, whereas Rule 1.1 focuses on a judge’s conduct, both on and off the bench.

D. Attorney Registration.

1. *Automatic Suspension.* Attorneys must renew their licensure registration annually. Suspension is automatic at the time of non-renewal. Minn. Sup. Ct. R. on Lawyers Reg. 2B; 2H.
 - a. 2011 Dismissal. A judge did not receive notice from the attorney registration office that renewal was due because the judge moved. The judge self-reported upon discovery, after four months of suspension. The Board did not find reasonable cause to believe discipline was warranted and dismissed the matter.
 - b. 2015 Letter of Caution. A part-time judicial officer (hereafter “judge”), who also worked part-time as a government attorney, failed to renew the judge’s law license and was suspended for non-payment for nearly two weeks. The judge self-reported and paid. However, the judge incorrectly chose “inactive status” for the license. The judge did not correct the status error for approximately two months even after being notified of the error. Because the Board was concerned with the judge’s failure to understand the need for an active license, the Board dismissed but also issued a non-disciplinary letter of caution.

E. Child Support, Maintenance or Alimony.

1. *In re Roberts*. The Supreme Court censured Judge Roberts for several offenses, including failure to comply with court orders to pay alimony and child support. Findings of Fact of Referee Rolf Fosseen, Findings 23, 26, *In re Roberts*, No. 51071 (Minn. Jan. 20, 1981),
2. *Rule 30, Rules on Lawyers Professional Responsibility*. This rule, applicable to lawyers, shows the importance of paying maintenance and child support. The rule provides: “Upon receipt of a district court order or a report from an Administrative Law Judge or public authority pursuant to Minn. Stat. § 518A.66 finding that a licensed Minnesota attorney is in arrears in payment of maintenance or child support and has not entered into or is not in compliance with an approved payment agreement for such support, the Director’s Office shall serve and file with the Supreme Court a motion requesting the administrative suspension of the attorney until such time as the attorney has paid the arrearages or entered into or is in compliance with an approved payment plan. The Court shall suspend the lawyer or take such action as it deems appropriate.”

F. Driving While Under the Influence Convictions.

1. *Judge Chu*. In 2005, the Board issued a public reprimand to Judge Chu, based on conviction for driving while impaired by alcohol. *In re Chu*, File No. 05-56 (July 11, 2005).
2. *Judge Murphy*. In 2003, the Board issued two public reprimands to Judge Murphy for driving while impaired by alcohol and for initially refusing to submit to the standard booking procedure in connection with the driving charge, in violation of Minnesota law. *In re Murphy*, File No. 03-02, (Mar. 18, 2003).

G. Oath.

1. *Text*. Minnesota Statutes section 358.05 (2016) requires judges to take the oath found in the Constitution, Article V, Section 6: “Each officer created by this article before entering upon his duties shall take an oath or affirmation to support the constitution of the United States and of this state and to discharge faithfully the duties of his office to the best of his judgment and ability.” See *Winters v. Kiffmeyer*, 650 N.W.2d 167, 172 (Minn. 2002) (holding that a judge does not begin to serve in office until the effective date of the appointment and after taking the oath of office).
2. *Timely Taking and Filing*. A pro se litigant, Myser, claimed that Judge Lennon did not timely take and file her oath, and therefore her judicial acts were invalid. The law requires a judge both to take the oath and to file it with the Secretary of State. Occasionally, judges are tardy in filing, especially when re-elected. The court of appeals held that a judge who fails to take the oath of office is a de facto judge and “[t]he acts of a de facto judge actually occupying the office and transacting business are valid.” (quotation omitted). *Myser v. Myser*, No. A13-0634, slip op. at 3 (Minn. Ct. App. May 21, 2013). Myser’s complaint was reported in the Star Tribune. Brandon Stahl, *Minnesota High Court to Consider Judge’s Oath*, Star Trib., Mar. 3, 2014,

<http://www.startribune.com/minnesota-high-court-to-consider-judge-s-oath/248301011/>.

3. *Attorney Discipline*. At least in an earlier era, the Minnesota Supreme Court sometimes disciplined lawyers for violating their oath. For example, a lawyer “willfully violated his obligation to maintain the respect due to courts and judicial officers.” *State Bd. of Law Exam’rs v. Hart*, 104 Minn. 88, 120, 116 N.W. 212, 217 (1908).

H. Residence.

1. *In re Pendleton*, 870 N.W.2d 367 (Minn. 2015).

- a. *Violations and Discipline*. Judge Pendleton violated Rules 1.1, 1.2 and 2.1, and Article VI, Section 4 of the Minnesota Constitution, by failing to reside in his district from January 15 through June 2, 2014. 870 N.W.2d at 381. Judge Pendleton was removed from office. *Id.* at 389.
- b. *Findings*. The Board did not appeal panel findings that Judge Pendleton had not lost residence from November 2013 (when he sold his condo in the district) to January 2014 (when he ceased looking for housing in the district) and from June (when he resumed looking for housing in the district) to August (when he resumed living in the district), because he was looking for a residence. The Court specifically stated that it was not deciding whether residency was lost in November, nor whether residency was regained in June. *Id.* at 374 n.3. “We likewise do not decide whether a judge who moves outside his judicial district can reacquire residency in his district after it has been lost.” *Id.*
- c. *Lack of Disclosure*. One factor relevant to proof of loss of residence was lack of disclosure. “Judge Pendleton’s failure to disclose his living situation during this time period – particularly in light of his previous disclosures to both his colleagues and to Paull – belies [his] assertion that he intended to remain a resident of the 10th Judicial District.” *Id.* at 375 (quoting Panel finding).

2. *In re Karasov*, 805 N.W.2d 255 (Minn. 2011).

- a. *Discipline*. Judge Karasov was found not to have maintained a residence in Hennepin County for three months. 805 N.W.2d at 265. She also was found to have made false or misleading statements to the Board regarding residence. *Id.* at 270. The hearing panel recommended a 90-day suspension, but the Court imposed a six month suspension. *Id.* at 263, 275.
- b. *Intent*. The panel and Court rejected Judge Karasov’s claims that her non-systematic and casual conversations with friends about rentals showed intent to reside. *Id.* at 265.
- c. *Findings*. The Court affirmed a hearing panel finding that Judge Karasov did not reside in the district from July 1, 2009 (when she moved to her lake home) to September 30, 2009 (on October 1, she signed a lease and began renting a room in

her daughter's rental unit). *Id.* at 265. "During this time period, Judge Karasov did not have a place to live within the district, and the panel reject[ed] as not credible Judge Karasov's testimony that she nonetheless intended to continue her residence within the judicial district during this time period. Judge Karasov's failure to take reasonable steps to find a place to live within the district and her conduct in relation to the board's investigation belies her professed intent." *Id.* at 262-63.

- d. *Residence.* The meaning of "residence" for judicial purposes is defined by the Court as being the same as for legislators. *Id.* at 265. Both "physical presence and intent to reside" are relevant. *Id.* "We conclude that the test for determining whether a legislator has resided in a legislative district, as required by Article IV, Section 6, of the Minnesota Constitution, should also apply in determining whether a district court judge complies with the residency requirement of Article VI, Section 4, of the Minnesota Constitution. Both constitutional provisions use similar language and involve the same subject matter. Thus, in order to determine whether Judge Karasov resided outside of her judicial district in the summer of 2009 after she rented out her Edina townhome, we will focus on Judge Karasov's physical presence and intent to reside." *Id.*
- e. *Validity of Judicial Acts.* The Minnesota Supreme Court held that, notwithstanding Judge Karasov's temporary lack of residence in her district, her judicial acts during her period of absence were valid. *State v. Irby*, 848 N.W.2d 515, 522-23 (Minn. 2014).
- f. *Due Process.* Judge Karasov challenged several board investigative procedures as violating her due process rights. 805 N.W.2d at 270. The Court rejected these challenges. *Id.* at 273-75. Further detail on this subject is found under "Constitutional Issues" below.

I. Criminal Sex Offenses.

1. *In re Winton*, 350 N.W.2d 337 (Minn. 1984). Judge Winton was convicted of two misdemeanors of soliciting prostitutes. 350 N.W.2d at 339. The record showed "an extensive course of soliciting and engaging in prostitution with 15 to 20 young male prostitutes during a period of 7 or 8 years, all in violation of Minn. § 609.324 (1982)." *Id.* at 340. Some of the sexual encounters occurred in chambers. *Id.* at 343. Although the conduct also violated the statute prohibiting sodomy, the Court considered only the violations of the prostitution statute. *Id.* at 343 n.9. Judge Winton was removed from office. *Id.* at 344.
2. *In re Mann*, No. 50982 (Minn. Mar. 4, 1980). Judge Mann engaged in prostitution with an adult woman "10 times or better" in a year. Statement of Allegations 1, *In re Mann*, No. 50982 (citation omitted). The conduct resulted in media attention. *Id.* at 2. Judge Mann received a public censure. Judgment at 1, *In re Mann*, No. 50982. In a later case, the Court stated: "It may well be that in *Mann* we should not have so summarily confirmed the stipulation for discipline no more severe than public censure, but respondent surely did not act in reliance on *Mann*, and we will not perpetuate it." *In re*

Winton, 350 N.W.2d 337, 343 n.10 (Minn. 1984). See *In re Miera*, 426 N.W.2d 850, 859 (Minn. 1988) (noting “reservations about . . . Judge Mann’s modest sanction.”).

J. **Not Filing Minnesota Income Tax Returns.** *In re Haas*, 365 N.W.2d 220 (Minn. 1985). Judge Haas pled guilty to the misdemeanor of not filing Minnesota individual income tax returns for 1979 and 1980. 365 N.W.2d at 220. Judge Haas was convicted and placed on probation. *Id.* at 221. Judge Haas subsequently filed his returns and was entitled to a refund. *Id.* Pursuant to stipulation between Judge Haas and the Board, the Supreme Court publicly censured him. *In re Haas*, 365 N.W.2d 220, 220 (Minn. 1985).

1. *In re Venne*, File No. 08-08 (Feb. 17, 2010). Judge Venne was reprimanded by the Board for failure to timely file Minnesota tax returns for five years. Judge Venne was also convicted of a misdemeanor. *State v. Venne*, No. 02-CR-08-12164 (Anoka Cty. June 22, 2009).

K. **Delay and Ninety Day Rule.**

1. *2014 Statutory Amendment.* In 2014, the Legislature amended the law to provide for reporting to the chief judge of the relevant district of a judge’s failure to render a decision within 90 days of the case being fully submitted. Minn. Stat. § 546.27, subd. 2 (2016).

2. *Public Discipline.*

a. *In re Perez*, 843 N.W.2d 562 (Minn. 2013). Judge Perez was censured for misconduct including chronically issuing opinions and orders on an untimely basis and falsifying dates in his orders so it appeared he was complying with the law. *Id.* at 568, 570.

b. *In re Anderson*, 312 Minn. 442, 252 N.W.2d 592 (1977). Judge Anderson was suspended for undisclosed loans from lawyers, multiple violations of the 90-day rule and other violations. *Id.* at 448, 252 N.W.2d at 595. At the beginning of discipline proceedings, Anderson had 12 pending matters more than 90-days old, one of them submitted in 1969. *Id.* at 445, 252 N.W.2d at 593. The Referee did not find credible Anderson’s claim that his tardiness was occasioned by a “mental sickness.” *Id.* at 445-46, 252 N.W.2d at 593.

c. *In re Johnson*, File No. 10-34 (Oct. 13, 2010). The Board issued a public reprimand to Judge Johnson for substantial delay in two cases, after issuing private disciplines in 1993 and 2008, also based on delay.

d. *In re Roue*, File No. 07-54, (Oct. 4, 2007). The Board issued a public reprimand to Judge Roue, based on failure to decide a case for 137 days.

e. *In re Mack*, File No. 98-45 (Sept. 22, 1998). The Board issued a public reprimand to Referee Mack, based on failure to render a decision for 134 days.

- f. *In re Rosas*, File No. 97-09 (May 23, 1997). The Board issued a public reprimand to Judge Rosas, based on failure to enter a judgment and decree in a marriage dissolution for more than 11 months.
3. *Admonitions.*
- a. *File No. 12-13 Admonition.* The Board issued a private admonition to a child support magistrate based on failure to render a decision for 110 days. Bd. on Jud. Standards, Private Discipline Summaries, File No. 12-13 (2012), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
 - b. *Other Admonitions.* In the period 2009-2014, the Board issued several other admonitions based on failure to render decisions in a timely way.
4. *Letters of Caution.*
- a. *2012, 2013 Letters of Caution.* In both cases, judges self-reported issuing orders 100-110 days after submission. The cases were not in the MNCIS system.
 - b. *Inexperience, Court Administration.* In or about 2011, a letter of caution was issued in a matter in which there was substantial delay. The judge was inexperienced and the court administrator failed to forward relevant documents.
5. *Dismissals.*
- a. In 2013, the Board dismissed a matter in which a child support magistrate may have rendered a decision more than 90 days after submission. There was not clear and convincing evidence regarding when the magistrate received the file in question by e-mail.
 - b. In 2012, two matters were dismissed where the judges rendered decisions 92 days and 95 days after submission.
 - c. In 2011, two matters were dismissed where there was substantial delay in deciding matters, but the judges were seriously ill.

X. RULE 1.2 – PROMOTING CONFIDENCE IN THE JUDICIARY, AVOIDING APPEARANCE OF IMPROPRIETY (formerly CANON 2A).

- A. **Independence, Integrity, Impartiality.** Rule 1.2 requires judges to act “at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary”
- B. **Personal Conduct – Related Standards.** Canon 3 in part governs personal conduct that may conflict with judicial responsibilities. Rule 1.1 requires a judge to comply with the law. Rule 1.2 applies both to conduct in a judicial capacity and to personal conduct.

C. Chemical Abuse, Intoxication, “Habitual Intemperance.”

1. *Rule and Statute.* “Habitual intemperance” is a ground for discipline or other action. Board Rule 4(a)(4). Habitual intemperance is a basis for a determination of judicial disability, as well as discipline. Minn. Stat. § 490A.02, subd. 3 (2016).
2. *Definition.* “Habitual intemperance” usually refers to frequent intoxication. *See e.g., Intemperance*, Black’s Law Dictionary (7th ed. 2007) (defining “intemperance” as “[a] lack of moderation or temperance; esp., habitual or excessive drinking of alcoholic beverages.”).
3. *In re Kirby*, 354 N.W.2d 410 (Minn. 1984). Judge Kirby was censured for public intoxication, conducting judicial business with alcohol on his breath, habitual tardiness, and discourteous treatment of female attorneys (using the terms “lawyerette” and “attorney generalette”). 354 N.W.2d at 421.
4. *In re Agerter*, 353 N.W.2d 908 (Minn. 1984).
 - a. *Procedure.* The Board received allegations that Judge Agerter “had an alcohol problem” and was having sexual relations with complainant’s ex-wife. 353 N.W.2d at 910. Judge Agerter met with the Executive Secretary, but refused to give a recorded statement. *Id.* The Board issued an investigative subpoena. *Id.* Judge Agerter moved to quash. *Id.* A Ramsey County District Court judge quashed the subpoena. *Id.* The Board sought a writ of prohibition. *Id.* at 910-11. The Supreme Court granted the writ as to the investigation of alcohol abuse and denied the writ as to investigation of sexual conduct. *Id.* at 915.
 - b. *First Holding – Alcoholism / Private / Public.* The court rejected Judge Agerter’s argument that his drinking was private. “There must also be, argues the judge, some further showing that his job performance has been impaired or that his misbehavior has been conducted openly or scandalously so as to bring the judicial office into disrepute. *See, e.g., In re Snyder*, 336 N.W.2d 533, 534 (Minn. 1983) (adulterous conduct ‘the subject of gossip and speculation in the community’). We think respondent and amicus view the informal complaint too narrowly.” *Id.* at 912. In authorizing investigation, the court reasoned, “Alcoholism is known to affect adversely job performance and public behavior.” *Id.*
 - c. *Second Holding – Private Sex Life.* The Syllabus by the Court stated: “The judge’s right of privacy must yield to the Board’s inquiry into a disciplinary violation for an alcohol problem; however, in the circumstances presented, the judge’s right of privacy outweighs the Board’s interest in inquiring into his private sex life.” *Id.* at 910.
5. *In re Sandeen, No. 48183 (Minn. Oct. 27, 1977).*
 - a. The Supreme Court approved a stipulation between Judge Sandeen and the Board. *Id.* slip op. at 1. Judge Sandeen acknowledged that he is an alcoholic, averred that he has received in-patient treatment and is active in Alcoholics Anonymous, and

agreed to abstain from alcohol and to be supervised by a person who will be chosen by the Board and report to the Board. Stipulation at 1, *In re Sandeen*, No. 48183. Judge Sandeen also agreed that “should he again indulge in the use of alcohol,” he may be removed from office. Stipulation at 2, *In re Sandeen*, No. 48183.

- b. In the stipulation, Judge Sandeen ceased contesting the Board’s complaint and admitted its allegations, principally that of “habitual intemperance, persistent failure to perform his duties and conduct prejudicial to the administration of justice” Complaint at 2, *In re Sandeen*, No. 48183. More specifically Judge Sandeen admitted he “has conducted court and attempted to conduct court while under the influence of alcohol, has been drunk and offensive in public places and in places where he was likely to be observed and where he was observed by persons in his jurisdiction, was drunk and offensive in such degree as to require restraint by peace officers, operated automobiles while under the influence of alcohol with resulting accidents and damage, made false statements, charges and accusations to police officers while intoxicated, and compelled unauthorized persons to substitute for him in his judicial functions while he was incapacitated by the effects of alcohol.” *Id.*
 6. *Driving While Under the Influence*. The Board has issued public reprimands based on judges’ convictions for DWI offenses. *In re Chu*, File No. 05-56 (July 11, 2005); *In re Murphy*, File No. 03-02, (Mar. 18, 2003).
 7. *1882 Impeachment*. In 1882, after House impeachment and Senate trial, from January to March 1882, Judge E. St. Julien Cox, was convicted and removed, for intoxication on the bench, and related misconduct, in seven instances. S. Journal, Sitting as a High Court of Eugene St. Julien Cox, at 14 (Dec. 13, 1881). The Journal of the Senate in the matter is found at https://books.google.com/books?id=QYsDAAAAYAAJ&pg=PA14&lpg=PA14&dq=minnesota+senate+journal+impeachment+e+st+julien+cox&source=bl&ots=pdSegRluMS&sig=i2IoX_qhiWYchlcV2tfFRGv7h84&hl=en&sa=X&ved=0ahUKEwjCvKbe0r3JAhUL8mMKHWlnAE4Q6AEIJjAC#v=onepage&q=minnesota%20senate%20journal%20impeachment%20e%20st%20julien%20cox&f=false.
 8. *Public or Habitual Drunkenness*. Public drunkenness is not a crime. Minn. Stat. § 340A.902 (2016). However, “[t]he habitual drunkenness of any person holding office under the Constitution or laws of this state shall be good cause for removal from office by the authority and in the manner provided by law.” Minn. Stat. § 351.07 (2016).
- D. **Slur**. In 1993, a judge accepted the Board’s reprimand for twice referring to “Martin Luther Coon Day,” in conversations with lawyers and court personnel. The Stipulation and Press Release characterized the conduct as “a derogatory comment concerning the Martin Luther King, Jr. holiday,” but the actual reference was reported in newspaper articles.

E. Traffic Tickets – Judges Conducting Private Procedures for Related Parties.

1. *In re Thuet*, File No. 06-100 (Apr. 20, 2007). The Board issued a public reprimand and a \$3500 penalty for Judge Thuet’s handling an acquaintance’s tickets without notice to the County Attorney. “The failure of Judge Thuet to notify the County Attorney of J.A.D.’s cases violated Canon 3A(7) of the Code of Judicial Conduct (Code), which requires judges to ‘accord every person who has a legal right in a proceeding, or the person’s lawyer, the right to be heard.’”
2. *In re Stacey*, 737 N.W.2d 345 (Minn. 2007). The Board issued a formal complaint regarding Judge Stacey for continuing a traffic ticket for dismissal. 737 N.W.2d at 347. The ticket was issued to a judicial administration clerk’s husband, the clerk’s request for the judge’s disposition violated county policy, and the disposition was in chambers. Judge Stacey challenged the reprimand. *Id.* at 347-48. After hearing, the Board recommended a public reprimand and a fine. *Id.* at 348. The Court issued a reprimand, but not a fine. *Id.* at 352.
3. *In re Murphy*, 737 N.W.2d 355 (Minn. 2007). The Supreme Court issued a public reprimand to Judge Murphy. 737 N.W.2d at 367. One basis for the discipline was misconduct regarding handling a ticket that was similar to the misconduct in *In re Stacey*, 737 N.W.2d 345 (Minn. 2007). *Id.* at 362. In addition, Judge Murphy appeared to attempt to influence a witness. *Id.* at 361-62.

F. Presiding in a Friend’s Case. The Board issued a public reprimand and a \$1,000 civil penalty to Judge Sovis. Judge Sovis presided in two cases involving Mr. McDonald. Judge Sovis made orders involving contempt, arrest and jail time for McDonald. McDonald was an antagonist of John Doe. Mrs. Sovis was a best friend of Doe’s wife, and Judge Sovis was a friend of Doe and his family. Judge Sovis took actions without providing McDonald an opportunity to be heard and without notifying the county attorney. *In re Sovis*, File No. 08-31 (Aug. 12, 2008).

G. Appearance of Impropriety.

1. *Criteria.* A judge may violate the “appearance of impropriety” provisions of Rule 1.2, even if there is no intent on the part of the judge to do so. *See* Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 62 (2d ed. 2011) (“Because the standard for determining the appearance of impropriety is objective, a judge’s own perception of motivation for behavior is irrelevant to the analysis.”). The test for the existence of an appearance of impropriety is “whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament or fitness to serve as a judge.” Rule 1.2 cmt. 5. To this, the following could be added: “A judge who feels able to preside fairly over the proceedings should not be required to step down upon allegations of a party which themselves may be unfair or which simply indicate dissatisfaction with the possible outcome of the litigation.” *McClelland v. McClelland*, 359 N.W.2d 7, 11 (Minn. 1984).

2. *Contacting Witnesses*. A judge may be disciplined under Rule 1.2 for either an actual attempt to influence a witness or for creating an appearance of an attempt to influence a witness, but merely discussing a disciplinary matter with a potential witness does not in itself create such an appearance. *In re Galler*, 805 N.W.2d 240 (2011); *In re Murphy*, 737 N.W.2d 355 (Minn. 2007).
3. *In re Murphy*, 737 N.W.2d 355 (Minn. 2007). Judge Murphy created the appearance that he contacted a witness for the purpose of influencing her testimony. 737 N.W.2d at 366. The court summarized the facts as follows: “In *Murphy*, the judge called a witness at home for the purpose of discussing the judicial discipline investigation and, according to the witness, told her that they needed to ‘get [their] stories straight.’ Further, the witness in *Murphy* claimed that the judge openly contradicted the witness’s version of events during the conversation, and appeared to ‘attempt to foreclose the clerk from testifying otherwise.’ The witness in *Murphy* testified that she was upset about the phone call because she felt the judge was asking her to change her story.” *In re Galler*, 805 N.W.2d 240, 252 (Minn. 2011) (citation omitted). Neither the Panel nor the Supreme Court majority found that Judge Murphy’s actual motive was to influence the witness’s testimony. *Murphy*, 737 N.W.2d at 365-66. The Court found a violation of the predecessor to Rule 1.2 based on two key findings:
 - a. “Judge Murphy initiated the calls partially, if not exclusively, for the purpose of discussing pending investigation into his own conduct, knowing that the clerk would be a witness in that investigation.” *Id.* at 362.
 - b. “Even assuming that Judge Murphy acted in good faith, his contacts with the clerk reflect an alarming lack of judgement. A judge’s contact with a witness in an ongoing disciplinary investigation into his conduct, outside of work hours, outside of the work setting, for the purpose of discussing the investigation, does not promote public confidence in the integrity and impartiality of the judiciary.” *Id.*
4. *In re Galler*, 805 N.W.2d 240 (2011). The Board charged Judge Galler with improperly contacting his court reporter “for the express purpose of discussing the witness’s future testimony.” 850 N.W.2d at 247. The Panel did not sustain this allegation. On appeal, the Board argued that Judge Galler’s conduct in discussing the investigation with his court reporter in itself created an appearance of impropriety. *Id.* at 251-52. The Court properly rejected this argument:
 - a. “We have not imposed any sort of blanket prohibition on a judge discussing a disciplinary matter with a potential witness. As Judge Galler notes, judges are permitted, but not required, to be represented by counsel during judicial discipline proceedings, *see* Rule 6(g), RBJ, and judges may have a legitimate need to contact potential witnesses for the purpose of preparing a defense.” *Id.* at 252.
 - b. At the same time, the Court did not overrule or limit the *Murphy* opinion. The Court cautioned: “A judge who initiates direct contact with a potential witness for the purpose of discussing judicial misconduct charges does so at the risk that his or

her questioning may be perceived as an attempt to influence the witness's testimony, and thus, be viewed as improper." *Id.* at 253.

- c. After *Galler*, the Board advised a judge [SBI]: "The Board does not take the position that any contact between a judge and a potential witness in a matter before the Board constitutes a violation of the Judicial Code, nor does the Board forbid a judge from apologizing to a potential witness. At the same time, contact with a witness may carry certain risks, particularly if the contact occurs before the Board has had an opportunity to interview the witness. The Supreme Court has provided some guidance on this issue [citing *Galler*]."
5. *In re Armstrong*, No. A11-121, File Nos. 09-37, 10-48 (Oct. 31, 2011). After hearing, a panel issued a public reprimand to Judge Armstrong. *Id.* slip op. at 10. Because the reprimand was not appealed to the Minnesota Supreme Court, it became final. Board Rule 11(d).
 - a. One of the two violations found was for "providing inside information of his impending decision to withdraw from the election for his judicial seat to his law clerk and then withdrawing after she filed for the office and the filing period for other candidates had expired, thus leaving the clerk to run unopposed and taking no action whatsoever to mitigate the negative perception such actions caused, Judge Armstrong violated *Canon 1, Rule 1.2 of the Code* (requiring the avoidance of any appearance of impropriety)." *Id.* slip op. at 10, <http://www.bjs.state.mn.us/file/news/armstrong-findings-and-recommendations.pdf>.
 - b. A charge of improper contact by Judge Armstrong with a court administrator was dismissed by a hearing Panel. Findings and Recommendations at 9, *In re Armstrong*, No. A11-121 (Minn. Oct. 31, 2011). The Panel found the Board's allegations of improper contact unproven, because the contacts were "unclear and disputed" and the "contacts were incidental and without any intent by Judge Armstrong to intimidate, influence or tamper with the investigation process." *Id.* at 9

H. *State v. Finch*, 865 N.W.2d 696 (Minn. 2015). Judge Prejudged Probation Revocation.

1. The Supreme Court wrote: "Judges must remain impartial by not prejudging; they must 'maintain[] an open mind.' *Schlienz*, 774 N.W.2d at 369. And judges 'should be sensitive to the 'appearance of impropriety' and should take measures to assure that litigants have no cause to think their case is not being fairly judged.' *McClelland v. McClelland*, 359 N.W.2d 7, 11 (Minn. 1984). Because the district court judge unequivocally told Finch that the court would revoke his probation for any violation, and because the judge speculated that Finch had 'duped' the court when he exercised his right to appeal, a reasonable examiner would question whether the judge could impartially conduct the proceeding under the *Austin* factors. Thus, we hold that the

judge was disqualified from the probation revocation proceeding.” *Finch*, 865 N.W.2d at 705.

I. **Law Review Article.** Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees is What the Judge Gets*, 94 Minn. L. Rev. 6, 1914-1996 (2010).

J. **Electronic Social Media.**

1. *Main Rules.* Several rules pertain to judges and social media. Rule 1.2 requires a judge to act “in a manner that promotes public confidence in the . . . judiciary” In addition, a judge should not form relationships with persons or organizations that may violate Rule 2.4(C), by conveying an impression that these persons or organizations are in a position to influence the judge. A judge must also avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending or impending matters in violation of Rule 2.9(A). A judge should avoid using any electronic social medial (“ESM”) site to obtain information regarding a matter before the judge that would violate Rule 2.9(C). A judge should be fully informed as to privacy settings. A judge should not comment on social media regarding pending matters. Such comments could prejudice the matter, or appear to undermine impartiality, or prejudice the administration of justice. Rules 1.2, 2.10(A), and 3.1(C); Board Rule 4(a)(5).
2. *In re Bearse*, File No. 15-17 (Nov. 24, 2015). Senior Judge Bearse posted Facebook messages regarding several cases over which he presided. *Id.* at 1. He thought the messages were available to approximately eighty persons he knew, but in fact the messages were available to the public. *Id.* During a jury trial in *State v. Weaver*, Judge Bearse posted a message that included: “In a Felony trial now State prosecuting a pimp. Cases are always difficult because the women (as in this case also) will not cooperate.” *Id.* When other judges became aware of the postings and notified Judge Bearse, he ceased posting comments about any of his cases. *Id.* at 2. Weaver was found guilty. *Id.* at 1. Based on the impropriety of the post in *Weaver*, the defense moved for a new trial. *Id.* A new judge granted the motion, noting in the court’s informal minutes that Judge Bearse’s posted statements “imply a pre-judgment of the case before any evidence is heard.” *Id.* at 2. The Board issued a public reprimand to Judge Bearse, which he accepted. *Id.* at 1. The reprimand found violations of Rules 1.2, 2.1, 2.8(B), 2.10(A), 3.1(A) and (C) of the Code, and Rule 4(a)(5) of the Board Rules. *Id.* at 3-4. The reprimand was amended, to clarify the sequence of some events. *Id.* at 5.
3. *In re Pendleton*, 876 N.W.2d 296 (Minn. 2016) License Suspension, 2016. Judge Pendleton was removed from office for failing to reside in his judicial district and for filing a campaign affidavit that included a knowingly false statement about his residence. *In re Pendleton*, 870 N.W.2d 367, 389 (Minn. 2015). After his removal, Judge Pendleton blogged in a misleading way that he had “retired” from the bench, rather than that he had been removed. *See* 876 N.W.2d at 296. Judge Pendleton was suspended from the practice of law for 90 days. *Id.*

4. *ABA Formal Opinion 462 (2013)*. An ABA Formal Opinion addresses judicial ethics and social media. ABA Formal Opinion 462. The opinion’s synopsis states: “A judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge’s independence, integrity, or impartiality, or create an appearance of impropriety.” *Id.* at 1. The opinion is discussed in Patrick R. Burns, *Rules of Engagement: Judges and ESM*, Minn. Law., June 3, 2013. <http://lprb.mncourts.gov/articles/Articles/Rules%20of%20engagement-judges%20and%20ESM.pdf>.
5. *NCSC Compilation*. The National Center for State Courts Center for Judicial Ethics has a compilation of opinions on judicial ethics and social media issues. Opinions of numerous state counterparts to the Board are included. <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/SocialMediaandJudicialEthicsFeb2016.ashx>.

K. **Sexual Harassment.** Several judges have been disciplined for sexual harassment under former Canon 2.A., the precursor to Rule 1.2. These cases are discussed below under Rule 2.3, “Bias, Prejudice, and Harassment.” At the times of the disciplines, the Code did not include a counterpart to current Rule 2.3.

XI. RULE 1.3 – AVOIDING ABUSE OF THE PRESTIGE OF THE JUDICIAL OFFICE AND NOT ADVANCING PERSONAL INTERESTS.

A. “Abuse” / “Use” / “Lend.”

1. Canon 2.B. of the 1990 ABA Model Code of Judicial Conduct provided: “A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others” *See also*, Minn. Code Canon 2.B. The 2007 Model Code substituted “abuse” for “lend,” and substituted “personal or economic” for “private.” Rule 1.3.
2. Current Rule 1.3’s title and text both state that a judge shall not “abuse” the prestige of the judicial office. However, Rule 1.3 comment 1 states it is improper for a judge to “use” the judicial position for personal advantage.
3. The comments to former Canon 2B and current Rule 1.3 are much the same. They provide examples of permitted and prohibited conduct. In effect, the comments illustrate “abuses” and “uses.”
4. The explanation for replacing “lend” with “abuse” is that “[t]he goal was to address conduct that exploited the prestige of the office in inappropriate ways.” ABA Comm. on Ethics & Prof. Responsibility, Formal Op. 470 (2015).

B. **Traffic Ticket.** Rule 1.3 comment 1 provides, as an example of a Rule 1.3 violation, a judge may not allude to the judge’s judicial status “to gain favorable treatment in encounters with traffic officials.”

- C. **Negative Statement, Judge’s Personal Interest.** A judge issued an order in which he made a negative statement about the character of a person associated with one of the parties. The statement related to a matter affecting the judge’s personal interests. This matter was unrelated to the case before the judge. The Board found a violation of Rules 1.3, 2.4(B), and 2.10(A). In addition, the order was issued ten days after the 90-day deadline in violation of Minn. Stat. § 546.27. The Board found a violation of Rules 1.1 and 2.5(A). Bd. on Jud. Standards, Private Discipline Summaries, File No. 16-32 (2017). <http://www.bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
- D. **Judge’s Personal Website.** A 2015 Board Advisory Opinion took the position that a judge may maintain a website for speaking engagements and the like, subject to certain conditions. Minn. Bd. on Jud. Standards, Board Op., at 2 (Dec. 11, 2015). In analyzing website issues related to Rule 1.3, the Board advised that factors making it more likely that the judge would abuse the prestige of office included: (1) the judge’s solicitation of business; (2) the audience being the public or a commercially targeted segment of the public; and (3) the audience including members who are likely to appear before the judge. *Id.* at 4. The opinion also stated: “On the other hand, the potential for abuse is lower when the audience is other judges or members who are not likely to appear before the judge. Some groups – such as other judges and audiences outside Minnesota – are likely to engage a judge to make a presentation on the basis of the judge’s expertise, reputation as an innovator, ability as a speaker, etc., rather than on the basis of the ‘prestige’ of the judicial office of Minnesota district court judge.” *Id.*
- E. **Judicial Letterhead, Reference to Judicial Office, and Letters of Recommendation.**
1. Board Formal Opinion 2013-1 addresses the question: “What are the standards a judge must or should follow in providing a reference or recommendation for an individual?”
 2. *Rule 1.3 Comments.*
 - a. It is improper to use letterhead to gain advantage in conducting “personal business.” Rule 1.3 cmt. 1.
 - b. It is proper to use letterhead for reference letters if the judge indicates the reference is personal and reference will not be perceived as an attempt to exert pressure. Rule 1.3 cmt. 2.
 3. *Judge Requests Attorneys’ Recommendation (Executive Secretary Advisory Opinion (Apr. 28, 2016)).*
 - a. A judge contemplates requesting two attorneys to provide letters of recommendation to support an application the judge will make for a position. Attorney A appears regularly before the judge. Attorney B does not appear before the judge and will soon retire.
 - b. A judge should not make requests for substantial favors, e.g., free tickets or contributions to a charity or a political campaign.

- c. A person receiving a request from a judge concerning a personal matter should not reasonably feel obligated to respond favorably or reasonably believe that a favorable response would curry favor with the judge. Rule 3.1(D); Rule 3.1 cmt. 4
 - d. The judge may request Attorney B to provide the recommendation. The judge may request Attorney A provide the recommendation, but to do so, or not, without informing the judge.
3. *References to Judicial Status – Executive Secretary Advisory Opinion (Sept. 28, 2015).*
- a. A part-time conciliation court referee asked about the propriety of making several types of references to judicial status. Citing Rule 1.3 and several authorities outside Minnesota, the Executive Secretary opined as follows:
 - (1) The referee may refer to judicial status when being interviewed for a newspaper article.
 - (2) The referee may not refer to judicial status in advertising. Thus, the referee may not have a picture in his law office of himself wearing judicial robes. Opinions relevant to these subjects are *In re Meldrum*, 834 N.W.2d 650, 654 (Iowa 2013) (reprimanding a part-time judge for wearing his judicial robes and referring to his position in an advertisement for his services as an attorney).
4. *Reference Letter Referring to Judicial Status - Executive Secretary Advisory Opinion (Aug. 7, 2015).*
- a. A judge inquired whether the judge could provide a reference letter on personal stationery, but refer to the judge’s status as a judge. The letter would relate to a person’s application for an executive position. The reference would help show that the judge had a basis for opining on the qualities needed for an executive position.
 - b. The Executive Secretary opined:
 - (1) A respected authority states as follows: “The prohibition on abusing the prestige of judicial office to advance the interests of another is intended to prevent inappropriate exploitation of judges’ positions, but there is nothing inappropriate about judges identifying themselves as such when judicial experience is germane to the recommendation. Therefore, a judge may write letters on the basis of a judge’s experience on the job . . . or general expertise in the law Comment [2] [to Rule 1.3] does not admonish judges to avoid writing letters of reference on behalf of someone with respect to whom the judge’s status is irrelevant, but rather, advises judges to consider whether their position might be perceived as exerting pressure by reason of their office and to refrain if it would.” Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 81 (2d ed. 2011).
 - (2) Absent unusual circumstances, it is unlikely that referring to the status of judge could be perceived as exerting pressure on the recipient of the letter. Thus, a

judge may refer to the status of judge in writing a letter of recommendation if the status is germane. A decision not to use official letterhead is reasonable since the judge's knowledge of the person for whom the reference is provided is exclusively through non-judicial activities.

- (3) Board Formal Opinion 2013-1, "References and Letters of Recommendation," states that when using official letterhead, the judge should indicate, in the reference, "that the reference is 'personal,'" rather than an official judicial approval. Minn. Bd. on Jud. Standards, Formal Op. 2013-1, at 2 (amended 2015). It follows that the same recommendation applies to a letter that does not use official letterhead but identifies the judge's office in the body of the letter.

c. It may also be noted:

- (1) The Advisory Committee to Review the American Bar Association Model Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards included a comment to Canon 2B stating that "a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation." Advisory Committee Commentary to the Minn. Code of Jud. Conduct (1995). The pre-2009 Code did not, however, address use of letterhead.
- (2) Rule 1.3 comment 2 of the 2009 Code echoes the Canon 2B comments, then adds: "The judge may use official letterhead if the judge indicates that the reference is personal 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) For further discussion regarding references see Cynthia Gray, *Recent Advisory Opinions: Recommendations and References*, Jud. Conduct Rep., Spring 2006, at 2, <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR%20Spring%202006.ashx>.

5. Board Opinions.

a. Numerous Board opinions approve of a judge writing a reference letter, with one exception:

- (1) A 2008 Board advisory opinion states: "Inappropriate for a judge or judicial officer to address a permitted letter of recommendation in such a way as to facilitate its use by recipients that are unintended or unknown at the time of writing, such as 'To whom it may concern.' *Canons 1, 2A, 2B, 4A, 4C(3)*." Minn. Bd. on Jud. Standards, *Summary of Advisory Ops.*, 29-30 (2016), <http://bjs.state.mn.us/file/advisory-opinions/summary-of-advisory-opinions.pdf>.

F. **Judicial Selection.** It is proper for a judge to respond to inquiries from appointing authorities and selection committees. Rule 1.3 cmt. 3.

G. **Publications.** Care is required when writing or contributing to a for-profit publication to ensure that the judge's office is not exploited. Rule 1.3 cmt. 4.

H. **Commercial Promotion.**

1. **File No. 09-113 Admonition.** A judge was admonished for promoting the judge's services as a wedding officiant, through a web site with testimonials and accolades, through appearance at a wedding trade show, and through solicitation. Bd. on Jud. Standards, *Private Discipline Summaries*, File No. 09-113 (2010), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.

I. **Public Controversy, Judge's Personal Interests, Friends, or Family.**

1. **File No. 15-07 Admonition.** A judge's interest in a local controversy was personal and unrelated to judicial duties. The judge sent two communications regarding the controversy to persons who potentially would be interested in the matter. One communication connected the private controversy with an earlier official act by the judge. The judge received a private admonition for violating Rule 1.3. The admonition memorandum cited *Matter of Mosley*, 102 P.3d 555 (Nev. 2004) (disciplining a judge who, among other things, used judicial letterhead to write a letter on family members' behalf). Bd. on Jud. Standards, *Private Discipline Summaries*, File No. 15-07 (2015), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.

J. **Judicial Robes.**

1. *History.* Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, 18 Geo. J. Legal Ethics 1 (2004).
2. *State Interest.* "The state has a compelling interest in preserving the integrity of the courtroom, and judicial use of the robe, which symbolically sets aside the judge's individuality and passions." *Jenevein v. Willing*, 493 F.3d 551, 560-61 (5th Cir. 2007). "We hold that it is within the Commission's power to censure Judge Jenevein for wielding state electronic equipment and choosing to don his robe and conduct his press conference in the courtroom, instead of walking to a public forum a block away. We do not suggest that the separation of office from office-holder is always easily accomplished. While holding office the judge is always a judge; indeed he seeks reelection as an incumbent judge. It does not follow that the state's interests in preserving the judicial temple is not compelling or that the state's interests lose their compelling force in the political arena. Today we say only that the state can put the courtroom aside." *Id.* at 561. However, this case should be considered in Minnesota only in light of the dismissal of charges, including misuse of a courtroom, in the proceeding *In re Lange*, No. C4-96-596 (Minn. Nov. 27, 1996).
3. *Political Speech in Robes.* No judge has the right to deliver partisan political opinions on the bench, in the courthouse, or clad in judicial robes. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, at 56.

4. *Advisory Opinion*. An advisory opinion from 1978 permits an incumbent to use photos of the incumbent wearing judicial robes. Minn. Bd. on Jud. Standards, *Summary of Advisory Ops.*, 3 (2016), <http://bjs.state.mn.us/file/advisory-opinions/summary-of-advisory-opinions.pdf>.

K. Courtroom.

1. Restrictions on place and manner of communication “must be narrowly tailored to serve the government’s legitimate content-neutral interests” *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989). Interpreting this case, the United States Supreme Court has said that it will uphold “‘time, place, or manner’ restrictions, but only if they are ‘justified without reference to the content of the regulated speech.’” *R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992) (quoting *Ward*, 491 U.S. at 791)).
2. There may be reasonable regulation of the use of public places, but “the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).
 - a. *In re Lange*. In 1996, the Board charged Judge Lange with Code violations, including using her courtroom for a press conference. The Board accepted a hearing panel recommendation for dismissal. *In re Lange*, No. C4-96-596 (Minn. Nov. 27, 1996).

L. Advancing Personal Interests.

1. In *In re Nordby*, No. A10-1847 (Minn. May 11, 2011), the Board charged Judge Nordby with violating several rules when he read a statement regarding the advocacy group WATCH during a court proceeding. The charges were presented to a public hearing panel. The panel dismissed and the Board did not appeal. Two of the panel’s findings were:
 - a. “The Board asserts a violation of canon I and rule 1.3, which mandate that a judge shall not abuse the prestige of his office to advance his personal or economic interests. But the Board has presented no evidence of Judge Nordby’s personal or economic gain. And Judge Nordby credibly testified that he anticipated that making the statement might harm his personal interests. The panel finds that the Board has failed to prove a violation of canon 1 or rule 1.3.” Findings of Fact and Conclusions of Law 8-9.
 - b. “The Board’s complaint and arguments turn on the contention that Judge Nordby read his statement to advance his personal interests and retaliate against WATCH. The Board must present clear and convincing evidence in support of the complaint. The panel finds that the weight of the evidence is to the contrary and the Board has failed to meet its burden.” Findings of Fact and Conclusions of Law 11.

M. Judge Serving as an Expert Witness.

1. *Full-Time Judge.*

- a. “A judge of the district court shall devote full time to the performance of duties and . . . shall not engage in any business activities that will tend to interfere with or appear to conflict with the judge’s judicial duties.” Minn. Stat. § 484.065, subd. 1 (2016).
- b. Rules 1.2 and 1.3 may bar service as an expert. Opinions in other states have so construed these rules, although the older version of Rule 1.3 was applied. *Compare* Rule 1.3 (“shall not abuse the prestige”) *with* Canon 2B (1996) (“shall not lend the prestige”).
- c. Rule 3.10 (“A judge shall not practice law”) does not apply because an expert is not practicing law. For example, a law school professor, who does not have a local license, could serve as an expert in a legal malpractice proceeding.
- d. Rule 3.3 (“A judge shall not testify as a character witness . . . except when duly summoned.”) does not apply.

2. *Senior and Part-Time Judges.*

- a. Rules 1.2 and 1.3 apply in principle and in fact, at least if the trier of fact learns of the current judicial status of the witness.
- b. If a stipulation or order provides that a jury will not learn of the current judicial status of the expert, Rules 1.2 and 1.3 would not seem to apply.
- c. Fully retired judges may serve as expert witnesses.

N. Charitable, Civic, Educational Organizations – See Section XXXVI, Rule 3.7.

XII. RULE 2.1 – “GIVING PRECEDENCE TO THE DUTIES OF JUDICIAL OFFICE.”

- A. **Rule 2.4(B).** The rule provides that “[a] judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.” The rule is closely related to Rule 2.1.
- B. **Improper Concern Regarding Judge’s Political Appearance.** A judge called a police chief to criticize a plea agreement proposed by the city attorney in a case that was pending before the judge. The judge stated that the practices of the City Attorney made the judge “look bad” to voters. The Board found that the judge’s conduct violated the Code including Rule 2.1 and 2.4(B), and issued an admonition. Bd. on Jud. Standards, *Private Discipline Summaries*, File No. 13-70 (2014), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
- C. **File No. 14-54 Admonition.** A judge obtained the judge’s own divorce file from court administration. The file was eventually lost. The Board found that the judge’s conduct violated the Code including Rule 2.1, and issued an admonition. Bd. on Jud. Standards,

XIII. RULE 2.2 – “IMPARTIALITY AND FAIRNESS.”

A. **Rule 2.2.** This rule provides: “A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”

B. Upholding and Applying the Law.

1. *Good-Faith Errors.* A comment states: “When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.” Rule 2.2 cmt. 3.
2. *Board Rule Correlates.* A Board Rule echoes Comment 3 to Code Rule 2.2. As amended in 2016, Board Rule 4(c) provides: “The board shall not take action against a judge for making findings of fact, reaching a legal conclusion, or applying the law as understood by the judge unless the judge acts contrary to clear and determined law and the error is egregious, made in bad faith, or made as part of a pattern or practice of legal error. Claims of error shall otherwise be left to the appellate process.”
3. *In re Cahill*, File Nos. 13-32, 13-41, 13-42 (Apr. 21, 2014). The Board publicly reprimanded Judge Cahill for failing to follow the law in six cases, improperly issuing ex parte orders in four cases, chronic tardiness, and other misconduct. *Id.* at 1-6. The Board also appointed a mentor for Judge Cahill for a six-month period. *Id.* at 7.
4. *In re Weddel*, 414 N.W.2d 178 (Minn. 1987). Judge Weddel refused a lawyer’s request to approach the bench in a child custody matter. 414 N.W.2d at 178. The lawyer then said, “Judge, then I’m going to raise an objection here that the tone of your questioning . . .” *Id.* Judge Weddel then stated: “The objection is denied, I’m going to continue.” *Id.* When the lawyer repeatedly attempted to state his objection, Judge Weddel cut him off, ordered him to be quiet, said “once more and you go to jail,” then sentenced the lawyer to one hour ten minutes in jail effective immediately. *Id.* at 178-79. Pursuant to stipulation, the Supreme Court issued a public reprimand to Judge Weddel. *Id.* at 178.
5. *In re Johnson*, 355 N.W.2d 305 (Minn. 1984). Judge Johnson failed to follow statutorily prescribed procedures in several cases, e.g., not certifying the record, not ordering alcohol problem assessments in alcohol-related cases. *Id.* at 307. Judge Johnson also failed to issue several decisions in a timely way. *Id.* As a lawyer, Judge Johnson also failed to complete numerous probate proceedings. *Id.* at 310. After the Board’s investigation began, Judge Johnson retained lawyers at his own expense to complete the probates. *Id.* at 306. Pursuant to stipulation, the Supreme Court issued a censure and a \$1,000 fine, payable to the Board. *Id.*
6. *In re Roberts*, No. 51071 (Minn. Jan. 20, 1981) Public Reprimand.

- a. Judge Roberts dismissed misdemeanor charges against a party because Judge Roberts believed the Attorney General acted improperly in a wholly unrelated case. *Id.* slip op. at 7-8. In fact, the Attorney General had no involvement whatsoever in either case. *Id.* slip op. at 10.
 - b. In a newspaper interview, Judge Roberts admitted the cases were unrelated and told the reporter, “Why don’t you just tell the people that I’m a strange person and sometimes I do strange things.” *Id.* slip op. at 8. This quotation and other odd statements were reported in the Minneapolis Tribune on March 2 and 3, 1979. *Id.* slip op. at 8-9.
 - c. The Board recommended a \$10,000 fine in addition to a reprimand. *Id.* slip op. at 1. The Supreme Court issued the public reprimand, but abated the fine because Judge Roberts lost his bid for re-election and was no longer a judge. *Id.* slip op. at 1-2.
7. *Knajdek v. West*, 153 N.W.2d 846 (Minn. 1967) Contempt (Direct / Constructive, Criminal / Civil).
- a. Facts. Drexler represented the Knajdeks against West. *Id.* at 846-47. The case was settled. *Id.* at 847. Drexler was directed to arrange for the minor Knajdek to appear in court for approval. *Id.* A hearing was set for 9 AM on a certain date. *Id.* Drexler appeared at 9:20 AM, without the minor. *Id.* Three weeks later, the judge issued an order for a show cause hearing on contempt. *Id.* Drexler explained, but his explanation was not satisfactory and he was sentenced to 60 days in jail. *Id.* He appealed. *Id.* at 846.
 - b. Summary. Procedural due process protections attach to all constructive (out of judge’s presence) contempts, civil and criminal, with jury trials rights in criminal cases. *Id.* at 847.
 - c. Direct Contempt / Summary Punishment. “[D]irect contempts may be heard and punished summarily but constructive contempts may not.” *Id.* at 847 n.2. Drexler’s contempt was treated as “criminal in nature.” *Id.* at 847. The purpose of criminal contempt is to punish wrongdoers and deter others. *See id.*
 - d. Jury Trial Right for Constructive Criminal Contempt. “Our recent decision in *Peterson v. Peterson*, Minn., 153 N.W.2d 825, filed October 27, 1967, compels a reversal of appellant’s conviction. In that case we held that a person charged with a criminal contempt not committed in the presence of the court is entitled to a jury trial.” *Id.* at 847. The purpose of civil contempt is to remediate, and make effective a civil remedy of a private party. *Id.* at 847-48. Drexler’s offer to secure court approval of the settlement within two weeks was, however, summarily rejected. *Id.* at 848.
 - e. Constructive Contempt. Courts differ on whether a tardy appearance is direct or constructive contempt. *See id.* at 847. Because reasons for tardiness arise outside

of judge's presence, and he does not have direct knowledge, tardiness in Minnesota is constructive contempt. *Id.* at 847-48.

f. Inherent Authority/Contempt.

(1) A district court lacks inherent authority to summarily impose a monetary sanction on a lawyer who fails to appear for a scheduled hearing in a criminal case without following the procedures set forth in Minnesota's contempt statutes, Minnesota Statutes sections 588.01-.15, .20 (2016). *In re Cascarano*, 871 N.W.2d 34, 38-39 (Minn. Ct. App. 2015). Cascarano represented Mason. *Id.* at 36. Cascarano arranged for substitute counsel, but substitute counsel mistakenly did not appear for a hearing. *Id.* The hearing judge assessed Cascarano \$100 in hearing costs. *Id.*

(2) The *Cascarano* opinion includes an excellent general discussion of the law of contempt. The opinion states: "[A] judge's inherent authority to control the courtroom is a contempt power." *Id.* at 38. *Cascarano* states: "And a court does not have inherent authority under chapter 588 to summarily punish an attorney's failure to appear in court." *Id.* at 38-39 (citing *State v. Tayari-Garrett*, 841 N.W.2d 644, 649 (Minn. Ct. App. 2014)).

8. *Pro Se Litigants.*

- a. "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." Rule 2.2 cmt. 4.
- b. Cynthia Gray, *Pro Se Litigants in the Code of Judicial Conduct*, Jud. Conduct Rep., Fall 2014, at 1, <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR%20Fall%202014.ashx>.

9. *Additional Resources.*

- a. Cynthia Gray, *Legal Error as Judicial Misconduct*, Jud. Conduct. Rep., Fall 2014, at 1, <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR%20Fall%202014.ashx>.
- b. Broad Survey. A New Jersey case is cited here because it includes a broad survey of Rule 2.2 applications and principles. *In re DiLeo*, 83 A.3d 11 (N.J. 2014), https://scholar.google.com/scholar_case?case=676158733373592168&q=in+re+dileo&hl=en&as_sdt=4,31.

XIV. RULE 2.2, “A JUDGE . . . SHALL PERFORM ALL DUTIES OF JUDICIAL OFFICE FAIRLY AND IMPARTIALLY.”

A. *In re Stacey*, File No. 16-10 (July 26, 2016).

1. In July 2016, the Board publicly reprimanded Judge Stacey for accusatory, hostile, and discourteous comments to parties who appeared before him. The comments did not serve any legitimate purpose and caused the parties to believe that Judge Stacey was biased against them.

B. **Limits on Judge’s Involvement in Plea Negotiations.** A judge’s agreement as part of negotiations to impose a certain sentence was the basis for reversing the conviction, vacating the plea, and remanding. *State v. Anyanwu*, 681 N.W.2d 411, 413-15 (Minn. 2014).

C. **Courtroom Spectator Conduct - *In re Nordby*.**

1. In *In re Nordby*, No. A10-1847 (Minn. May 11, 2011), the Board charged that by conduct in December 2009 and February 2010, “Judge Nordby violated Canons 1, 2 and 3” and numerous rules. Compl. 5. Although Canon 2 and Rule 2.2 both require a judge to act “impartially,” and partiality was central to the Board’s allegations, the Complaint charged a violation of Canon 2, but not of Rule 2.2. Compl. 5.
2. Judge Nordby’s statements in court were critical of a group, WATCH, which monitored courtroom activities for fairness to victims of familial abuse. *See Findings of Fact and Conclusions of Law 5-6.*
3. The hearing panel stated: “The Board alleges that Judge Nordby violated canon 2 by failing to ‘perform duties impartially, competently and diligently.’ But the effect of courtroom-spectator conduct on a defendant’s fair-trial rights ‘is an open question.’ *Carey v. Musladin*, 549 U.S. 70, 76, 127 S. Ct. 649, 653 (2006). In addressing the conduct of WATCH’s courtroom monitors, the panel finds that Judge Nordby made a decision in good faith to address what he perceived as an attempt by courtroom spectators to influence him and the possible implications of WATCH’s conduct on Hahn’s rights. The Board has failed to prove a violation of canon 2.” *Findings of Fact and Conclusions of Law 9.*
4. The Board did not appeal the panel’s dismissal of the formal complaint against Judge Nordby. The matter was closed without any discipline.

D. **Limits on Disqualified Judge’s Further Actions.** The Executive Secretary advised that a judge who is disqualified from a case should not thereafter issue a search warrant or otherwise take any further actions in the case other than those necessary to effect the transfer of the case to another judge. The Executive Secretary cited two of the Board’s private admonitions (Bd. on Jud. Standards, Private Discipline Summaries, File Nos. 09-65, 09-66 (2009), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>; *U.S. v. O’Keefe*, 128 F.3d 885, 891 (5th Cir. 1997); and *People v. Alteri*, 835 N.Y.S.2d 869 (2007). Executive Secretary Advisory Opinion (Sept. 22, 2016).

XV. RULE 2.3, “BIAS, PREJUDICE, AND HARASSMENT.”

- A. **Judges’ Conduct.** Rule 2.3(A) provides: “A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.” Rule 2.3(B) forbids a judge from “manifest[ing] bias or prejudice, or engag[ing] in harassment” The rule applies “in the performance of judicial duties.” Rule 2.3(C) provides that, in court proceedings, judges must require lawyers to refrain from bias, prejudice, and harassment.
- B. **Slur.** In 1993, a judge accepted the Board’s reprimand for twice referring to “Martin Luther Coon Day,” in conversations with lawyers and court personnel. The Stipulation and Press Release characterized the conduct as “a derogatory comment concerning the Martin Luther King, Jr. holiday,” but the actual reference was reported in newspaper articles.
- C. **Sex Harassment Discipline Cases.** Discipline cases based on judges’ sexual harassment arose before the Code included specific prohibitions on the subject.
1. *In re Miera*, 426 N.W.2d 850 (Minn. 1988). Judge Miera sexually harassed his court reporter, Johnson. 426 N.W.2d at 854. “[O]n two occasions, while staying at Johnson’s apartment, Miera lay down next to Johnson and touched Johnson’s back against Johnson’s wishes; Miera told Johnson that someday the two of them would have sexual relations; and Miera kissed Johnson on the lips in Miera’s court chambers without Johnson’s consent.” *Id.* The Court found that these acts “demonstrate a serious abuse of the power inherent in Judge Miera’s position. That conduct jeopardizes confidence in the integrity of the judiciary and brings the office into disrepute.” *Id.* at 856. Judge Miera thereby violated Canon 2, by impairing public confidence in the integrity of the judiciary, and other standards. *Id.* at 855-56. The Court rejected Judge Miera’s argument that he had not violated a statute prohibiting harassment, because that statute was enacted for civil liability purposes, not judicial discipline. *Id.* at 856. Judge Miera was suspended for one year. *Id.* at 859.
 2. *In re Kirby*, 354 N.W.2d 410 (Minn. 1984). Judge Kirby was found to have engaged in public intoxication, conducting judicial business with alcohol on his breath, habitual tardiness, and discourteous treatment of female attorneys (“lawyerette” and “attorney generalette”). 354 N.W.2d at 421. Female attorneys were “justifiably annoyed and disturbed.” *Id.* at 414. The Court’s referee found that Judge Kirby’s apology and the adverse publicity for these comments was a “sufficient penalty.” *Id.* at 414. The Court, however, explained the need for discipline: “We are mindful of Plutarch’s wise observation: ‘Tho’ boys thro’ stones at frogs in sport, the frogs do not die in sport, but in earnest.’” *Id.* at 415. Although the Board eventually “abandoned” the public intoxication charge, the referee found several instances of intoxication and the court included these in its basis for discipline. *Id.* at 416. The Court issued a public censure. *Id.* at 421.

3. *In re Sears*, No. 81-1264 (Minn. July 28, 1982).
 - a. Judge Sears “conducted judicial business while inebriated on several occasions, at times failed to conduct business because of inebriation, and sexually harassed and embarrassed female employees and female attorneys on repeated occasions by making suggestive comments or kissing and touching female staff.” *In re Miera*, 426 N.W.2d 850, 859 (Minn. 1988). Judge Sears received a public reprimand and probation pursuant to stipulation. *In re Sears*, No. 81-1264, slip op. at 1 (Minn. 1982). Judge Sears also admitted to being an alcoholic and to having been inebriated on and off the bench. *Id.* slip op. at 5, 13.
 - b. Judge Miera cited *Sears* as precedent for lenient discipline. The Court responded: “The *Sears* case is complicated by that judge’s severe drinking problem, and our action there should not be read as precedent for the proper disciplinary response to sexual misconduct by a judge. To the extent the case suggests otherwise, we will not perpetuate it.” *Miera*, 426 N.W.2d at 859.
 - c. The stipulation included Judge Sears’ admissions of misconduct alleged by the Board. *Sears*, No. 81-1264, Stipulation ¶4.A. The formal complaint alleged the following sexual harassment by Judge Sears: “That you . . . sexually harassed and embarrassed female employees of Crow Wing County and female attorneys practicing before you on repeated occasions by making suggestive and off-color remarks to them in the presence of others, and, without their permission, touching them by running your finger up their back and/or touching their hair or buttocks, and/or kissing and attempting to make dates with female employees.” *Id.* slip op. at 15. Judge Sears was also, “impatient, undignified, discourteous and publicly critical of female attorneys appearing before [him], without cause and in such a manner as to discredit the office of judge.” *Id.* The stipulation included Judge Sears’ statement that the harassment was caused by his alcoholism “and was not motivated by a desire to gain improper favors” *Id.*, Complaint, ¶7.M.
 - d. The Supreme Court order was signed June 11, 1982 and filed June 15, 1982. *Id.*, Order at 2. The citation in *Miera* to *Sears* gives the date July 28, 1982. *Miera*, 426 N.W.2d at 859.

D. Same-Sex Marriage Authorities.

1. *Minnesota*. A July 1, 2013 Memo from the Judicial Council to all district Chief Judges advises that if Minnesota judges officiate at weddings, they must officiate at same-sex weddings.
2. *Ohio Op. 2015-1*. This opinion advises, like the opinions below, that a judge may not refuse to perform same-sex marriages if the judge performs opposite-sex marriages. Sup. Ct. of Ohio Bd. of Prof’l Conduct, Op. 2015-1, 7 (2015), http://www.sc.ohio.gov/Boards/BOC/Advisory_Opinions/2015/Op_15-001.pdf. The Ohio opinion also advises: “A judge who takes the position that he or she will discontinue performing all marriages, in order to avoid marrying same-sex couples

based on his or her personal, moral, or religious beliefs, may be interpreted as manifesting an improper bias or prejudice toward a particular class. The judge’s decision also may raise reasonable questions about his or her impartiality in legal proceedings where sexual orientation is at issue and consequently would require disqualification under Jud. Cond. R. 2.11.” *Id.*

3. *Other Opinions.* As of 2015, in addition to the opinion above, the opinions on same-sex marriage and judicial ethics were summarized in a blog. Cynthia Gray, *Analyzing the Same-Sex Marriage Advice*, NCSC Judicial Ethics Blog (August 25, 2015), <https://ncscjudicialethicsblog.org/2015/08/25/same-sex-marriage/>.

XVI. RULE 2.4 – EXTERNAL INFLUENCES ON JUDICIAL CONDUCT.

A. Rule 2.4(B) – Family, Social, Political, Financial Interests.

1. *Failure of Proof.* The Board did not prove violation of former Canon 2B (current Rule 2.4(B)) where a judge resolved a court clerk’s husband’s tickets in chambers, because similar tickets of strangers were routinely resolved similarly. *In re Stacey*, 737 N.W.2d 345, 350 (Minn. 2007). However, Judge Stacey was reprimanded for because this conduct violated Canons 1 and 2A. *Id.* at 351-52.
2. *Negative Statement, Judge’s Personal Interest.* A judge issued an order in which he made a negative statement about the character of a person associated with one of the parties. The statement related to a matter affecting the judge’s personal interests. This matter was unrelated to the case before the judge. The Board found a violation of Rules 1.3, 2.4(B), and 2.10(A). In addition, the order was issued ten days after the 90-day deadline in violation of Minn. Stat. § 546.27. The Board found a violation of Rules 1.1 and 2.5(A). Bd. on Jud. Standards, Private Discipline Summaries, File No. 16-32 (2017), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
3. *Improper Concern Regarding Judge’s Political Appearance.* A judge called a police chief to criticize a plea agreement proposed by the city attorney in a case that was pending before the judge. The judge stated that the practices of the City Attorney made the judge “look bad” to voters. The Board found that the judge’s conduct violated the Code including Rule 2.1 and 2.4(B), and issued an admonition. Bd. on Jud. Standards, *Private Discipline Summaries*, File No. 13-70 (2014), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.

XVII. Rule 2.5(A) – COMPETENCE AND DILIGENCE, TIMELINESS OF DECISIONS.

A. The rule requires judges to perform duties “diligently.”

B. Deferred Disposition – Letter of Caution.

1. *File No. 16-08.* A judge did not take action on an in forma pauperis petition by a civilly committed patient for eight and one-half months. The judge’s filing system was

deficient. The judge had a long record of service without discipline. In 2016, the judge and the Board entered into a deferred disposition agreement by which the judge agreed to establish appropriate systems and to act diligently and promptly. If the judge complies with the agreement, the file will be closed in 2018 with a letter of caution.

C. **Admonitions.** Before 2015, the Board issued a substantial number of admonitions in the following form: “Your actions in the case of *Roe v. Doe*, File No. 1234, were not in compliance with the Minnesota Code of Judicial Conduct Rule 1.1, Rule 1.2, Rule 2.5 (see Comment 4) and Board Rules 4(a)(5) and (6), as well as Minnesota Statutes section 546.27. A decision in the case was due on December 29, 2010. The case was not adjudicated until January 9, 2011.”

D. **Public Reprimand.**

1. *In re Johnson*, File No. 10-34 (Oct. 13, 2010). Judge Johnson received a public reprimand for failing to decide two cases within the 90-day period of time permitted by law. One case was decided 29 days late; the other was decided 48 days late. “Judge Johnson was previously disciplined for two prior case delays, the first in 1993 and the second in 2008.”

E. **Statutes.** A statute requires that trial judges file decisions within 90 days of submission, unless prevented by “sickness or casualty,” or the parties give written consent to an extension. Minn. Stat. § 546.27, subd. 1(a) (2016). Judges must certify compliance with the statute. *Id.* Tax Court judges have similar requirements. Minn. Stat. § 271.20 (2016).

F. **Board Review Before 2014.** Before 2014, a statute provided that the Board “shall review the compliance of each district judge with the provisions of subdivision 1.” Minn. Stat. § 546.27, subd. 2 (2012).

G. **2014 Amendment.** In 2014, the Minnesota Legislature amended Minnesota Statutes section 546, subdivision 2(a), to provide that the Chief Judge of each district would receive initial reports of untimely decisions. The amendment provided for reports by chief judges to the Board in the event of repeated timeliness problems. *Id.* The amendment also provided: “Should the board receive a complaint alleging a serious violation of this section, the board’s authority to review and act shall not be limited.” *Id.*

H. **Negative Statement, Judge’s Personal Interest.** A judge issued an order in which he made a negative statement about the character of a person associated with one of the parties. The statement related to a matter affecting the judge’s personal interests. This matter was unrelated to the case before the judge. The Board found a violation of Rules 1.3, 2.4(B), and 2.10(A). In addition, the order was issued ten days after the 90-day deadline in violation of Minn. Stat. § 546.27. The Board found a violation of Rules 1.1 and 2.5(A). Bd. on Jud. Standards, Private Discipline Summaries, File No. 16-32 (2017), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.

I. **File No. 16-30 Admonition.** A judge issued an order eleven days after the 90-day deadline in violation of Minn. Stat. § 546.27. Two years earlier, the Board had issued a letter of caution to the judge for delayed decisions in two other cases. The Board found a violation

of Rule 2.5(A). Bd. on Jud. Standards, Private Discipline Summaries, File No. 16-30 (2017), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.

- J. **File No. 14-15 Admonition.** A judge ruled on a habeas corpus petition 141 days after it was submitted. While the matter was pending, the judge received at least one notice of file-aging from court administration. Bd. on Jud. Standards, Private Discipline Summaries, File No. 14-15 (2014), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
- K. ***In re Perez*, 843 N.W.2d 562 (Minn. 2014).** Judge Perez was censured and subject to other discipline for misconduct including chronically issuing opinions and orders on an untimely basis. *Id.* at 568, 570.
- L. ***In re Johnson*, 355 N.W.2d 305 (Minn. 1984).** Judge Johnson failed to follow statutorily prescribed procedures in several cases, e.g., not certifying the record, not ordering alcohol problem assessments in alcohol-related cases. *Id.* at 307. Judge Johnson also failed to issue several decisions in a timely way. *Id.* As a lawyer, Judge Johnson also failed to complete numerous probate proceedings. *Id.* at 310. After the Board’s investigation began, Judge Johnson retained lawyers at his own expense to complete the probates. *Id.* at 306. Pursuant to stipulation, the Supreme Court issued a censure and a \$1,000 fine, payable to the Board. *Id.*

XVIII. **RULE 2.6 – ENSURING THE RIGHT TO BE HEARD.**

- A. **Rule 2.6 – Two Provisions.** Rule 2.6(A) provides that a judge shall accord everyone “who has a legal interest in a proceeding . . . the right to be heard according to law.” Rule 2.6(B) provides that a judge may encourage settlement, “but shall not act in a manner that coerces any party into settlement.”
- B. ***In re Walters*, File Nos. 13-40, 13-57, 13-85, 13-89 (Apr. 22, 2014).** The Board reprimanded Judge Walters for failing to adequately supervise his law clerk, failing to ensure that the law clerk’s timesheets were accurate, refusing to allow a criminal defendant to withdraw a plea after Judge Walters rejected a negotiated plea although the defendant had the right to do so under the plea agreement, trying a defendant in absentia, and implying without evidence that a deaf psychologist might be “agenda-driven” in evaluating a deaf defendant. *Id.* at 1-6. The Board also appointed a mentor for Judge Walters for a six-month period. *Id.* at 7. Judge Walters’ conduct regarding the criminal matter violated Rules 2.2, 2.5(A) and 2.6(A). http://www.bjs.state.mn.us/file/public-discipline/1340-57-85-89_FinalAmendedReprimand_Walters.pdf.
- C. **File No. 17-04 Admonition.** The Board admonished a judge who imposed a monetary sanction on an attorney whose conduct placed unnecessary burdens on the court and opposing party, without providing him advance notice and without giving him an opportunity to be heard. The Board found a violation of Rule 2.6(A). Bd. on Jud. Standards, Private Discipline Summaries, File No. 17-04 (2017) <http://www.bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.

- D. **File No. 14-64 Admonition.** A child was moved from one family to a second family for a pre-adoption placement. The second family had the right to be heard in any hearing in the case. Minn. R. Juv. Pro. P. 22.02, subd. 2. When the judge was informed of a therapist’s recommendation that the child remain with the first family, the judge scheduled a hearing on three-and-a-half-hours’ notice. Court staff informed the second family’s mother and gave her a dial-in number. The mother was able to listen to only part of the hearing, but the judge was not aware that she was on the call. At the hearing, the judge ordered that the child be returned to the first family immediately. The Board found the judge violated Rule 2.6(A) by not giving the second family a reasonable opportunity to be heard. Bd. on Jud. Standards, Private Discipline Summaries, File No. 14-64 (2015), <http://www.bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
- E. **File No. 14-11 Admonition.** A judge ordered judgment in favor of a landlord in an eviction case without receiving any evidence and without affording a trial to the tenants who contested the eviction. The judge was admonished for violating the Rules including Rule 2.6(A). Bd. on Jud. Standards, Private Discipline Summaries, File No. 14-11 (2014), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
- F. **File No. 10-03 Admonition.** A judge frequently interrupted a party, questioning her in an aggressive tone, and not allowing her an adequate opportunity to address the court. The judge violated the Rules including Rules 2.6(A) and 2.8(B). Bd. on Jud. Standards, Private Discipline Summaries, File No. 10-03 (2010), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
- G. **File No. 09-120 Admonition.** A judge treated a newspaper reporter discourteously and ordered the reporter to leave the courtroom without providing the newspaper company an opportunity to be heard. The judge violated rules including Rules 2.6(A) and 2.8(B). Bd. on Jud. Standards, Private Discipline Summaries, File No. 09-120 (2010), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.

XIX. RULE 2.8(B) – PATIENCE, DIGNITY, COURTESY.

A. **Rule 2.8(B).** The Rule provides: “A judge shall be patient, dignified, and courteous.”

B. **Anger.**

1. *Extreme, Repeated Anger to Judicial Staff.* Over several years, Judge Rice exhibited extreme anger toward his judicial staff. *In re Rice*, 515 N.W.2d 53, 55 (Minn. 1994). The conduct included shouting, slamming a door hard enough to cause a clock to fall from the wall, approaching staff so abruptly and angrily that other staff intervened, ignoring staff whom he had invited into chambers for lengthy periods, and engaging in harsh and unjustified criticism. *Id.* Staff members sued, alleging a hostile work environment and the State of Minnesota paid substantial settlements. *Id.* The judge suffered from bipolar disorder and other psychological problems. *Id.* at 54. Pursuant to stipulation, the Supreme Court suspended the judge for 60 days, placed him on

probation, provided for monitoring his judicial performance and continuation of psychological treatment, and ordered him to pay the Board \$3500. *Id.* at 55-56.

C. Accusatory, Undignified, Discourteous, or Harsh Language.

1. *In re Walters*, Nos. 13-40, 13-57, 13-85, 13-89 (Apr. 22, 2014). In 2014, the Board issued a public reprimand to Judge Walters for failing to adequately supervise his law clerk, failing to ensure that the law clerk's timesheets were accurate, refusing to allow a criminal defendant to withdraw a plea after Judge Walters rejected a negotiated plea although the defendant had the right to do so under the plea agreement, trying a defendant in absentia, and implying without evidence that a deaf psychologist might be "agenda-driven" in evaluating a deaf defendant. *Id.* at 1-6. Judge Walters' statements regarding the psychologist violated Rule 2.8(B). *Id.* at 6. The Board also appointed a mentor for Judge Walters for a six-month period. *Id.* at 7. http://www.bjs.state.mn.us/file/public-discipline/1340-57-85-89_FinalAmendedReprimand_Walters.pdf.
2. *In re Armstrong*, File No. 98-18 (Aug. 6, 1998). The Board issued a public reprimand to Judge Armstrong for using the term "bullshit" in a court proceeding.
3. *In re McDonough*, 296 N.W.2d 648, 693 (Minn. 1980). Judge McDonough violated the Code by "accusing attorney Monson of coercing a false affidavit . . ." without any basis.
4. *File No. 15-05 Admonition*. A mother ("M") filed a petition for an order for protection regarding the father of her children. M did not present evidence sufficiently supporting the petition. At the hearing on the petition, the judge stated to M: "You need counseling badly, because your kids are suffering. Not because of [their father]. Because of you. . . I don't believe your children are afraid of their father. I think they're afraid of you." The record did not support the statements that the children were afraid of M or were suffering because of M. The Board found violations of Rules 1.2, 2.2, and 2.8(B), and entered into a deferred disposition agreement with the judge. The judge would have received an admonition if the Board did not learn of any further violations within two years. Private Discipline Summaries, File No. 15-05 (2016), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>. The judge committed further violations and has since received a public reprimand. See *In re Stacey*, File No. 16-10 (July 26, 2016), <http://www.bjs.state.mn.us/file/public-discipline/1610-public-reprimand.pdf>.
5. *File No. 13-38 Admonition*. A judge was admonished for engaging in a pattern of disparaging comments about other judges, attorneys, parties, and court staff that served no legitimate purpose and reasonably appeared to the targeted attorneys and parties to be close-minded about their cases in violation of Rules 2.2, 2.5(A), 2.6(A), and 2.8(B). Bd. on Jud. Standards, Private Discipline Summaries, File No. 13-38 (2014), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.

6. *File No. 14-20 Admonition.* A judge showed disrespect to the participants in the trial by walking out of the courtroom during the trial, asking a clerk for an unrelated file during the examination of a witness, and other conduct. The judge also unnecessarily demeaned a party who had been overheard using inappropriate homophobic language. Rather than reprimanding the person once, the judge repeatedly and sarcastically returned to the subject on numerous occasions during the proceedings. Bd. on Jud. Standards, Private Discipline Summaries, File No. 14-20 (2014), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
7. *File No. 12-07 Admonition.* A judge was admonished for ordering a person observing court to remain in the courtroom for an indefinite period of time after her cell phone accidentally rang during a court proceeding and issuing a warrant for her arrest when, after several hours of waiting, she left because she needed to go to work. The Board found violations of Rules 1.1, 1.2, 2.2, and 2.8(A) and (B) and Board Rule 4(a)(5) and (6). Bd. on Jud. Standards, Private Discipline Summaries, File No. 12-07 (2012), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
8. *File No. 10-03 Admonition.* A judge frequently interrupted a party, questioning her in an aggressive tone, and not allowing her an adequate opportunity to address the court. The judge violated rules including Rules 2.6(A) and 2.8(B). Bd. on Jud. Standards, Private Discipline Summaries, File No. 10-03 (2010), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
9. *File No. 10-02 Admonition.* A judge was found to have acted in an undignified way by offering to bet the defendant that he would not prevail at trial. The conduct was undignified, in violation of Rule 2.8(A). Bd. on Jud. Standards, Private Discipline Summaries, File No. 10-02 (2010), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
10. *File No. 10-21 Admonition.* A judge stated to a criminal defendant that the judge automatically disqualified himself from all matters involving the defendant's lawyer and that the judge had "absolutely no faith in any representations" made by the lawyer. The judge was motivated in whole or in part by the lawyer's filing of complaints about the judge with the Board. The Board found violations of Rules 1.1, 1.2, 1.3, 2.8(A), and 2.16 and Board Rule 4(a)(5) and (6). Bd. on Jud. Standards, Private Discipline Summaries, File No. 10-21 (2010), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
11. *In re Stacey*, File No.16-10 (July 26, 2016) Public Reprimand. In July 2016, the Board publicly reprimanded Judge Stacey for accusatory, hostile, and discourteous comments to parties who appeared before him. The comments did not serve any legitimate purpose and caused the parties to believe that Judge Stacey was biased against them.

D. Inappropriate Humor.

1. *In re Aldrich*, File Nos. 08-104, 08-105, 09-110, 09-111 (Sept. 27, 2010) Public Reprimand. Judge Aldrich referred to several possible witnesses as "a bunch of

drunkards” and “incompetent.” He also called out to a deputy county attorney that he had been waiting for a response from the prosecutor for a year and to “call” him to continue the discussion. Judge Aldrich also suggested that the prosecutor was demeaning the court by grandstanding to the court, stating: “You choose not to answer the questions but to give us a spin for the family one more time Have you finished writing your headlines for the press yet?” Judge Aldrich and the Board stipulated to a public reprimand. <http://bjs.cit-net.com/file/news/public-reprimand-judge-stephen-aldrich.pdf>.

2. *In re Spicer I, File No. 08-07 (Feb. 5, 2009) Public Reprimand.*

- a. In 2009 the Board issued a public reprimand to Judge Spicer, who used disparaging speech in reference to a defendant who was in court. *Id.* at 1. Judge Spicer also asked the gallery to weigh in on Judge Spicer’s conduct and that of the defendant, implying either a delegation of authority or asking the gallery for its opinion on how he should decide an issue in a case. *Id.* <http://www.bjs.state.mn.us/file/public-discipline/public-reprimand-pr-0887-r-spicer.pdf>.

3. *In re Spicer II, File No. 12-32 (Mar. 26, 2013) Public Reprimand.*

- a. In 2011, in the matter *State v. Latham*, Nos. A11-1930, A11-1931 (Minn. Ct. App. Sept. 4, 2012), Judge Spicer engaged in misconduct similar to that for which he was reprimanded in 2009. *Id.* slip op. at 3-5, 12-13. Examples are cited in the Public Reprimand, which was reached by stipulated agreement. *Spicer II*, File No. 12-32 at 1-2, <http://www.bjs.state.mn.us/file/public-discipline/public-reprimand-1232-r-spicer.pdf>.
- b. For example, during voir dire a juror stated she knew the defense attorney because she and the attorney shared a hotel room on a school choir trip. *Id.* at 1. Judge Spicer stated: “Shared a room? . . . I don’t want to hear about that. Oh, it was a choir trip.” *Id.* A few minutes later, when a deputy entered the courtroom, Judge Spicer stated: “He wants to make sure we’re safe. I don’t know; we have a couple women sleeping together but besides that everything is okay.” *Id.*
- c. In the reprimand, the Board stated: “Humor, when used cautiously, sparingly and respectfully, has a place in the courtroom.” *Id.* at 3. However, the court of appeals found Spicer’s remarks “inappropriate,” and, more specifically, the Board found them “insensitive and demeaning.” *Latham*, slip op. at 13; *Spicer II*, File No. 12-32 at 3.

E. Inebriation, Sexist Conduct.

1. *In re Kirby*, 354 N.W.2d 410 (Minn. 1984). Judge Kirby was found to have engaged in public intoxication, conducting judicial business with alcohol on his breath, habitual tardiness, and discourteous treatment of female attorneys (“lawyerette” and “attorney generalette”). 354 N.W.2d at 413-14. Female attorneys were “justifiably annoyed and disturbed.” *Id.* at 414. The court’s referee found that Judge Kirby’s apology and the adverse publicity for these comments was a “sufficient penalty.” *Id.* The Court,

- however, explained the need for discipline: “We are mindful of Plutarch’s wise observation: ‘Tho’ boys thro’ stones at frogs in sport, the frogs do not die in sport, but in earnest.” *Id.* at 415. Although the Board “abandoned” the public intoxication charge, the referee found several instances of intoxication and the Court included these in its basis for discipline. *Id.* at 416-17. The Court issued a public censure. *Id.* at 421.
2. *In re Sears*, File No. 81-1264 (Minn. July 26, 1982). Judge Sears “conducted judicial business while inebriated on several occasions, at times failed to conduct business because of inebriation, and sexually harassed and embarrassed female employees and female attorneys on repeated occasions by making suggestive comments or kissing and touching female staff.” *In re Miera*, 426 N.W.2d 850, 860 (Minn. 1988). Judge Sears received a public reprimand. *In re Sears*, slip op. at 1.
- F. ***In re Wolf*, File No. 99-109 (Jan. 31, 2001).** “Judge Wolf acted improperly in the case of *State v. Donald Blom* by (1) failing to maintain an impartial demeanor, (2) making undignified and discourteous public references to lawyers serving as public defenders and in other capacities, and (3) publicly commenting on the pending matter.” Judge Wolf was publicly reprimanded and was also subject to disability proceedings and agreements. The matter was highly publicized.

G. **No Discipline.**

1. *2011 Letter of Caution*. A (non-disciplinary) Letter of Caution was issued to a judge who asked a pro se litigant: “Are you sober?” The litigant was somewhat confused about court procedures, but did not display behavior justifying the inquiry.
2. *In re Nordby*, File No. A10-1847 (Minn. May 11, 2011). Judge Nordby made a long, critical statement about WATCH in open court, in a criminal matter. *See Findings of Fact and Conclusions of Law 5-6*. Judge Nordby claimed WATCH’s red clipboards were an attempt to influence him through ex parte communication. *See Findings of Fact and Conclusions of Law 5*. The Board charged numerous Rule violations. Compl. 5. A Panel dismissed all charges, including the alleged violation of Rule 2.8. “Judge Nordby expressed his strong opinions in strong terms. But the fact that a comment may cause offense does not in and of itself establish a basis for discipline.” *Findings of Fact and Conclusions of Law 10*. Judge Nordby delivered his remarks “dispassionately.” *Findings of Fact and Conclusions of Law 10*. The Board did not appeal the Panel dismissal and it became final.
3. *In re Miera*, 426 N.W.2d 850 (Minn. 1988). Judge Miera was suspended for other misconduct, but discipline charges were dismissed regarding inappropriate conduct. 426 N.W.2d at 856. In a lunchroom, Miera joked to court employees about a banana being a phallic symbol and, in offering coins for coffee, flipped open a flap on an employee’s shirt pocket and touched her shirt. *Id.* This conduct was “out of place and ill-conceived,” but “would not warrant discipline.” *Id.*

XX. RULE 2.9 - EX PARTE CONTACTS.

- A. **Rule 2.9 Overview.** “A judge shall not initiate, permit, or consider ex parte communications” Rule 2.9(A). Five exceptions are provided in Rule 2.9(A)(1)-(5). Rule 2.9(B) governs inadvertently received communications. Rule 2.9(C) proscribes a judge’s independent investigation. Rule 2.9(D) applies Rule 2.9 to the judge’s staff.
- B. **Related Rules.** Before July 1, 2009, Canon 3A(7) governed ex parte communications. Rule 2.9(A) and Canon 3A(7) have some significant differences. The counterpart to Rule 2.9(A) for lawyers is Minnesota Rules of Professional Conduct Rule 3.5(g). A judge was reprimanded for misconduct including, in his own post-decree marriage dissolution and support proceedings, making ex parte communications to the presiding judge. *In re Roberts*, No. 51071, slip op. at 1 (Minn. Jan. 20, 1981); Findings of Fact, Conclusions and Recommendations 5-12.
- C. **Legal Ethics Correlates.** The Office of Lawyers Professional Responsibility (OLPR) has twice discussed what a lawyer should do when a judge directs the lawyer to submit ex parte proposed findings, a proposed order, etc. OLPR’s first answer was that the lawyer was required by the Code of Professional Responsibility to send a copy of the proposed items to other parties. R. Walter Bachman, Jr., *The Ten Most-Asked Legal Ethics Questions*, Bench & B. of Minn., March 1977, [http://lprb.mncourts.gov/articles/Articles/Report%20%20Lawyers%20Professional%20Responsibility%20Board%20\(The%20Ten%20Most-Asked%20Legal%20Ethics%20Questions\).pdf](http://lprb.mncourts.gov/articles/Articles/Report%20%20Lawyers%20Professional%20Responsibility%20Board%20(The%20Ten%20Most-Asked%20Legal%20Ethics%20Questions).pdf). OLPR’s second answer was, “[c]urrent rules favor compliance with a court’s order; the best practice is for the lawyer to challenge the order and make a record of her attempt.” Martin A. Cole, *Top Ten List*, Bench & B. of Minn., Aug. 2015, <http://lprb.mncourts.gov/articles/Articles/Top%20Ten%20List.pdf>. It is not just “best practice,” but a requirement that the lawyer either challenge the order or provide a copy of the submission to the other side. *Id.* Lawyers may not engage in ex parte contacts and may not assist a judge in violating the Code of Judicial Conduct. Minn. R. of Prof’l. Conduct 3.5(g), 8.4(f).
- D. **Related Criminal Statute.** A judge who, contrary to the regular course of the proceeding, “intentionally obtains or receives and uses information relating” to a matter pending or impending before the judge, commits a misdemeanor. Minn. Stat. § 609.515, subd. 1 (2016).
- E. **Proposed Findings and Orders.**
1. *Ahlers v. Ahlers*, No. A08-0901 (Minn. Ct. App. Jan. 27, 2009).
 - a. Facts. Ex-spouses reached an oral settlement, on the record, of disputes regarding their children. *Id.* slip op. at 2. They agreed the judge would draft an order implementing the agreement. *Id.* The judge requested a “proposed resolution” from the mother’s lawyer (L), but not to the father’s attorney (A). *Id.* L sent back a proposed order to the judge, but not to A. After the order was issued, the father learned of the communications and moved for a new order. *Id.* slip op. at 2-3. The

judge recused but the replacement judge affirmed the order. *Id.* slip op. at 3. The father appealed. *Id.*

- b. Appeal. The appellate court – for purposes of determining reversible error, not to find an ethics violation – found that the communications between L and the judge violated the Code’s rule on ex parte communications. *Id.* slip op. at 12. L argued the communications were merely “procedural,” but the court found they were “substantive.” *Id.* slip op. at 10-11. The court cited Minnesota General Rules of Practice 307(b) and Minnesota Rules of Civil Procedure 4.01-4.07, 5.01-5.05, to support its holding that a copy of a proposed order must be shared with other parties. *Id.* slip op. at 10.
 - c. Policy Rationale. “In the context of administrative tribunals, this court has found ex parte communications to be reversible error because the appearance of impropriety created by ex parte communications undermines public confidence in the system. *Meinzer v. Buhl 66 C & B Warehouse Distrib., Inc.*, 584 N.W.2d 5, 6-7 (Minn. Ct. App. 1988) (overturning reemployment insurance judge’s decision when a tape recording of the hearing demonstrated that the judge and opposing party ‘discussed some pieces of evidence and laughed’ when Meinzer left the room).” *Id.* slip op. at 9-10.
 - d. Policy Considerations Include Promoting Impartiality and Accuracy. “Although the ex parte communications may have been unintentional and innocent, they raise the specter of partiality. We note that if father had been given an opportunity to comment on mother’s proposed order, the variances with the stipulation could have been identified, and useful analysis and argument could have been provided to the district court. This would have allowed the district court to address the complained of errors or enter an order expressly addressing shortcomings in the stipulated agreement and adopting the disputed provisions based on appropriate findings.” *Id.* slip op. at 12 (Minn. Ct. App. Jan. 27, 2009).
2. *File No. 09-101 Admonition.* A judge issued a final order without providing one of the parties an opportunity to be heard, in violation of Rules 1.1, 1.2, 2.2, 2.3, 2.6(A), and 2.9(A) and Board Rule 4(a)(5) and (6). Bd. on Jud. Standards, Private Discipline Summaries, File No. 09-101 (2010), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.

F. Admonitions for Rule 2.9 Violations.

1. *File No. 14-64 Admonition. Judge Excluded Counsel from Interview of Child.* In connection with a child welfare proceeding, a judge interviewed a 12-year-old child, M. The judge denied the county attorney’s request to be present. The Board found a violation of Rule 2.9(A) and (C). The child was moved from one family to a second family for a pre-adoption placement. Rule 2.9(A)(5) contains an exception allowing ex parte communications that are “expressly authorized by law.” In some circumstances, a judge may exclude a party from an in-chambers interview with a child. However, a judge may not exclude a party’s attorney. Minn. Stat. § 260C.163,

- subds. 6, 7 (2016); Minn. R. Juv. Prot. P. 27.04; *see also* Minn. R. Juv. Prot. 11.01 (“A verbatim recording of all hearings shall be made by a stenographic reporter or by an electronic sound recording device.”). Bd. on Jud. Standards, Private Discipline Summaries, File No. 14-64 (2015), <http://www.bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
2. *File Nos. 12-15, 12-16 Admonition. Judge Interviewed Social Worker/Witness.* Following a hearing in a CHIPS proceeding, the judge, without giving the parties timely notice and opportunity to be heard, initiated and engaged in an ex parte communication with a social worker who had previously acted as a witness in the case. The Board found a violation of Rules 1.1, 1.2, 2.2, and 2.9(A) and Board Rule 4(a)(5) and (6) Bd. on Jud. Standards, Private Discipline Summaries, File Nos. 12-15, 12-16 (2012), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
 3. *File No. 10-08 Admonition. Judge Reviewed Video Evidence Online.* A judge permitted a staff member to search the internet for a video that was the subject of the case. Then, without first hearing from either party, the judge viewed the video and made a preliminary determination that one of the parties and his attorney may not have been truthful with the court. The Board found violations of Rules 1.1., 1.2, 2.6(A), and 2.9(A)(3) and (C) and Board Rules 4(a)(5) and (6). Bd. on Jud. Standards, Private Discipline Summaries, File No. 10-08 (2010), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
 4. *File Nos. 09-65, 09-66 Admonition. Recused Judge Attempted to Influence Successor.* After a judge was removed from a case, the judge initiated an ex parte communication with the newly assigned judge in an attempt to influence the latter’s decision. The Board found violations of Rules 1.1, 1.2, 1.3, 2.2, 2.3, and 2.9 and Board Rule 4(a)(5) and (6). Bd. on Jud. Standards, Private Discipline Summaries, File Nos. 09-65, 09-66 (2009), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
 5. *File No. 09-92 Admonition. Over Objection, Judge Met With Parties Separately.* A judge met separately with the parties in an effort to settle a case despite the objection of one of the parties. The Board found violations of Rules 1.1, 1.2, 2.2, 2.3, and 2.9(A)(4) and Board Rule 4(a)(5) and (6). Bd. on Jud. Standards, Private Discipline Summaries, File No. 09-92 (2009), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.

G. Judge Improperly Coached Prosecutor. *State v. Schlien*, 774 N.W.2d 361 (Minn. 2009).

1. *Facts.* A trial judge coached a prosecutor to present argument regarding victim impact at a hearing on a motion to vacate a guilty plea. *Id.* at 364, 367. The court characterized the coaching as “giving the State a roadmap for responding to the expected plea-withdrawal motion.” *Id.* at 369. In addition, “the judge used inclusive language referring to the State and the court as ‘us.’” *Id.* The judge later shared at least some of

the communications (those that were recorded by the judge) with defense counsel, and defense counsel did not object. *Id.*

2. *Code Application.* The applicable Code provision required a judge to disqualify himself or herself where “the judge’s impartiality might reasonably be questioned.” *Id.* at 366 (quoting Canon 3D(1)) (current version at Rule 2.11(A)). When a criminal defendant on appeal challenges a trial judge’s conduct, the presumption is that “a judge has discharged his or her judicial duties properly.” *Id.* (citing *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998)). Here, however, the judge made improper *ex parte* communications that “at a minimum, reasonably called the judge’s impartiality into question. Because a judge is disqualified when his or her impartiality is reasonably called into question, the judge’s failure to recuse in this case constituted error that was plain.” *Id.* at 367. Because the judge’s plain error affected the defendant’s substantial rights and it was necessary to correct the error to ensure the fairness and integrity of the judicial proceedings, the court of appeals reversed the conviction and remanded the matter to the district court for further proceedings. *Id.* at 369.

H. To Be “Ex Parte” Must a Communication Be to a Decision-Maker?

1. *Facts.* A non-presiding judge provided advice, on request, to an Assistant County Attorney, regarding whether certain information had to be disclosed to the defense. The prosecutor mentioned the colloquy during argument in court. Defense counsel made a motion to disqualify the prosecutor. The motion was denied. The judge self-reported to the Board, and the Board ultimately dismissed the matter.
2. *Rules.* Rule 2.9 is not expressly restricted to the presiding judge. However, if the rule applied to all non-presiding judges, there could be absurd consequences, e.g., a lawyer who is not involved in the case talks, as a matter of mutual professional or academic interest, with a judge not involved in the case about the case. No one would find a violation. Cases cited in opposition to the disqualification motion indicate “*ex parte*” means to a decision-maker. The lawyer disciplinary rule governing *ex parte* contacts, Minnesota Rules of Professional Conduct 3.5(g) applies to communications to the person “before whom a proceeding is pending.”

I. Permitted Communications – Rule 2.9(A).

1. *Scheduling, Administrative or Emergency Communications – Rule 2.9(A)(1).*
 - a. *Text of Rule.* Rule 2.9(A)(1) provides: “When circumstances require it, *ex parte* communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted” The Rule includes provisions that no party gains an advantage from the communication, the substance of the communication is shared, and there is an opportunity to respond. Rule 2.9(A)(1)(a), (b).
 - b. *In re Nordby*, No. A10-1847 (Minn. May 11, 2011). (Facts described above.) The Panel’s explanation stated: “His conduct was also permitted by rule 2.9(A)(1)(b) on *ex parte* communication, which requires a judge to ‘promptly . . . notify all other

parties of the substance of the ex parte communication, and give[] the parties an opportunity to respond.” Findings of Fact and Conclusions of Law 8. The Board had not charged Nordby with violating Rule 2.9. Compl. 5. The panel rejected charges of numerous rule violations. Findings of Fact and Conclusions of Law 12.

- c. Emergency Purposes (2012). A judge in a rural county communicated with several persons ex parte regarding an 81-year-old man in jail who appeared to be in distress and might not have been taking his medications. The judge disclosed the communications to counsel. The underlying case was settled. It appears that the judge complied with Rule 2.9(A)(1). The Board dismissed this complaint. Board File No. 11-31.
2. *Judge’s Communication With Other Judges* – Rule 2.9(A)(3).
 - a. Pre-2009 Code. Until July 1, 2009, Canon 3A(7)(c) provided, without limitation: “A judge may consult with other judges” Rule 2.9(A)(3) provides that such consultation is permitted, “provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.”
 - b. *McKenzie v. State*, 583 N.W.2d 744 (Minn. 1998). The Supreme Court has broadly stated permission for judges to discuss cases with each other. 583 N.W.2d at 748. “Clearly a judge may not discuss a trial with one party unless the opposing party is present; however, McKenzie has not cited any authority for the proposition that a judge may not discuss potential issues with a judicial colleague in the absence of the parties. We believe it is inherently a judge’s role to assist colleagues in performing their adjudicative responsibilities, whereas the phrase ‘whose function is to aid the judge’ refers to ‘court personnel.’ Our system of justice would suffer greatly if judges could not discuss cases with, solicit input from, and benefit from each other’s richly varied experiences.” *Id.*
 - c. Creating a Judges’ List Serve – Executive Secretary Advisory Opinion (July 27, 2015). The Executive Secretary responded to an inquiry by confirming that Rule 2.9(A)(3) and 2.9 cmt. 5 authorize a judge to create a List Serve, in which Minnesota state court judges and referees could discuss juvenile court issues online, without referencing cases by name or other identifying information. The inquiring judge thought it would be helpful to learn how other judges handle juvenile issues. The judge would indicate that appellate judges should not be part of the forum.
3. *Parties’ Consent*. Rule 2.9(A)(4) (formerly Canon 3(A)(7)) permits a judge to “confer separately with the parties . . . in an effort to settle matters pending before the judge” with the parties’ consent. The Supreme Court dismissed Board charges of violating Canon 3(A)(7) where prosecutors allowed judges to resolve petty traffic offenses in conferences with defendants, without prosecutorial input. *In re Stacey*, 737 N.W.2d 345, 350 (Minn. 2007); *In re Murphy*, 737 N.W.2d 355, 364-65 (Minn. 2007).

4. Communication With “Court Officials” (Receiver) - Rule 2.9(A)(4). In response to a judge’s request for a Board advisory opinion, a Board member opined that a judge may have ex parte communications with a receiver appointed by the judge as to the receiver’s specific duties and the means by which the duties are to be performed.

XXI. RULE 2.9(C) – INDEPENDENT INVESTIGATIONS.

A. ELECTRONIC INVESTIGATIONS – Rule 2.9(C) and Comment 6.

1. *Rule 2.9(C)*. “A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.” A comment adds, “The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.” Rule 2.9 cmt. 6.

B. Judicial Notice Distinguished.

1. *Disclosure, Opportunity to Contest*. “Taking judicial notice is different than conducting an independent investigation because a judge discloses on the record when he or she is taking judicial notice of a fact, and the parties may contest the propriety of taking judicial notice and the nature of the fact to be noticed.” Cynthia Gray, *Independent Investigations*, Jud. Conduct Rep., Summer 2012 at 1, <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR%20Summer%202012.ashx>.
2. *Federal Rule*. Additionally, “a judge can only take judicial notice of a fact ‘that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.’” *Id.* (quoting Fed. R. Evid. 201).
3. *Minnesota Rule*. “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Minn. R. Evid. 201(b). A Committee Comment cites three Minnesota cases on judicial notice.
4. *Example of Judicial Notice - Unitherm Food Systems, Inc. v. Hormel Foods Corp.*, Civil No. 14-4034 (D. Minn. Jan. 30, 2015). The judge searched the Secretary of State website, to determine the status of certain limited liability corporations. *Id.* slip op. at 2-3. The judge concluded there was no subject matter jurisdiction, but gave the parties an opportunity to present evidence to the contrary. *Id.* slip op. at 4. In doing so, the judge noted: “The Court has ‘an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it.’” *Id.* slip op. at 1 (quoting *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010)). As precedent, the judge cited *Belleville Catering Co. v. Champaign Market Place, L.L.C.*, 350 F.3d 691, 692-93 (7th Cir. 2003) for the analogous proposition that a “court consulted databases available on the Internet to ascertain jurisdictional details before oral argument.” *Id.* slip op. at 2-3.

5. *Board Formal Opinion 2016-2 “Judicial Notice of Electronic Court Records in OFP Proceedings.”* The opinion states: “In an order for protection (OFP) proceeding, a judge may access electronic court records of other cases to determine whether there are outstanding orders involving the parties. Generally, under Rule 2.9(C) of the Code of Judicial Conduct, the judge must give the parties a meaningful opportunity to challenge the propriety of taking judicial notice, preferably before the judge reviews the evidence in question. However, given the need for a prompt decision when a party applies for an ex parte OFP, a judge may, without advance notice to the parties, review records of other cases to determine whether there are orders involving the petitioner or respondent that could affect the decision whether to issue an OFP or the terms of the OFP. If advance notice is not practical, the Board recommends that the judge give the parties an opportunity to be heard on the propriety of taking judicial notice after issuing the ex parte order.” Minn. Bd. on Jud. Standards, Formal Op. 2016-2, at 2 (2016).

XXII. RULE 2.10 – PUBLIC STATEMENTS AND PLEDGES.

A. OVERVIEW.

1. *Rule 2.10 Overview.* Paragraphs (A)-(C) of Rule 2.10 proscribe public statements that are prejudicial to a case or constitute pledges, and require a judge to train staff. Paragraphs (D)-(E) permit a judge to make certain statements, e.g., explaining procedures, providing self-defense.
2. *Model Rule Background.* Canon 3A(6) of the 1972 ABA Model Code of Judicial Conduct stated: “A judge should abstain from public comment about a pending or impending proceeding in any court.” Concerned that that language was “overbroad and unenforceable,” the ABA narrowed that provision in the 1990 model code. Lisa L. Milord, *The Development of the ABA Judicial Code* 21 (1992). As amended, Model Rule 2.10(A) prohibits such comments when they “might reasonably be expected to affect the outcome or impair the fairness of a matter” Minnesota adopted the Model Rule amendment in 2004. Canon 3A(8) (2004) (current version at Rule 2.10(A)).
3. *“Well-tuned cymbal.”* A bit of historical and literary background may bear on Rule 2.10(A). “[A]n overspeaking judge is no well-tuned cymbal.” Francis Bacon, *Of Judicature*, reprinted in Bacon’s Essays 222, 224 (W. Aldis Wright ed., Macmillan 1892). Bacon’s aphorism was one of the “Ancient Precedents” selected to precede the *Proposed Canons of Judicial Ethics* in 1923. *The Proposed Canons of Judicial Ethics*, 9 A.B.A. J. 73, 73 (1923). The *Proposed Canons* were proposed by a committee chaired by U.S. Supreme Court Justice (and former U.S. President) William Howard Taft. *Id.* “Well-tuned cymbal” is an allusion to a poem by John Donne, “Oh God, my God, what thunder is not a well-tuned cymbal . . . if thou be pleased to set thy voice to it?” The phrase and poem allude to Psalm 150, “I will praise Him upon a well-tuned cymbal.”

B. Rule 2.10(A) - PUBLIC STATEMENTS.

1. Articles.

- a. William J. Wernz and The Minnesota Board on Judicial Standards, *Regulating Judges' Public Comments*, Bench & B. of Minn., May/June 2011 at 33, <http://mnbenchbar.com/2011/06/regulating-judges-public-comments/>. In 2014, the Board stated that it no longer held the views it had stated in its portion of this article. Board on Judicial Standards, *Position Statement Regarding Judges' Public Comments on Cases* (June 22, 2014), <http://www.bjs.state.mn.us/file/news/postion-statement-rule2-10-a.pdf>.
 - b. Erwin Chemerinsky, *Is it the Siren's Call: Judges and Free Speech While Cases Are Pending*, 28 Loy. Los Angeles L. Rev. 831 (1995).
2. *Negative Statement, Judge's Personal Interest*. A judge issued an order in which he made a negative statement about the character of a person associated with one of the parties. The statement related to a matter affecting the judge's personal interests. This matter was unrelated to the case before the judge. The Board found a violation of Rules 1.3, 2.4(B), and 2.10(A). In addition, the order was issued ten days after the 90-day deadline in violation of Minn. Stat. § 546.27. The Board found a violation of Rules 1.1 and 2.5(A). Bd. on Jud. Standards, Private Discipline Summaries, File No. 16-32 (2017), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.
 3. *In re Bearse, File No. 15-17 (Nov. 24, 2015)*. Senior Judge Bearse posted Facebook messages regarding several cases over which he presided. *Id.* at 1. He thought the messages were available to approximately eighty persons he knew, but in fact the messages were available to the public. *Id.* During a jury trial in *State v. Weaver*, Judge Bearse posted a message that included: "In a Felony trial now State prosecuting a pimp. Cases are always difficult because the women (as in this case also) will not cooperate." *Id.* When other judges became aware of the postings and notified Judge Bearse, he ceased posting comments about any of his cases. *Id.* at 2. Weaver was found guilty. *Id.* at 1. Based on the impropriety of the post in *Weaver*, the defense moved for a new trial. *Id.* A new judge granted the motion, noting in the court's informal minutes that Judge Bearse's posted statements "imply a pre-judgment of the case before any evidence is heard." *Id.* at 2. The Board issued a public reprimand to Judge Bearse, which he accepted. *Id.* at 1. The reprimand found violations of Rules 1.2, 2.1, 2.8(B), 2.10(A), 3.1(A) and (C) of the Code, and Rule 4(a)(5) of the Board Rules. *Id.* at 3-4. The reprimand was amended, to clarify the sequence of some events. *Id.* at 5.
 4. *Executive Secretary Advisory Opinion (Sept. 29, 2015)*. A judge asked for confirmation that the judge could respond to a media request for comment related to a case that was adjudicated when the judge was a prosecutor. The judge stated: "I am asked to comment on a closed case. Both convicted defendants have been released from prison, though one may still be on supervised release. No legal action is pending or impending, post-conviction relief is almost certainly time-barred and no related mental

health/commitment action is possible. I conclude I am free to comment on my role as the prosecutor in this closed case, and answer questions about my legal career since the case was closed.” The Executive Secretary confirmed that under Rule 2.10(A) the judge was free to comment as proposed.

5. *Dismissal of Warning to Judge Burke, File No. 01-115.*

- a. Criminal Cases Involving Government Lawyers. In 2004 the Board initiated an investigation, without complaint, of Judge Burke. Two government lawyers were charged with cocaine possession. The cases were to be transferred to Ramsey County and Judge Burke was never assigned to the matters.
- b. Responses to Media. Judge Burke responded to inquiries from the *Star Tribune* regarding whether the lawyers’ courtroom performance indicated drug impairment. Randy Furst, Pam Louwagie, *Prosecutor Couple Charged With Coke*, *Star Tribune*, Nov. 23, 2004, at A1. Of one lawyer, Judge Burke said, “I thought she was very professional, very caring and very committed.” *Id.* Of the other lawyer, Judge Burke said, “He was very professional very committed . . . He did some very difficult cases and was very sensitive to victims.” *Id.*
- c. Lawyers’ Views. As to the allegation that his comments would likely prejudice the criminal case, Judge Burke pointed out that the lawyers involved in the criminal cases did not find his comments prejudicial and the lawyer prosecuting the cases did not even recall what Burke had said. All of the lawyers who were representing parties to the criminal cases said that Judge Burke’s reported comments would not be a subject of voir dire.
- d. Board’s Theory. While the matter involving Judge Burke was pending, the Board would not disclose its theory of the case. The theory apparently was that Judge Burke’s statements would influence the sentencing judge. This theory would seem to require proof of likelihood of conviction. One of the lawyers pled guilty and apparently the charge against the other lawyer was dismissed. Pursuant to plea bargain, the lawyer who pled guilty had proceedings continued for dismissal, upon meeting certain conditions.
- e. Warning, Public Filings. The Board issued a warning to Judge Burke. Judge Burke appealed. The Board’s charges and Judge Burke’s response were filed publicly, in the Supreme Court.
- f. Dismissal. A few days after the public filings, the Board withdrew its charges, on conditions that Judge Burke not sue the Board or seek attorney fees.
- g. Board Review. After the dismissal Judge Burke’s counsel wrote to the Minnesota Supreme Court, requesting appointment of a committee to review various Board procedures. In 2007, the Minnesota Supreme Court appointed a committee to review the Board’s rules and procedures. Numerous rule amendments and procedural changes resulted. The March 14, 2008, Committee Report is available

at <http://www.bjs.state.mn.us/file/code-of-judicial-conduct/bjs-final-report-mar-2008.pdf>.

6. *Letter of Caution*. On November 8, 2010 the Board sent a letter of caution to a judge, relating to the judge's public statement regarding a matter. A letter of caution is a non-disciplinary disposition. Board Rule 6(f)(4). The letter of caution stated the Board's enforcement position regarding public comment by judges: "The Board takes the position that a judge violates *Canon 2, Rule 2.10(A)* when the comment relates to the merits of a pending or impending case, regardless of intent. Judicial comments, in the Board's opinion, should not disclose personal opinions relating to any participant in the case, including the parties, witnesses or any judge connected to the proceedings." This statement was a subject of a point / counter-point debate. William J. Wernz and The Minnesota Board on Judicial Standards, *Regulating Judges' Public Comments – A Critique and Response*, Bench & B. Of Minn., May/June 2011 at 33, <http://mnbenchbar.com/2011/06/regulating-judges-public-comments>. As noted above, in 2014 the Board withdrew the positions it took in the letter of caution and in the article.
7. *In re Nordby*, No. A10-1847 (Minn. May 11, 2011). Nordby made a long, critical statement about WATCH in open court, in a criminal matter. See Findings of Fact and Conclusions of Law 5-6. Nordby claimed WATCH'S red clipboards were an attempt to influence him through ex parte communication. See Findings of Fact and Conclusions of Law 5. The Board charged numerous Rule violations. Compl. 5. A Panel dismissed all charges, including the alleged violation of Rule 2.8. "Judge Nordby expressed his strong opinions in strong terms. But the fact that a comment may cause offense does not in and of itself establish a basis for discipline." Findings of Fact and Conclusions of Law 10. Nordby delivered his remarks "dispassionately." Findings of Fact and Conclusions of Law 10. The Board did not appeal the Panel determination.
8. *In re Lange*. The hearing panel found Lange did not violate the Code by labeling other judges' conduct "a cancer growing on the judiciary." Findings and Recommendations at 1, 31, *In re Lange*, No. C4-96-596 (Minn. Oct. 17, 1996).
9. *In re Miera*. The Court found that Miera calling his colleagues "blood-thirsty hypocrites" did not warrant discipline. *In re Miera*, 426 N.W.2d 850, 856-57 (Minn. 1988).
10. *File No. 91-63 (May 27, 1992)*. On May 27, 1992, the Board issued the following news release: "The Board on Judicial Standards has issued a reprimand to [a district court judge] for statements made by him for a WCCO TV Telecast on May 6, 1991 concerning a defendant in two first degree murder cases pending in the Hennepin County District Court. At the time of such telecast, the jury selection in such case had been completed, the trial was in progress, and the jury was not sequestered. Comments of the [judge] on such newscast were in violation of Canon 3A(6) which provides: 'A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit judges from

- making public statements in the course of their official duties or from explaining for public information the procedures of the court.” At this time, reprimands were private but some private reprimands were the subject of stipulations by which they were publicly released.
11. *In re Mann*, No. 50982 (Minn. Mar. 4, 1980). Judge Mann engaged in prostitution with an adult woman “10 times or better” in a year. Statement of Allegations 1, *In re Mann*, No. 50982. There were apparently no criminal charges or conviction. The conduct resulted in media attention. *Id.* at 2. Judge Mann gave an interview with the *Minneapolis Star*. *Id.* at 1. In the interview, he commented on the humanity of prostitutes and opined that prostitution laws should be repealed. *Id.* Judge Mann admitted his conduct, including the interview, violated several standards, including the Board rule proscribing conduct prejudicial to the administration of justice. Stipulation and Agreement at 2, *In re Mann*, No. 50982. Pursuant to stipulation, Judge Mann received a public censure. Judgement at 1, *In re Mann*, No. 50982.
 12. *State ex rel. Martin v. Burnquist*, 141 Minn. 308, 170 N.W. 201 (1918). Judge Martin served as Dodge County probate judge for 16 years. 141 Minn. at 320, 170 N.W. at 202. He was re-elected repeatedly. *Id.* at 32, 170 N.W. at 202. Judge Martin made numerous public statements against U.S. involvement in World War I. *Id.* at 318, 170 N.W. at 201. Governor Burnquist removed Judge Martin from the office of probate judge. *Id.* at 319, 170 N.W. at 202. The only legal grounds for removal were “malfeasance in office,” conviction of an infamous crime, or violation of oath of office. *Id.* at 308, 170 N.W. at 201. Finding there was no such malfeasance, the Supreme Court reversed the removal. *Id.* at 322-23, 170 N.W. at 203. The court explained: “But we are clear that scolding the President of the United States, particularly at long range, condemning in a strong voice the war policy of the federal authorities, expressing sympathy with Germany, justifying the sinking of the Lusitania, by remarks made by a public officer of the jurisdiction and limited authority possessed by the judge of probate under the Constitution and laws of this state, do not constitute malfeasance in the discharge of official duties, and therefore furnish no legal ground for removal.” *Id.* at 322, 170 N.W. at 203. In a subsequent proceeding, the Court held that Judge Martin was not entitled to tax costs and disbursements. *State v. Burnquist*, 141 Minn. 308, 323, 170 N.W. 609, 609 (1919).
 13. *Annotated Model Code of Judicial Conduct*. “Once a case is fully resolved and no longer pending, a judge is free to engage in any extrajudicial comment.” Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 208 (2d ed. 2011); *see also Wenger v. Comm’n on Judicial Performance*, 29 Cal. 3d 615 (Cal. 1981). This case held: “As for petitioner’s statement to the press, he correctly points out that his making it did not violate the command of Canon 3(A)(6) of the Code of Judicial Conduct to ‘abstain from public comment about a pending or impending proceeding in any court.’ The contempt litigation had been concluded.” *Wenger*, 29 Cal 3d. at 635.
 14. *Scott v. Flowers*, 910 F.2d 201 (5th Cir. 1990). Judge Scott made the following statement which appeared in a newspaper: “It seems the county court system is not interested in justice.” 910 F.2d at 205 n.6. Scott was charged with statements

purportedly “destructive to public confidence in the judiciary.” *Id.* The court noted that this was “a matter about which Scott, as an elected judge from that county, was likely to have well-informed opinions.” *Id.* at 211. The court found it “not unexpected” that as an elected judge, Scott “would be willing to speak out against what he perceived to be serious defects in the administration of justice in his county.” *Id.* at 212. The court reversed a denial of summary judgment for Scott, concluding that Scott’s statements touched upon “core first amendment values” and that “Scott in fact furthered the very goals [of promoting an efficient and impartial judiciary] that the Commission wishes to promote.” *Id.* at 212-13.

15. Intemperate Statements. Several cases have affirmed the right of lawyers and judges to make vigorous public statements. “No class of the community’ . . . ‘ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality, or integrity of judges than members of the Bar.’” *State Bd. of Law Exam’rs. v. Hart*, 104 Minn. 88, 118 116 N.W. 212, 216 (Minn. 1908) (citation omitted); *see also Partington v. Bugliosi*, 56 F.3d 1147, 1160 (9th Cir. 1995) (“[W]e believe that openness, debate, and the free exchange of ideas are necessary to maintain the legitimacy of the court in the eyes of the public.”). The special vigor of speech by judges in dissents has been noted. “Dissenting opinions in our reports are apt to make petitioner’s speech look like tame stuff indeed.” *In re Sawyer*, 360 U.S. 622, 635 (1959). Vigorous dissent can be found in Minnesota appellate opinions. *See, e.g., State v. Cogshell*, 538 N.W.2d 120, 125 (Minn. 1995) (arguing that majority’s views are “intellectually dishonest.”).

C. “Pending” and “Impending.” These terms are defined in the Terminology section.

XXIII. RULE 2.11 – DISQUALIFICATION – MINNESOTA CRIMINAL AND DISCIPLINARY CASES.

A. Related Rules.

1. *Rule 2.7.* “A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.”
2. *Rule 3.13(A).* A judge may not accept things of value where prohibited by law or where it would “appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”
3. *Minn. R. Crim. P 26.03, subd. 14(3).* In criminal cases, disqualification motions are effectively governed by the Code of Judicial Conduct. “A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct.” *Id.*

B. Related Comments.

1. *Policy Purposes of Disqualification.* Disqualification is sometimes “necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary” Rule 2.7 cmt. 1.

2. *Avoiding Unnecessary Disqualifications*. Unnecessary disqualifications should be avoided for several reasons: “public disfavor, . . . [t]he dignity of the court, the judge’s respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed on the judge’s colleagues . . .” Rule 2.7 cmt. 1.
3. *Campaign Contributors*. Lawyers and parties who appear before judges are permitted to make contribution to judges’ campaigns, but care should be taken that the contributions do not create grounds for disqualification. Rule 4.4 cmt. 3. The identities of contributors should be unknown to judges. Rule 4.4(B)(3).

C. Leading Minnesota Cases - *In re Jacobs*, 802 N.W.2d 748 (Minn. 2011) and *State v. Pratt*, 813 N.W.2d 868 (Minn. 2012).

D. Article. William J. Wernz, *Judicial Disqualification in Minnesota*, Bench & B. of Minn., Nov. 2016, <http://mnbenchbar.com/2016/11/judicial-disqualification-in-minnesota>. Although the views in the article are those of Mr. Wernz personally, Mr. Wernz was Board Chair when the article was published.

E. *Troxel v. State*, 875 N.W.2d 302 (Minn. 2016).

1. On August 28, 2012, Judge Aandal was assigned to preside over the murder trial of Mr. Troxel in Pennington County District Court, Ninth Judicial District. 875 N.W.2d at 312.
2. On January 16, 2013, Judge Aandal issued an order for recusal in some cases, not including *Troxel*. *Id.* at 312-13. The order stated: “Whereas this Court has engaged in employment negotiations with the law firms Drenckhahn & Williams, P.A., Galstad, Jensen & McCann, P.A., and the Marshall County Attorney’s Office, and whereas this Court is therefore disqualified from hearing cases involving the above-listed entities, it is therefore ordered that this Court shall not hear or be assigned any cases involving those entities.” *Id.*
3. On September 26, 2013, Troxel moved to remove Judge Aandal for cause based on an appearance of partiality, citing Minnesota Rules of Criminal Procedure 26.03, subdivision 14(3) and Rule 2.11(A). *Id.* at 313. The motion cited the proximity of Marshall and Pennington Counties and the cooperation of their county attorneys in some cases, etc. *Id.*
4. The District Chief Judge denied the motion. *Id.* Judge Aandal presided at trial. *Id.* Troxel was convicted and appealed on grounds including those in his prior motion. *Id.* at 307.
5. The Supreme Court affirmed the conviction. *Id.* at 316. The Court divided 4-3 on whether Judge Aandal’s employment negotiations created a basis on which his impartiality could reasonably be questioned. *Id.* at 318. The majority distinguished case law in which the judge was employed by, or seeking employment with, an entity appearing in a matter before the judge. *Id.* at 315-16. There was only a short period between the end of the trial and Judge Aandal’s commencing his new employment, but

the majority distinguished between a judge who has become a prosecutor and a judge about to become a prosecutor. *Id.* at 315.

6. The dissent acknowledged there was no proof of actual bias. *Id.* at 320. However, in the dissent's view, "a reasonable examiner would see that the judge was seeking to leave his position as umpire in order to join one of the teams: the State. In fact, he did just that; he joined the State's team about two months after he sentenced Troxel." *Id.* at 318.
7. It may be noted that in another case, the court determined for conflicts imputation purposes that a "government legal department is not a 'firm' under [Minnesota Rules of Professional Conduct] 1.10 (conflict of interest)." *Humphrey ex rel. State v. McLaren*, 402 N.W.2d 535, 543 (Minn. 1987). The Court effectively codified this holding in Rules 1.10(e) and 1.11(d)(1). In this case and in these rules, the court does not regard all the lawyers in a single government office – let alone all county attorneys and other state prosecutors – as on the same "team" for conflicts and information-sharing purposes. *Id.*

F. **2009 Amendment.** Cases decided under the pre-2009 Code should be applied only with caution because the 2009 Code made several changes. For example, Rule 2.11 cmt. 5 states only that a judge "should" make disclosure and the disclosure is only of that which parties or lawyers "might *reasonably* consider relevant to a possible motion for disqualification" (emphasis added).

G. **Rule 2.11(A) / Canon 3D.**

1. *Impartiality.* Rule 2.11(A) requires a judge to disqualify where "impartiality *might reasonably be questioned.*" (emphasis added). The Rule lists several circumstances requiring disqualification.
2. *Interests.* De minimis economic interests are *not* disqualifying. Rule 2.11(A)(2)(c). Rule 2.11(A)(2)(c) requires disqualification where the judge or a close relative "has more than a de minimis interest that could be substantially affected by the proceeding." Rule 2.11(A)(3) requires disqualification where the judge or a close relative "has an economic interest in the subject matter in controversy or in a party to the proceeding," but comment 6 defines "economic interest" as "more than a de minimis . . . interest."

H. **"Reasonably Be Questioned."** The test for this standard of disqualification is where "a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." *In re Jacobs*, 802 N.W.2d 748, 753 (Minn. 2011). The "reasonable examiner" is "an objective unbiased layperson with full knowledge of the facts and circumstances." *State v. Pratt*, 813 N.W.2d 868, 876 n.8 (Minn. 2012) (quoting *Jacobs*, 802 N.W.2d at 753).

I. **Subjective Belief Insufficient; Burden.** "While removal is warranted when the judge's impartiality might reasonably be questioned, [an appellant's] subjective belief that the

judge is biased does not necessarily warrant removal.” *Hooper v. State*, 680 N.W.2d 89, 93 (Minn. 2004); *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998).

- J. **Presumption.** When an appellate court evaluates a claim of judicial bias, there is a “presumption that a [district court] judge has discharged his or her judicial duties properly.” *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). The party alleging bias in *McKenzie* had the burden to establish allegations sufficient to overcome this presumption. *Id.*
- K. **Appearance of Partiality / Disqualification.** “A failure to disclose is not likely to create an appearance of partiality where, as here, the fact of his spouse’s employment does not require disqualification.” *In re Jacobs*, 802 N.W.2d 748, 754 (Minn. 2011) (citing Rule 2.11 cmt. 4).
- L. **“Good Deal of Discretion.”** “The rule places a good deal of discretion with the judge to determine when additional information should be disclosed.” *Id.* at 754. Notwithstanding this latitude, the Court has found certain undisclosed relationships to be disqualifying, e.g., in *Powell v. Anderson*, 660 N.W.2d 107, 115 (Minn. 2003) and *State v. Pratt*, 813 N.W.2d 868 (Minn. 2012).
- M. **Policy.** “Justice requires that the judicial process be fair and that it appear to be fair; it necessarily follows that a presiding judge must be impartial and must appear to be impartial. To paraphrase Judge Posner, writing for the court in *Pepsico*, the public cannot be confident that a case tried by a judge who is on retainer by one of the parties to the case will be decided in accordance with the highest traditions of the judiciary. *See Pepsico*, 764 F.2d at 461. Put another way, the public cannot have trust and confidence in a judicial system that permits the presiding judge in a case to be simultaneously retained as an expert witness by one of the parties appearing before the judge.” *State v. Pratt*, 813 N.W.2d at 878 (citing *Pepsico, Inc. v. McMillen*, 764 F.2d 458, 461 (7th Cir. 1985)).
- N. **Disclosure? - *In re Jacobs*, 802 N.W.2d 748 (Minn. 2011).**
1. *Overview.* *Jacobs* sought a writ of prohibition against Judge Moreno continuing to preside, because Judge Moreno did not disclose that his wife was an Assistant County Attorney in the office prosecuting the case. 802 N.W.2d at 750.
 2. *“Should” Disclose Does Not Mean “Required” to Disclose.* “*Jacobs* also argues that an appearance of partiality arose because Judge Moreno did not disclose that his spouse is an attorney in the county attorney’s office. We do not agree that a judge is *required* to disclose the nature of his wife’s employment to the parties. The comments to Rule 2.11 suggest that ‘[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.’ Minn. Code of Judicial Conduct, Rule 2.11 cmt. 5 (emphasis added). But the use of the word ‘should’ indicates that the comment is not mandatory. ‘Where a Rule contains a permissive term, such as ‘may’ or ‘should,’ the conduct being addressed is committed to the personal and professional discretion of the judge or

candidate in question.’ Minn. Code of Judicial Conduct, Scope; *see also State v. Dahlin*, 753 N.W.2d 300, 306–07 (Minn. 2008). The rule places a good deal of discretion with the judge to determine when additional information should be disclosed. A failure to disclose is not likely to create an appearance of partiality where, as here, the fact of his spouse’s employment does not require disqualification. *Cf.* Minn. Code of Judicial Conduct, Rule 2.11 cmt. 4.” *Id.* at 754.

O. **Non-Disclosure Not a Discipline Offense.** As indicated both in *Jacobs* and in Rule 2.11 cmt. 5, failure to disqualify may be a subject of discipline, but failure to disclose information that might reasonably be relevant to disqualification is not a subject of discipline.

P. **Difference From ABA Model Rule 2.11(A)(4).**

1. *Model Rule 2.11(A)(4)*. “The judge knows or learns by means of a timely motion that a party, a party’s lawyer, or the law firm of a party’s lawyer has within the previous [insert number] year[s] made aggregate* contributions* to the judge’s campaign in an amount that [is greater than \$[insert amount] for an individual or \$[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].”
2. *Minnesota*. Minnesota did not adopt Model Rule 2.11(A)(4).
3. *New York*. New York takes a position on an issue that has not been addressed in Minnesota, viz. where an individual has a prominent role in the campaign, recusal is required. N.Y. Advisory Comm. on Jud. Ethics, Op. 03-64 (2003); Op. 108-52 (2008).

Q. ***State v. Schlien*, 774 N.W.2d 361 (Minn. 2009).**

1. A trial judge coached a prosecutor to present argument regarding victim impact at a hearing on a motion to vacate a guilty plea. 774 N.W.2d at 363-64. The court characterized the coaching as “giving the State a roadmap for responding to the expected plea-withdrawal motion.” *Id.* at 369. In addition, “the judge used inclusive language referring to the State and the court as ‘us.’” *Id.* The judge later shared at least some of the communications (those which were recorded by the judge) with defense counsel, and defense counsel did not object. *Id.* at 365.
2. The applicable Code provision required a judge to disqualify where “the judge’s impartiality might reasonably be questioned.” *Id.* at 366 (quoting Canon 3D(1) (2009) (current version at Rule 2.11(A)). The presumption is that “a judge has discharged his or her judicial duties properly.” *Id.* (citing *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998)). Here, however, the judge made improper ex parte communications that “at a minimum, reasonably called the judge’s impartiality into question. Because a judge is disqualified when his or her impartiality is reasonably called into question, the judge’s failure to recuse in this case constituted error that was plain.” *Id.* at 367. Because this plain error affected Schlien’s substantial rights and it was necessary to correct the error to ensure the fairness and integrity of the judicial proceedings, the court reversed the conviction and remanded the matter to the district court for further proceedings. *Id.* at 369.

- R. ***State v. Burrell*, 743 N.W.2d 596 (Minn. 2008).** In *Burrell*, the Supreme Court addressed a disqualification motion in a criminal case and noted: “In determining whether a judge should be disqualified under [Minnesota Code of Judicial Conduct] Canon 3D(1), the question is whether an objective examination of the facts and circumstances would cause a reasonable examiner to question the judge’s impartiality.” *Id.* at 601-02 (citing *State v. Dorsey*, 701 N.W.2d 238, 248 (Minn. 2005)).
- S. **Relationship to a Party / Retired Judge - *State v. Pratt*, 813 N.W.2d 868 (Minn. 2012).**
1. *Overview.* The court found there was sufficient evidence to support Pratt’s convictions of racketeering, theft by swindle, etc. 813 N.W.2d at 875. However, the convictions were reversed because the judge failed to disclose a business relationship with the prosecutor. *Id.* at 878-79.
 2. *Judge Retained as Expert Witness.* In December 2008, the Hennepin County Attorney’s Office (HCAO) retained a retired judge as an expert in a federal civil case, in which the County was a defendant. *Id.* at 872 & n.2. The federal case was unrelated to *State v. Pratt*. *Id.* at 872. The judge attended a meeting with the HCAO, “during which he expressed what his opinion would be if he were to testify.” *Id.* at 876. The judge received documents from HCAO regarding the civil case but did not review them. *Id.* at 877. The judge never received compensation, but “there is nothing in the record to suggest that he agreed not to be paid as an expert witness.” *Id.* at 876-77.
 3. *Judge Presides.* After presiding over several pre-trial proceedings, beginning June 3, 2009, the judge presided at trial. *Id.* at 872.
 4. *Expert Witness, Round 2.* On June 30, 2009, the judge informed HCAO he was no longer available as an expert. *Id.* On July 2, 2009, with trial continuing, and before the July 4 holiday, HCAO disclosed the judge’s expert retention to the defense. *Id.*
 5. *Verdict, Motion, Writ, Sentencing.* Shortly after the trial resumed on July 6, the trial concluded and the jury found Pratt guilty. *Id.* The defense moved to disqualify the judge. *Id.* at 873. The motion was denied. *Id.* A writ of prohibition was sought from the court of appeals, but that too was denied. *Id.* The judge sentenced Pratt. *Id.*
 6. *Reversal.* On appeal, the Minnesota Supreme Court reversed. The Court found the judge violated Rule 2.11(A) and its predecessor, Canon 3D(1). *Id.* at 876 n.6, 879. A reasonable examiner “would,” or “might,” question the judge’s impartiality both from his retention and from his termination of the retention just before the end of trial. *Id.* at 876.
- T. **Presiding at Sentencing and Probation Revocation - *State v. Finch*, 865 N.W.2d 696 (Minn. 2015).**
1. The same judge who presided at Finch’s sentencing (which included probation) presided at Finch’s probation revocation hearing. *Id.* at 699-700. At sentencing, the judge announced that if Finch violated probation the judge would revoke his probation and send him to prison. *Id.* at 704.

2. Finch brought a motion to disqualify the judge or, alternatively, for an order directing the Chief Judge of the district to make an order regarding disqualification. *Id.* at 699. The judge denied the motion and, after hearing, revoked Finch's probation. *Id.* at 699-700.
3. Finch appealed. *Id.* at 700. Finch argued that the judge erred by failing to refer the disqualification motion to the chief judge. *Id.* The court of appeals affirmed. *Id.* The Supreme Court reversed. *Id.* at 705.
4. Citing Minnesota Rules of Criminal Procedure 26.03, subdivision 14(3), the Court held that a writ of prohibition is not required. *Id.* at 701. Instead, the chief judge may hear and determine the disqualification motion, even after the trial judge has denied the motion. *Id.*
5. In reversing the probation revocation, the Court found that Finch was denied his substantial right to a hearing before a judge who had not prejudged the matter. *Id.* at 705. Probation revocation requires consideration of three factors, but the judge had pre-determined that she would revoke probation for any violation. *Id.* at 704-05. "[T]he district court prejudged a probation revocation proceeding, reasonably calling into question the judge's impartiality. Regardless of which standard is applied, the district court judge's presence in the probation revocation proceeding requires vacatur." *Id.* at 705.
6. The judge violated Rules 1.2 (appearance of impropriety) and 2.11(A) (impartiality might reasonably be questioned).
7. "Judges must remain impartial by not prejudging; they must 'maintain[] an open mind.' *Schlienz*, 774 N.W.2d at 369. And judges 'should be sensitive to the 'appearance of impropriety' and should take measures to assure that litigants have no cause to think their case is not being fairly judged.' *McClelland v. McClelland*, 359 N.W.2d 7, 11 (Minn. 1984). Because the district court judge unequivocally told Finch that the court would revoke his probation for any violation, and because the judge speculated that Finch had 'duped' the court when he exercised his right to appeal, a reasonable examiner would question whether the judge could impartially conduct the proceeding under the *Austin* factors. Thus, we hold that the judge was disqualified from the probation revocation proceeding." *Id.*

U. *State v. Yeager*, 399 N.W.2d 648, 652 (Minn. Ct. App. 1987).

1. Yaeger sought reversal of his conviction for arson on various grounds, including that the trial judge allegedly "heard statements in another action to the effect he burned his house, and that the judge had sentence him in connection with his welfare fraud conviction." 399 N.W.2d at 652. The court of appeals affirmed the conviction, explaining that Yeager had to show the judge's actual prejudice, and "[t]he fact that a judge is familiar with a defendant is not an affirmative showing of prejudice." *Id.* at 652-53

V. ***State v. Pero*, 590 N.W.2d 319 (Minn. 1999).**

1. Failure to recuse after hearing defendant's inculpatory statements was found not to be improper where the judge will preside at the jury trial and defendant's admissions were largely the same as those made to the police. *Id.* at 326-27.
2. *Pero* states that advisory committee comments to the Rules of Criminal procedure are not binding and a judge is not required to follow them. *Id.* at 326. The statement specifically refers to a comment to Minnesota Rules of Criminal Procedure 15.04. *Id.* *State v. Osterkamp*, No. A11-1103, slip op. at 8-9 (Minn. Ct. App. Aug. 2, 2012) (below) nonetheless cites a comment as authority for the case's holding that a judge should have recused.

W. ***State v. Osterkamp*, No. A11-1103 (Minn. Ct. App. Aug. 2, 2012) - Plea and Bench Trial.**

1. This case is unpublished and therefore not precedential. The case cites comments to a Rule of Criminal Procedure, but the status of comments is unclear. *Id.* slip op. at 8-9.
2. "Nonetheless, '[i]f the defendant has made factual disclosures tending to disclose guilt of the offense charged, the judge should disqualify himself or herself from the trial of the case.' Minn. R. Crim. P. 15.04, adv. comm. cmt. (2006); *cf.* *State v. Pero*, 590 N.W.2d 319, 326-27 (Minn.1999) (concluding that a district court judge did not abuse discretion by failing to recuse after presiding over a plea hearing and rejecting a defendant's proposed plea agreement, when defendant retained right to jury trial)." *Id.*, slip op. at 11.
3. "We recognize that judicial disqualification is not required simply because a judge has considered and then rejected a guilty plea after reviewing a PSI. *Thompson*, 754 N.W.2d at 356. But we conclude that the particular circumstances in this case warrant a recusal. Here, the district court judge was the fact-finder in appellant's bench trial after having elicited a factual basis for appellant's plea that included appellant's admission that he touched R.M. with sexual intent, an element contested at trial. *See* Minn. Stat. § 609.341, subd. 11(b) (Supp. 2009) (stating relevant definition of sexual contact). Furthermore, the PSI contained appellant's express admission to the intent element of the offense, as well as additional inculpatory statements. On this record, the judge's comments at sentencing appear to reflect on the judge's impartiality at trial." *Id.*

X. **Judge's Prior Representation of Party and Former Partner's Involvement in Matter - *Town of Denmark v. Suburban Towing, Inc.*, No. A09-947 (Minn. Ct. App. Mar. 30, 2010).**

1. *Facts.* Town of Denmark (Denmark) and Suburban Towing, Inc. (Suburban) had numerous proceedings regarding several Conditional Use Permits (CUP) first issued in 1995, and related land use matters. *Id.* slip op. at 2-4. In approximately 1989 or 1990 to 1995 or 1996, an attorney represented Denmark on matters not related to CUP. *Id.* slip op. at 3-4. At an October 2008 hearing on Denmark's motion to revoke the CUP

- issued to Suburban in 2008, the former-attorney for Denmark now served as the judge in the proceeding, and disclosed his prior representations. *Id.* Suburban did not object to the former attorney continuing to preside as judge. *Id.* slip op. at 4, 6.
2. *Allegation of Partiality.* After a January 2009 hearing, the judge revoked Suburban's CUP. *Id.* slip op. at 4. Suburban moved for relief, on grounds including that the judge should have recused. *Id.* Suburban's argument was based on the fact that "one of the judge's former partners once drafted a CUP that respondent issued to appellants." *Id.*
 3. *District Court's Explanation and Ruling.* In denying Suburban's motion the court stated: "The district court explained that any prior CUP was not at issue and that the judge had not done any work for respondent for sixteen years. The court also explained that he mentioned his former partner's involvement in his findings to provide a historical background and that the order specifically states that the CUP at the core of the matter was issued in 2008 when the judge had already been on the bench for several years." *Id.* slip op. at 4-5. The district court affirmed the judge's determination that his recusal was not required. *Id.* slip op. at 5.
 4. *Appeals Court Affirms.* The court of appeals explained that the work of the judge's former partner on a prior CUP was not disqualifying, "[b]ut the district court judge would be subject to disqualification only if his former partner participated substantially in the current matter. The controversy at hand did not involve the CUP that the judge's former partner drafted; thus, there is no substantial participation." *Id.* slip op. at 7. The court also rejected Suburban's argument that the judge's prior representation of Denmark on unrelated matters was disqualifying, saying that Suburban should have raised that issue in October 2008. *Id.* slip op. at 6. The court did not state whether, if objection had been made timely, a prior representation of a party on unrelated matters would be disqualifying.

Y. Minnesota Supreme Court Recusals. "On July 23, 2012, Clark filed a motion to disqualify all members of this court from this matter. On October 15, 2012, she filed a request seeking a date for her recusal motion to be heard. Members of this court are subject to the standards in the Code of Judicial Conduct governing recusal. *See* Minn. Code of Judicial Conduct, Rule 2.11; *State ex rel. Wild v. Otis*, 257 N.W.2d 361, 363 (Minn. 1977). However, '[i]t has long been the practice of this court to honor decisions of its individual members as to whether to participate in a pending proceeding.' *In re Modification of Canon 3A(7) of the Minn. Code of Judicial Conduct*, 438 N.W.2d 95, 95 (Minn. 1989) (order); *accord Wild*, 257 N.W.2d at 363-64. Each member of the court has applied the applicable standards for recusal and made an individual determination whether to participate in this case. In light of the court's practice, Clark's motions are denied." *In re Clark*, 834 N.W.2d 186, 188 n.1 (Minn. 2013).

XXIV. DISQUALIFICATION – MINNESOTA CIVIL CASES.

- A. **Criminal / Civil.** In criminal cases, judicial disqualification is normally governed by the Code, most often Rule 2.11(A) (and its predecessor). *See* Minn. R. Crim. Proc. 26.03, subd. 14(3). In civil case, judicial disqualification is nominally dependent on an

“affirmative showing of prejudice.” Minn. R. Civ. Proc 63.03. The Board has proposed that the Supreme Court adopt the Judicial Code disqualification standards in civil cases. <http://www.bjs.state.mn.us/board-news/news-petition-to-amend-civil-rules>.

B. Procedure for Disqualification of Judge in a Civil Matter - *Dorsey & Whitney LLP v. Grossman*, No. A10-1694 (Minn. Ct. App. July 25, 2011).

1. “In civil matters, a party may disqualify the initial judge assigned to a proceeding, as a matter of right, within ten days following the judicial assignment. Minn. R. Civ. P. 63.03. Once a party removes a judge as a matter of right, as appellants did here, a motion for disqualification must first be brought before the judge that the party is attempting to remove. Minn. R. Gen. Prac. 106. If the motion is denied, the chief judge of the district court may reconsider the motion. *Id.* The standard for disqualifying a judge in civil matters requires an ‘affirmative showing of prejudice,’ which includes ‘[a] showing that the judge . . . might be excluded for bias from acting as a juror in the matter.’ Minn. R. Civ. P. 63.03. The decision to deny a motion to disqualify a judge based on bias lies within the discretion of the district court and will be reversed only upon an abuse of this discretion. *Matson v. Matson*, 638 N.W.2d 462, 469 (Minn. Ct. App. 2002).” *Id.* slip op. at 6.

C. Removal as of Right Not Available Where Judge Has Presided in a Matter. Where a judge presided over a dissolution action before the judgment and decree, a party may not remove the judge as of right. *In re Ihde*, 800 N.W.2d 808, 811 (Minn. Ct. App. 2011) (citing Minn. R. Civ. Proc 63.03).

D. “Considerable Room for Interpretation.” The prohibition against a judge presiding when his or her impartiality might reasonably be questioned leaves “considerable room for interpretation . . . [and] does not provide a precise formula that can automatically be applied.” *Powell v. Anderson*, 660 N.W.2d 107, 115 (Minn. 2003).

E. Judge’s Lawyers Appearing for a Party Before the Judge. *Powell v. Anderson*, 660 N.W.2d 107 (Minn. 2003).

1. Appeals Court Judge Amundson should have disqualified himself in the *Powell* case because Rider Bennett (through different individual attorneys) represented both Amundson as trustee and some defendants in the *Powell* case. 660 N.W.2d at 113, 119. The Supreme Court remanded to the court of appeals. *Id.* at 124.

2. A different appeals court panel did not grant Powell’s motion to vacate because the Amundson panel ruled unanimously. *Id.* at 122.

3. The Court held that the Judicial Code disqualification standards should apply to court of appeals judges. The Court adopted a four factor test: (a) “extent of attorney-client relationship”; (b) “nature of the representation,” e.g., personal, institutional, technical; (c) frequency, volume, nature of judge-lawyer contacts; (d) special circumstances. *Id.* at 118. Here, Judge Amundson’s ongoing stealing from the trust was a unique factor that weighed heavily for disqualification. *Id.* at 119.

F. A “Close Call” - Disqualification Denial Affirmed – Husband’s Relationship to Party - *Dorsey & Whitney v. Grossman*, No. A10-1694 (Minn. Ct. App. July 25, 2011).

1. “Appellants advance a strong argument that the chief judge abused his discretion by failing to disqualify the hearing judge from the summary-judgment proceeding. The judge’s husband was serially demoted over a three-month period, leading to his resignation from Ambient after five years of employment. Presumably, the judge was aware of her husband’s employment plight, and it is reasonable to project her aversion toward her husband’s former employer. The judge’s subsequent realization that the CEO of her husband’s former employer was also a defendant in a civil matter before her raises fair questions as to her ability to remain impartial in the case. Appellants assert that, given these facts, there is a good argument that the judge might have been disqualified as a juror in this matter and, thus, an affirmative showing of prejudice could have been made.” *Id.* slip op. at 7-8.
2. However, several factors militate against a showing of prejudice. *Id.* slip op. at 8. The judge did not connect her husband’s situation with a party for some months, and the former employer is not a party to the present case. *Id.* slip op. at 8-9. The events transpired some years ago. *Id.* slip op. at 9. There was no showing of hardship on the judge’s family caused by the unemployment or demotions. *Id.*

G. Disqualification Denial – Son-in-Law’s Firm Representing a Party. *Laches. In re Medtronic, Inc.*, 623 F.3d 1200 (8th Cir. 2010).

1. Plaintiffs moved for Judge Kyle’s disqualification based on defendant being a client of the law firm in which the judge’s son is a partner. *Id.* at 1208-09. “Plaintiffs knew, or with due diligence could have known, that Medtronic is a significant client of Fredrikson & Byron, and that Judge Kyle’s son is a shareholder of the firm, before the Judicial Panel transferred this litigation to Judge Kyle. Thus, the recusal motion was untimely.” *Id.* The motion was denied and the denial was affirmed on appeal. *Id.*
2. The appellate court found the motion was also a device “‘interposed for suspect tactical and strategic reasons’ following the district court’s adverse rulings. *In re Kansas Pub. Emps. Ret. Sys.*, 85 F.3d 1353, 1360 (8th Cir. 1996)). As the grant of such a belated motion would have serious adverse effects on the efficient use of judicial resources and the administration of justice, ‘on this basis alone, the district court’s . . . denial of the recusal motion is affirmed.’” 623 F.3d at 1209 (quoting *Tri-State Fin., LLC v. Lovald*, 525 F.3d 649, 654 (8th Cir.)).

H. Disqualification Denial – Son Representing Party Before Judge – Old Cases More Permissive.

1. *In re Wunsch’s Estate*, 177 Minn. 169, 225 N.W. 109 (1929). One of the parties argued that the judge ought to step aside because the judge’s son represented the other party in a will contest. *Id.* at 170, 225 N.W. at 109. It was a bench trial, and their relationship seemed unfair. *Id.* The judge declined, the complaining party lost the will contest and appealed. *Id.* at 174, 225 N.W. at 111. The Minnesota Supreme Court, with little

analysis, concluded, “The fact that a son of the judge appeared for the respondents furnished no legal ground for . . . the calling for another judge to try the case” *Id.* at 170, 225 N.W. at 109.

2. *State v. Ledbeter*, 111 Minn. 110, 115, 126 N.W. 477, 478 (1910). In another case involving a presiding judge and a son representing a party, the Court contemplated the baneful effects of applying broad judicial disqualification standards so as to render judgments void, stating that under such an interpretation, “the statute is a snare, a menace to the constitutional rights of the citizens, the honor of families, and the legitimacy of innocent children.”
3. *Sjoberg v. Nordin*, 26 Minn. 501, 5 N.W. 677, (Minn. 1880). A statute provided that a judge would be disqualified where a juror would be disqualified. *Id.* at 502-03, 5 N.W. at 677-78. The interpretation was that the statute applied only where the judge had a financial interest, and not to a family relationship. *Id.* at 503-04, 5 N.W. at 678.

I. Party’s Perception of Bias and Adverse Rulings are Insufficient to Require Disqualification.

1. “The mere fact that a party declares a judge partial does not in itself generate a reasonable question as to the judge’s impartiality.” *State v. Burrell*, 743 N.W.2d 596, 601-02 (Minn. 2008).
2. “[A] judge who feels able to preside fairly over the proceedings should not be required to step down upon allegations of a party which themselves may be unfair or which simply indicate dissatisfaction with the possible outcome of the litigation.” *McClelland v. McClelland*, 359 N.W.2d 7, 11 (Minn. 1984), *superseded by statute on other grounds*, 1985 Minn. Laws 1185, 1186 (codified at Minn. Stat. § 518.552, subd. 2 (2016) *as recognized in Gales v. Gales*, 553 N.W.2d 416, 419 (Minn. Ct. App. 1996)).
3. “Prior adverse rulings, however, clearly cannot constitute bias.” *Olson v. Olson*, 392 N.W.2d 338, 341 (Minn. Ct. App. 1986).

- J. **“Blanket Removals.”** “Minn. R. Crim. P. 26.03, subd. 13(4) grants to litigants the privilege of [removing a judge] once summarily in a case without having to give a reason for removing a judge. The Kandiyohi County Attorney’s Office has repeatedly used the rule to pursue its own goals on virtually all criminal cases in the county. The County Attorney started this practice not because of any claimed misconduct, but in response to an adverse ruling by Judge Lindstrom. Such use of the rule does nothing to further the spirit of the rule, but instead strikes at the very heart of judicial independence, which is so essential in a free society. The misuse of Minn. R. Crim. P. 26.03, subd. 13(4), by the County Attorney’s Office sends the clear message that dissatisfaction with a judge’s rulings will result in removal of that judge from virtually all similar cases.” *State v. Erickson*, 589 N.W.2d 481, 484-85 (Minn. 1999).

K. Duty to Perform Judicial Duties if not Disqualified.

1. “A judge shall hear and decide matters assigned to the judge, except when disqualification is required” Rule 2.7. This provision was added in 2009. Opinions issued before this amendment may not give due weight, for current purposes, to the judge’s duty to hear and decide.
2. A judge’s duty to hear a case if qualified is just as strong as the duty to recuse if bias does exist. *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (Rehnquist, J.) (denying motion to disqualify). “Those federal courts of appeals which have considered the matter have unanimously concluded that a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified.” *Id.*

L. Removal as Juror Standard Not the Same as Judicial Disqualification.

1. The court of appeals affirmed the denial of a disqualification motion brought under Minnesota Rules of Civil Procedure 63.03 upon the conclusion that a newspaper publishing a judge’s comments about a case did not constitute a showing of affirmative prejudice. *Roatsch v. Puera*, 534 N.W.2d 560, 563-64 (Minn. Ct. App. 1995).
2. The court of appeals concluded that the district court did not abuse its discretion by denying a disqualification motion made by a party upon the allegations that the district court judge improperly engaged in ex parte communications about him and the case with the party’s former lawyer. *Carlson v. Carlson*, 390 N.W.2d 780, 785-86 (Minn. Ct. App. 1986).

M. Is the Failure to Disqualify Grounds for Reversal?

1. The old standard was that prejudice had to be shown before a failure to disqualify would be grounds for reversal. *Nachtsheim v. Wartnick*, 411 N.W.2d 882, 890-91 (Minn. Ct. App. 1987); *Miller v. Michel*, 409 N.W.2d 11, 14 (Minn. Ct. App. 1987); *Desnick v. Mast*, 311 Minn. 356, 362-63, 249 N.W.2d 878, 882-83 (1976).
2. However, with respect to court of appeals judges, the Court adopted the disqualification standards in the Code. “To the extent that *Nachtsheim* and *Miller* might be interpreted as standing for the proposition that disqualification of an appellate judge could not be based upon the Code of Judicial Conduct, we specifically overrule them and accept the recommendations of the ABA Standards Relating to Appellate Courts that an appellate judge should be subject to disqualification on the grounds set forth in the Code of Judicial Conduct.” *Powell v. Anderson*, 660 N.W.2d 107, 114-15 (Minn. 2003). In *Powell*, the Supreme Court vacated an opinion of the court of appeals because a judge serving on the court of appeals panel failed to disqualify himself. The risk of prejudice to one of the parties was substantial, and the risk of undermining the public’s confidence in the judicial process was also significant.

XXV. DISQUALIFICATION – BOARD / EXECUTIVE SECRETARY ADVISORY OPINIONS.

A. Relationship of Judge and Lawyer – Two Board Formal Opinions.

1. *Board Formal Opinion 2014-1* is titled, “Judicial Disqualification – Judge’s Financial Relationship with Lawyer.”
2. *Board Formal Opinion 2013-2* addresses the question, “Under what circumstances is disqualification required when a judge has or has had a professional but non-financial relationship with a lawyer or law firm appearing before the judge on a currently pending matter?”
3. These opinions are posted on the Board’s website. <http://bjs.state.mn.us/formal-opinions>.

B. Relationship to Lawyer – Informal Board Advisory Opinions.

1. A 1977 Board advisory opinion, amended in 2015, states: “Appropriate for a judge who has an ongoing installment sale contract for office equipment to a law firm to disqualify himself or herself in matters in which the law firm appears, unless disclosure is made and consents obtained as provide in Rule 2.11(C). *See State v. Pratt*, 813 N.W.2d 868 (Minn. 2012).” Minn. Bd. on Jud. Standards, *Summary of Advisory Ops.*, 3 (2016), <http://bjs.state.mn.us/file/advisory-opinions/summary-of-advisory-opinions.pdf>.

C. Relationship to Lawyer – Executive Secretary Advisory Opinion (Aug. 25, 2014). A judge presided over a contentious case for several years. The judge ruled against a party. The party retained new counsel – the judge’s opponent in a pending judicial election – for a motion to reconsider. The Executive Secretary opined that the judge was not required to recuse, citing an Alabama case which itself cited other authorities. *In re Thacker*, 159 So.3d 77 (Ala. Civ. App. 2014), https://scholar.google.com/scholar_case?case=17903957258829938531&q=thacker+v.+thacker&hl=en&as_sdt=4,1,24; *see also Residential Funding Co. v. Impac Funding Corp.*, No. 13-3506, slip op. at 20 (D. Minn. Dec. 8, 2016) (holding that a party should not be allowed to bring in new counsel in order to trigger judge’s disqualification).

D. Family Relationship – Board Advisory Opinions.

1. A 1978 Board advisory opinion states: “Appropriate for a judge whose spouse runs an active business employing local attorneys to disqualify if those attorneys appear before the judge.” Minn. Bd. on Jud. Standards, *Summary of Advisory Ops.*, 13, 38 (2016), <http://bjs.state.mn.us/file/advisory-opinions/summary-of-advisory-opinions.pdf>.
2. A 1984 Board advisory opinion states: “Appropriate for a judge whose spouse becomes the mayor of a municipality, to handle city misdemeanor cases, but may need to

disqualify in cases where there was litigation involving the municipality.” *Id.* at 14, 38.

3. A 1986 Board advisory opinion states: “Inappropriate for judge to hear criminal welfare cases where the judges’ son is chief of the welfare division in the county attorney’s office. *Id.* at 14, 18, 28.
4. A 1990 Board advisory opinion states: “Appropriate for a judge to preside over cases from the county attorney’s office where the judge’s wife’s niece is married to the county attorney, however, the judge should recuse in cases where the county attorney personally appears. *Id.* at 38. *See* Rules 2.11(A)(2) and Code, Terminology.

E. Family Relationship – Executive Secretary Advisory Opinion (Oct. 21, 2015). A judge’s child works in a non-lawyer position for a lawyer in a solo practice. The lawyer sometimes appears before the judge. Should the judge disclose, or must the judge disclose, the child’s employment? Rule 2.11 comments 4 and 5 address the issues. If the judge determines that the judge’s impartiality can reasonably be questioned, the judge must recuse, unless the judge discloses and the parties waive disqualification under Rule 2.11(C). If the judge determines that impartiality cannot reasonably be questioned, disclosure is recommended but not required. Rule 2.11 cmt. 5.

F. Family Relationship – Executive Secretary Advisory Opinion (Mar. 11, 2016).

1. *Lawyer is Aunt or Uncle of Judge’s Spouse.* A judge inquired whether the judge is disqualified where the lawyer representing a party before the judge is the aunt or uncle of the judge’s spouse. Rule 2.11(A)(2)(b) requires disqualification because a person within the third degree of relationship to the judge’s spouse acts as a lawyer in a proceeding before the judge. An aunt or uncle is within the third degree of relationship. Code, Terminology. However, the parties may waive disqualification under Rule 2.11(C).

G. Financial Relationships.

1. A 1992 Board advisory opinion states: “Appropriate for a judge to hear cases involving a bank where the judge has a home loan. However, the judge should disclose the relationship to the parties. *Canons 3C(1)(c), 3C(1)(d).*” Minn. Bd. on Jud. Standards, *Summary of Advisory Ops.*, 14 (2016), <http://bjs.state.mn.us/file/advisory-opinions/summary-of-advisory-opinions.pdf>.
2. A 1998 Board advisory opinion states: “Appropriate for a judge to be a member of an investment club, even if one of the members of the club is an investigator who has previously testified in a county in which the judge presides. However, unless the relationship is disclosed, the judge should recuse from any case in which the investigator is involved. *Canon 4D(1)(b).*” *Id.*
 - a. But the Canon, and current Rule 3.11(C)(3), provide the “judge shall not engage in financial activities” of certain sorts, rather than allowing the activities and requiring

recusal. In addition, if the club members do not pool funds, there seems to be no basis for disqualification.

3. *Executive Secretary Advisory Opinion (June 5, 2014).*

- a. A judge left a law firm but leased space from the firm for file storage. The lease is now terminating and the judge will have no further financial relationship with the firm.
- b. Opinion: The judge may immediately begin hearing cases involving the law firm, assuming that there are no other disqualifying factors, e.g., the judge received overly favorable lease terms. *See* Rule 2.11(A). A discussion in the *Annotated Model Code of Judicial Conduct* does not suggest that a judge must wait a decent interval after the landlord/tenant relationship ends. Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 256-58 (2d ed. 2011).
- c. In addition, “the former economic relationship with the law firm is too remote to require disclosure to the parties to a case involving the law firm.” *See* Rule 2.11(A) cmt. 5 (which, moreover, uses the term “should disclose” rather than “shall disclose”). Therefore, disclosure is a matter for the judge’s judgment.

4. *Executive Secretary Advisory Opinion (Mar. 4, 2016).*

- a. A judge inquires whether she may preside in a matter brought by a plaintiff who brings numerous, apparently frivolous lawsuits, including one pending against the Chief Justice of the Minnesota Supreme Court.
- b. Under the rule of necessity, a judge may hear a matter notwithstanding possible grounds for disqualification if there is no alternative. *See* Rule 2.11 cmt. 3. “The rule of necessity permits a judge who is otherwise disqualified from handling a case to preside if there is no provision allowing another judge to hear the matter. The rule ensures that no person seeking redress in the courts will be denied a forum.” Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 225 (2d ed. 2011) (quoting *U.S. v. Will*, 449 U.S. 200 (1980)). Re-assigning the case to another district judge or to a senior judge would not eliminate the fact that a judge would be hearing a case concerning a superior judicial officer. Accordingly, the judge may preside.

H. Rules 2.10, 2.11(A)(4).

1. *Judge’s Participation in Mock Trial (Executive Secretary Advisory Opinion (Mar. 23, 2016)).*

- a. A judge has been asked to act in the role of Minnesota Supreme Court justice at a mock trial appellate setting, with students in the roles of attorneys. The case involves same sex marriage legal issues, patterned on an actual case pending in a federal district court outside Minnesota.

- b. The judge may participate because it is unlikely participation will have any effect on the pending matter, for various reasons, including the educational setting. If a same sex marriage legal issue arises in the future in a case before the judge, the mock trial participation would not be disqualifying, because it is unlikely that the participation would commit or appear to commit the judge to ruling in a certain way. Judges traditionally have been permitted to participate in lecturing, scholarship, and other educational activities provided that the activity does not undermine the judge's impartiality.

I. Adversary Dealings – Board Advisory Opinions.

1. A 1989 Board advisory opinion states: “Appropriate for a judge to hear cases where a county attorney has brought a mandamus action against the district’s judges.” Minn. Bd. on Jud. Standards, *Summary of Advisory Ops.*, 14 (2016), <http://bjs.state.mn.us/file/advisory-opinions/summary-of-advisory-opinions.pdf>.
2. A 1989 Board advisory opinion states: “Appropriate for a judge to remain on a case after the Supreme Court remands to make findings, and thereafter one of the parties files an affidavit of prejudice.” *Id.*
3. A 1997 Board advisory opinion states: “Appropriate for a judge to join with other residents of their county in a class action lawsuit in federal court. Furthermore, it is appropriate for a judge to hear cases involving the law firm which represented the class in the federal action. *Canon 4D.*” *Id.* at 14, 28.
4. A 1998 Board advisory opinion states: “Appropriate for a judge to recuse where a serious threat to the judge’s physical wellbeing is made, unless such a disqualification would cause a serious disruption to the court proceedings. *Canon 3D.*” *Id.* at 14.
5. A 2004 Board advisory opinion states: “Judges not required to disqualify solely on grounds that an attorney or party has filed an ethical complaint against the judge. *Canons 1, 2A, 3A(1), 3A(3), 3A(4), 3D.*” *Id.*

XXVI. Rule 2.11 - DISQUALIFICATION OF JUDGE FOR INTEREST OR BIAS: STATUTES AND RULES.

- A. **Rule 2.11 and Other Sources.** The most comprehensive criteria relating to disqualification of judges are those stated in Rule 2.11. The criteria stated in the following rules and statute are, with one exception, stated in Rule 2.11. The exception is for degree of “consanguinity or affinity,” noted below.
- B. **Juror Challenges for Cause.** Several of the grounds for challenging a juror for cause are arguably incorporated by reference into provisions for disqualifying a judge. The juror grounds, stated in Minnesota Rules of Criminal Procedure 26.02, subdivision 5, include:
 1. “The juror’s state of mind—in reference to the case or to either party—satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the challenging party.” Minn. R. Crim. P. 26.02, subd. 5(1).

2. “Standing as a guardian, ward, attorney, client, employer, employee, landlord, tenant, family member of the defendant, or person alleged to have been injured by the offense, or whose complaint instituted the prosecution.” *Id.* at subd. 5(6).
3. “Being a party adverse to the defendant in a civil action, or a party who complained against the defendant, or whom the defendant accused, in a criminal prosecution.” *Id.* at subd. 5(7).
4. The consanguinity or affinity, within the ninth degree, to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant, or to any of the attorneys in the case.” *Id.* at subd. 5(5).
 - a. It appears that “ninth degree” includes third cousins once removed or second cousins thrice removed.
 - b. The Terminology section of the Code defines the disqualification group as “Third degree of relationship,” which includes the following relationships: “great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.” It does not include cousins.

C. **Rule of Civil Procedure:** “No judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror. If there is no other judge of the district who is qualified, or if there is only one judge of the district, such judge shall forthwith notify the Chief Justice of the Minnesota Supreme Court of that judge’s disqualification.” Minn. R. Civ. P. 63.02.

D. **Rule of Criminal Procedure:** “A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct. A request to disqualify a judge for cause must be heard and determined by the chief judge of the district or by the assistant chief judge if the chief judge is the subject of the request.” Minn. R. Crim. P. 26.03, subd. 14(3).

XXVII. RULE 2.11 – DISQUALIFICATION – FEDERAL AND STATES OTHER THAN MINNESOTA.

A. ***Williams v. Pennsylvania*, 579 U.S. __ (June 9, 2016).**[SB2]

1. Williams was convicted of the 1984 murder of Norwood and sentenced to death. During the trial, the then-district attorney of Philadelphia, Ronald Castille, approved the trial prosecutor’s request to seek the death penalty against Williams. In 2012, Williams filed a successive petition pursuant to Pennsylvania’s Post Conviction Relief Act (PCRA), arguing that the prosecutor had obtained false testimony from his co-defendant and suppressed material, exculpatory evidence in violation of *Brady v. Maryland*, 373 U. S. 83 (1963).
2. Finding that the trial prosecutor had committed *Brady* violations, the PCRA court stayed Williams’s execution and ordered a new sentencing hearing. The Commonwealth asked the Pennsylvania Supreme Court, whose chief justice was

former District Attorney Castille, to vacate the stay. Williams filed a response, along with a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the motion to the full court for decision. Without explanation, the chief justice denied Williams's motion for recusal and the request for its referral. He then joined the State Supreme Court opinion vacating the PCRA court's grant of penalty-phase relief and reinstating Williams's death sentence. Two weeks later, Chief Justice Castille retired from the bench.

3. *Held*:

a. Chief Justice Castille's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment.

(1) Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case.

(2) Because Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision, his failure to recuse from Williams's case presented an unconstitutional risk of bias.

b. An unconstitutional failure to recuse constitutes structural error that is "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive. *Puckett v. United States*, 556 U.S. 129, 141 (2009).

4. *Dissents by Chief Justice Roberts and Justice Thomas*. Justice Thomas's dissent includes a lengthy history of due process jurisprudence relating to disqualification of judges for interest, bias, and other involvement in the case being adjudicated.

5. *State v. Ledbeter*, 111 Minn. 110, 126 N.W. 477 (1910): A 1901 Minnesota statute forbade what the Pennsylvania justice did in *Williams v. Pennsylvania*, 136 S.Ct. 1899, 579 U.S. ___, (June 9, 2016) [SB3]. "No change, affecting its construction, was made in the statute construed in the *Sjoberg* case, prior to the adoption of R.L. 1905, § 4098, except that by Laws 1901, p. 17, c. 16, § 1, it was amended by inserting therein before the clause, 'or in which he would be excluded from sitting as a juror,' the words 'or in which he is or has been an attorney or counsel for either party or any person interested in the determination of action.'" *Ledbeter*, 111 Minn. at 117, 126 N.W. at 478.

B. Leading U.S. Case – *Caperton v. Massey*, 556 U.S. 868 (2009).

1. The president and chief executive officer (CEO) of Massey appeared before the West Virginia Supreme Court of Appeals following a trial court's entry of a \$50 million judgment against Massey. *Id.* at 873. The CEO had helped to elect a judge to the Supreme Court of Appeals by contributing and spending a total of about \$3 million in support of the judge's election campaign. *Id.* The CEO knew it was likely that Massey would be seeking review in the Supreme Court of Appeals. *Id.*

Based on this, the newly elected judge should have recused himself as a matter of due process. *Id.* at 889-90.

2. While “a fair trial in fair tribunal is basic requirement of due process, . . . most matters relating to judicial disqualification do not rise to a Constitutional level.” *Id.* at 876 (quotations and internal punctuation omitted). Even when a judge does not have any “direct, personal, substantial, pecuniary interest” in a case, of a kind requiring his or her disqualification at common law, there are circumstances in which “the probability of actual bias on the part of judge . . . is too high to be constitutionally tolerable.” *Id.* at 876-77 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).
3. “In lieu of exclusive reliance on . . . personal inquiry [by a judge], or on appellate review of the judge’s determination respecting actual bias, the Due Process Clause has been implemented, [in area of judicial recusal,] by objective standards that do not require proof of actual bias. In defining these standards the Court asks whether, ‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’” *Id.* at 883-84 (citations omitted) (quoting *Withrow*, 421 U.S. at 47).
4. “The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress and the states . . . remain free to impose more rigorous standards for judicial disqualification than those . . .” mandated as a matter of due process. *Id.* at 889-90.
5. *Compare to Rule 2.11(A)*. The “risk of actual bias or prejudgment” from *Caperton v. Massey* appears to be an objective test, while the Rule 2.11(A) test appears to have an objective element (“reasonably”) and a partially subjective element (“impartiality might . . . be questioned”). Rule 2.11(A)(1) is subjective.

C. Recusal Rarely Required – *Liteky v. U.S.*, 510 U.S. 540 (1993).

1. “[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. . . . They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in *Berger v. United States*, 255 U.S. 22 (1921), a World War I espionage case against German-American defendants: ‘One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans’ because their ‘hearts are reeking with disloyalty.’ *Id.* at 28 (internal quotation marks omitted). *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even

anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge’s ordinary efforts at courtroom administration—even a stern and short-tempered judge’s ordinary efforts at courtroom administration—remain immune.” *Id.* at 555-56.

D. *In re Yehud-Monosson U.S.A., Inc.*, 472 B.R. 868 (D. Minn. May 11, 2012) –A Judge May Respond Sharply to Provocation Without Having to Recuse.

1. This case rejected a claim, by Naomi Isaacson, that Judge Nancy Dreher should have recused herself (though Isaacson did not demand recusal) after Isaacson and her lawyer, Rebekah Nett, repeatedly assailed Dreher with anti-Catholic epithets, e.g., “Catholic Knight Witch Hunter.” *Id.* at 874, n.3, 876.
2. The opinion cites several authorities permitting judges latitude for sharp and even angry comments when judges are provoked. *Id.* at 878-79. For example, the opinion notes: “[R]ecusal is not necessarily required even after a district court has expressed ‘impatience, dissatisfaction, annoyance, and even anger’ toward a party. *United States v. Rubashkin*, 655 F.3d 849, 858 (8th Cir. 2011) (citing *United States v. Sypolt*, 346 F.3d 838, 839 (8th Cir. 2003).” *Id.* at 878.

E. *In re Mason*, 916 F.2d 384 (7th Cir. 1990) – “Substantially out of the Ordinary” Test.

1. The Board cited this case as stating “an appropriate standard” to explain its dismissal of a complaint on May 22, 1997. The complaint alleged that a judge should have disqualified himself because an officer of a corporate defendant was a donor to a charity sponsored by the judge.
2. *In re Mason* states: “An objective standard is essential when the question is how things appear to the well-informed, thoughtful observer rather than . . . a subjective approach [which] would approximate automatic disqualification. A reasonable observer is unconcerned about trivial risks; there is always some risk, a probability exceeding 0.0001%, that a judge will disregard the merits. Trivial risks are endemic, and if they were enough to require disqualification we would have a system of preemptory strikes and judge-shopping, which itself would imperil the perceived ability of the judicial system to decide cases without regard to persons. A thoughtful observer understands that putting disqualification in the hands of a party, whose real fear may be that the judge will apply rather than disregard the law, could introduce a bias into adjudication. Thus the search is for a risk substantially out of the ordinary.” *Id.* at 386.

XXVIII. RULE 2.12 – SUPERVISORY DUTIES.

- A. **Rule 2.12(A).** This rule provides: “A judge shall require court staff, court officials, and others subject to the judge’s direction and control to act in a manner consistent with the judge’s obligations under this Code.”
- B. ***In re Walters*, File Nos. 13-40, 13-57, 13-85, 13-89 (Apr. 22, 2014).** The Board publicly reprimanded Judge Walters for failing to adequately supervise his law clerk, failing to

ensure that the law clerk's timesheets were accurate, refusing to allow a criminal defendant to withdraw a plea after Judge Walters rejected a negotiated plea although the defendant had the right to do so under the plea agreement, trying a defendant in absentia, and implying without evidence that a deaf psychologist might be "agenda-driven" in evaluating a deaf defendant. *Id.* at 1-6. The Board also appointed a mentor for Judge Walters for a six-month period. *Id.* at 7. Judge Walters' conduct regarding the law clerk violated Rules 1.1, 1.2, and 2.12(A). *Id.* at 3. http://www.bjs.state.mn.us/file/public-discipline/1340-57-85-89_FinalAmendedReprimand_Walters.pdf.

- C. **2016 Admonition.** A judge failed to properly supervise two employees: a court reporter and a paralegal. Contrary to judicial branch policy, the judge allowed one employee to take comp time and allowed the other employee to work from home without a written agreement. A judicial branch auditor found that the two employees were paid for hours not worked. The employees' annual leave balances were reduced to repay the judicial branch. The Board issued a private admonition, finding violations of Rules 1.2, 2.5(A), and 2.12(A). File No. 15-21 (2016), <http://bjs.state.mn.us/file/private-discipline/private-discipline-summaries.pdf>.

XXIX. RULE 2.15 – RESPONDING TO JUDICIAL AND LAWYER MISCONDUCT.

- A. **2009 Amendment.** Rule 2.15 is substantially different from its pre-2009 Code counterpart.
- B. **Overview.** Rule 2.15 deals with reporting both judicial and lawyer misconduct. The reporting obligation depends on whether the judge has "knowledge" of misconduct, or merely "receives credible information." The counterpart rule for lawyers, Minnesota Rules of Professional Conduct 8.3, is based on "knowledge." "Knowledge" means "actual knowledge." Code, Terminology.
- C. **Discretion.** Where a judge receives credible information of judicial or lawyer misconduct, but does not have actual knowledge, the judge has discretion whether to report misconduct or attempt to deal with it directly. Rule 2.15(C), (D). Where a judge knows of serious misconduct, the judge "shall inform the appropriate authority." Rule 2.15(A), (B). The old Code gave a judge considerably more discretion in whether to address misconduct by reporting, or by taking corrective action directly. *See* Canon 3C (1996). *See also* Rule 2.14 and cmt. 2 (requiring judge having a reasonable belief that a lawyer or judge is impaired to take appropriate action, which depending on the gravity of the conduct may require a report to the appropriate authority).
- D. **Criminal Conduct –Executive Secretary Advisory Opinion (Dec. 29, 2015).**
 - 1. *Issue.* "You periodically hold hearings on name change applications. . . . You have recently received an application from a man who submitted his [Bureau of Criminal Apprehension] BCA report with his application. The BCA report indicates that his fingerprints do not match the BCA record. You also note that the applicant has used an alias. You are concerned from a national security point of view. You ask whether

judges can provide the FBI with information that is a matter of public record. The hearing on this application has not yet been held.”

2. *Prior Opinions.* The opinion cited and enclosed a redacted copy of the 2009 Board Advisory Opinion, below. The opinion also cited several prior Board opinions:
 - a. A 1980 Board advisory opinion states: “Appropriate for a judge to report probable criminal activity that the judge is made aware of during the course of a criminal trial when it will not likely come to the attention of prosecutors otherwise. Appropriate for the judge to bring the matter, including transcripts and evidence, to the prosecutor.” Minn. Bd. on Jud. Standards, *Summary of Advisory Ops.*, 36 (2016), <http://bjs.state.mn.us/file/advisory-opinions/summary-of-advisory-opinions.pdf>.
 - b. A 1986 Board advisory opinion states: “A judge is not required to report possible welfare fraud coming to the judge’s attention during a dissolution matter.” *Id.*
 - c. A 1987 Board advisory opinion states: “Appropriate for a judge to recuse and advise both the county attorney and defense attorney of a letter sent by a defendant to the judge admitting a crime with which the defendant is charged.” *Id.*

E. Non-Lawyer Misconduct - Executive Secretary Advisory Opinion (July 24, 2014).

1. *Issue.* Is a judge obligated to report to the county attorney that a party appearing before the judge on a housing court appeal was represented by a person who indicated to the judge that he was an attorney but apparently is not?
2. *Opinion.* Whether to report is within the judge’s discretion, since there is no obligation under Rule 2.15 to report misconduct by a person who is not a lawyer or judge.
3. *First Principle.* The Executive Secretary Advisory Opinion (July 22, 2014) stated: “First, judges have the discretion to report possible criminal activity to law enforcement authorities.”
4. *Second Principle.* The opinion also stated: “Second, if the judge reports criminal activity while the case is pending, the judge will need to consider whether she should disclose the report to the party or parties under Comment 5 to Judicial Code Rule 2.11, or whether she must recuse herself under Rule 2.11. To avoid this issue, it is preferable to make the report only after the proceedings have been concluded. See Richard A. Dollinger, *Judicial Ethics: The Obligation to Report Tax Evasion in Support Cases*, discussion in text at footnotes 80, 81, and 88, http://www.aaml.org/sites/default/files/MAT107_6.pdf.”
5. *Other Considerations.* “[N]ot reporting could allow the person to commit future misconduct which could result in harm to the public, e.g., if future “clients” paid fees to him and received incompetent advice and representation. In addition, the availability of a transcript of the hearing could make this case easy for a prosecutor to prove.” It is

also significant whether the criminal activity was committed in the courtroom in the presence of the judge.

6. *Criminal Statute*. “The applicable criminal statute is Minnesota Statutes section 481.02, subdivision 8 (2014). Notwithstanding the references to the Attorney General and the Board of Law Examiners, the appropriate agency to which to report the unlawful practice of law is the county attorney’s office.”
7. *2009 Board Advisory Opinion*. “No duty to report criminal activity disclosed in court proceedings. That decision is left to the judgment and conscience of the judge. Factors to consider include (1) Is the alleged offense of a serious nature? (2) Is the evidentiary basis for the report sufficient? (3) Is there danger to the community or is a public trust involved? (4) Is it likely that the wrongful conduct would come to light absent a report? (5) Are there other persons or entities aware of the wrongful conduct? (6) Did the crime have an individual victim and if so, was the victim’s ability to report the matter interfered with in any way? (7) Was a lawyer representing an appropriate governmental or law enforcement authority present? (8) Would the report positively or adversely affect the appearance of the judge’s impartiality or promote the public’s confidence in the judiciary? *Canon 1, Rules 1.1, 1.2, 2.3, 2.11, 3.1.*” Minn. Bd. on Jud. Standards, *Summary of Advisory Ops.*, 36 (2016), <http://bjs.state.mn.us/file/advisory-opinions/summary-of-advisory-opinions.pdf>.
8. *Article*. A brief article, *A Judge’s Obligation to Report Criminal Activity*, appeared on this subject several years ago, in the *Judicial Conduct Reporter*. Cynthia Gray, *A Judge’s Obligation to Report Criminal Activity*, *Jud. Conduct Rep.*, Fall 1996, at 3.

XXX. RULE 2.16 – CANDOR AND COOPERATION WITH DISCIPLINARY AUTHORITIES REQUIRED. RETALIATION PROHIBITED.

- A. **“Reasonable Basis” For Investigation.** Judge Agerter challenged the Board’s basis for investigating his possible alcohol abuse and his sexual conduct. *In re Agerter*, 353 N.W.2d 908, 912 (Minn. 1984). The Supreme Court held that the Board had a sufficient basis for investigating the possible alcohol abuse, which could affect judicial performance. *Id.* However, the Board did not have a sufficient basis for investigating the sexual conduct because Judge Agerter’s right of privacy must be weighed, especially when there has not been any open and notorious activity. *Id.* at 915. The Court explained: “We hold, therefore, consistent with its rules and due process, that the Board has the authority to proceed with a preliminary investigation when, on the information before it, the Board has a reasonable basis to believe there might be a disciplinary violation.” *Id.* at 912.
- B. **Inquiry Regarding a “Baseless Complaint” May be Justified.** “Even the baseless complaint—an occupational hazard of judges, unfortunately—may deserve inquiry, if only to vindicate the judge by its dismissal and to ensure public confidence in the judicial system.” *Id.* at 913.

- C. **Omissions, Inconsistent Responses, Failure To Be Candid and Honest.** Judge Karasov violated Rule 2.16, “by failing to cooperate and be candid and honest with respect to the Board’s investigation.” *In re Karasov*, 805 N.W.2d 255, 263 (Minn. 2011). Judge Karasov “omitted material information” from a letter to the Board. *Id.* Judge Karasov also “gave inconsistent responses” to questions regarding whether she lived outside the district. *Id.*; see *Heidbreder v. Carton*, 645 N.W.2d 355, 367 (Minn. 2002) (“A misrepresentation may be made by an affirmative statement that is itself false or by concealing or not disclosing certain facts that render facts disclosed misleading.”).

XXXI. RULE 3.1 – EXTRAJUDICIAL ACTIVITIES IN GENERAL.

- A. **Board Formal Opinion 2014-2, “Appointment to Governmental Committees and Boards,” applies Rule 3.1.** When legislative enactments provide for the appointment of a judge to serve on a government committee, a determination has been made that such service is in the public interest and considerable deference should be given. Minn. Bd. on Jud. Standards, Formal Op. 2014-2, at 6 (amended 2016), <http://bjs.state.mn.us/file/advisory-opinions/formal-opinion-2014-2.pdf>.
- B. **Overview.** Rule 3.1 permits and encourages extrajudicial activities in principle, but prohibits five types of activities, or conduct related to activities. Rule 3.1 (A)-(E). For example, “when engaging in extrajudicial activities, a judge shall not . . . participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.” Rule 3.1(C).
- C. **Statute - No Interfering Business Activities.** “A judge of the district court shall devote full time to the performance of duties . . . shall not engage in any business activities that will tend to interfere with or appear to conflict with the judge’s judicial duties.” Minn. Stat. § 484.065, subd. 1 (2016).
- D. **Constitution – No Other Office.** Minnesota judges “shall not hold any office under the United States except a commission in a reserve component of the military forces of the United States and shall not hold any other office under this state.” Minn. Const. art. VI, § 6.
- E. **Judge’s Personal Website.** A 2015 Board Advisory Opinion took the position that a judge may maintain a website for speaking engagements and the like, subject to certain conditions. Minn. Bd. on Jud. Standards, Board Op., at 3 (Dec. 11, 2015). In analyzing website issues relate to Rule 3.1(A) and (C), the opinion advised:
1. “To avoid or at least minimize concerns about the possibility that extra-judicial teaching and speaking activities might appear to interfere with performance of judicial duties, a judge should endeavor to engage in telephone and email communication regarding teaching or speaking engagements during non-judicial time, such as the workday lunch hour, or early morning or evening time slots when the judge is not scheduled to be in court and not likely to be needed by lawyers or court staff.” *Id.*
 2. “To minimize concerns about extra-judicial teaching and speaking activities appearing to interfere with judicial duties, a judge should consider whether to decline

engagements which result in another judge, perhaps on short notice, being assigned to handle the judge's calendar of cases." *Id.*

XXXII. Rule 3.3 – TESTIFYING AS A CHARACTER WITNESS.

- A. **Text of Rule 3.3.** “A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.” Comment 1 to the rule states: “Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.”
- B. **Executive Secretary Advisory Opinion (Sept. 21, 2016).** In 2016, the Executive Secretary advised a judge that Rule 3.3 and ethics opinions in other states indicated that a judge should not write a letter of good character for a criminal defendant, whether addressed to another judge or to a prosecutor.
- C. **Board Formal Opinion.** A judge may give references based on personal knowledge, including character references for bar candidates. Minn. Bd. on Jud. Standards, Formal Op. 2013-1, at 2, (amended 2017).

XXXIII. RULE 3.4 – APPOINTMENTS TO GOVERNMENTAL POSITIONS.

- A. **Text of Rule 3.4.** “A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.”
- B. **Comments:**
 - 1. “[A] judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commitments, and giving due regard to the requirements of the independence and impartiality of the judiciary.” Rule 3.4 cmt. 1.
 - 2. “A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities.” Doing so “does not constitute acceptance of a governmental position.” Rule 3.4 cmt. 2.
 - 3. *Board Formal Opinion 2014-2, “Appointment to Governmental Committees and Boards,” applies Rule 3.4.* The opinion considers “whether the ‘subject matter’ of the work and activities of the governmental committee on which the judge would serve is concerned with the law, the legal system, or the administration of justice. Rule 3.4 cmt. 1.” Minn. Bd. on Jud. Standards, Formal Op. 2014-2, at 7 (amended 2016).

XXXIV. RULE 3.5 – USE OF NONPUBLIC INFORMATION - *In re Armstrong*, No. A11-121 (Minn. Oct. 31, 2011).

- A. **Wrong Rule Charged.** On June 12, 2009, Judge Armstrong sent confidential information from a juvenile file to Senator Betzold. Findings and Recommendations at 5, *In re Armstrong*, No. A11-121 (Minn. Oct. 31, 2011). The November 22, 2010 Board Complaint alleged Judge Armstrong violated Rule 3.5. *Id.* at 5-6. However, Rule 3.5 did not become effective until July 1, 2009. *Id.*; *In re Armstrong*, File Nos. 09-37, 10-48 (Oct. 31, 2011), <http://www.bjs.state.mn.us/file/news/armstrong-findings-and-recommendations.pdf>.
- B. **Panel Findings and Conclusion.** The 2011 Panel findings noted that “the confidentiality rule in place” on June 12, 2009, viz. Canon 3A(12), unlike Rule 3.5, did not require intent for a violation. *Id.* The Panel also noted that Rule 3.5 did not become effective until July 1, 2009. *Id.* By pleading the wrong rule, the Board apparently took on a higher burden of proof. However, the Panel found that Judge Armstrong violated both the old and the new rule, even though the conduct apparently took place only at the time the old rule was in effect. *Id.* at 9-10.

XXXV. RULE 3.6 – AFFILIATION WITH DISCRIMINATORY ORGANIZATIONS.

- A. **Executive Secretary Advisory Opinion (Dec. 16, 2015).** A judge held a position of responsibility in a non-profit organization that supported certain activities. The organization treated one participant in a way that was arguably discriminatory in relation to two other participants. The judge inquired whether continued involvement with the organization would violate Rule 3.6(A). The executive secretary opined that there would not be a violation. Rule 3.6(A) applies where an organization “practices unlawful discrimination.” “Practices” implies more than an isolated incident of discrimination. In addition, Rule 3.6(A) applies only where a judge “knowingly” holds membership in an organization that practices unlawful discrimination. In the incident under consideration, illegal discrimination was arguable, but not actually known.

XXXVI. RULE 3.7 – CHARITABLE, EDUCATIONAL, CIVIC ORGANIZATIONS AND ACTIVITIES.

A. 2016 Amendment.

1. In December 2015, the Board filed a petition to amend Rule 3.7(A)(4). The amendment allows a judge to participate in a fund-raising event if, “the event concerns the law, the legal system, or the administration of justice.” Rule 3.7(A)(4)(a). This portion of the amendment is based on the ABA Model Rule. The Court approved the amendment, effective July 1, 2016.
2. The Board’s amendment adds clarifications or restatements that are not in the Model Rule. Participation is subject to two conditions: “[T]he judge does not encourage persons to buy tickets for or attend the event or to make a contribution except as provided in paragraph (A)(2) of this rule, and . . . participation does not reflect

adversely on the judge's independence, integrity, or impartiality.”
Rule 3.7(A)(4)(b)-(c).

B. Closely Related Rules: 1.3, 3.1.

XXXVII. Rule 3.7(A).

A. Board's Opinion. Board Formal Opinion 2016-1, “Participation in Charitable, Educational, or Civic Organizations and Activities,” is available at <http://www.bjs.state.mn.us/file/advisory-opinions/formal-opinion-2016-1-final-11-7-2016-v3.pdf>.

B. Chief Judge. Chief judges may encourage judges in their districts to attend a dinner for an organization that provides pro bono legal services where the price of the dinner does not have a substantial fund-raising component. Executive Secretary Advisory Opinion (May 11, 2016); *see also* Rule 3.7(B) (“A judge may encourage lawyers to provide pro bono public legal services.”).

C. Judge Listed as Contributor (Executive Secretary Advisory Opinion (May 3, 2016)).

1. A Minnesota judge may appear on a list of donors to a fundraiser provided that the list is not used to solicit funds. If the list is published after the fundraising event and after the contributions have already been made, the judge's name may appear on the list because the list is not used to solicit funds. However, if the list is published prior to the fundraising event and the list is used to encourage attorneys or others to contribute, the judge's name should not appear on the list. *See* Rule 3.7(A)(2) and (4). Whether the list is used to encourage contributions would depend on the particular facts.
2. A judge's name may be included on a list of donors to a fundraiser honoring a retired public defender “provided that the list is not used to solicit funds.” *See* Ill. Judges Assoc., Ethics Op. 1999-03 (1999), <https://www.ija.org/ethics-opinions/148-1999-03-judge-s-name-appearing-on-donors-list-for-a-fundraiser.html>.

D. Soliciting Funds. Rule 3.7(A)(2).

1. *ABA Formal Opinion 08-452.* ABA Formal Opinion 08-452 (2008) is titled, “*Judges Soliciting Contributions for ‘Therapeutic’ or ‘Problem-solving’ Courts.*” The synopsis of the opinion states: “A judge who participates in fundraising activities on behalf of a court, including a “therapeutic” or “problem-solving” court, must limit the participation to activities permitted by Model Code of Judicial Conduct Rule 3.7(A). The judge also must ensure that her conduct does not violate Judicial Code Rules 3.1, 1.2, or 1.3.”
2. *Private Discipline.* A judge solicited and obtained funds from a business corporation for a civic event. The judge was privately disciplined.

3. *Improper or Inappropriate Conduct.*

a. Board Annual Reports include summaries of conduct that the Board found improper. The summaries do not state the nature of discipline, if any, for such conduct.

(1) “Appearing before a city council to promote and raise funds for a charitable or civic project that has no relation to the law, the legal system or the administration of justice. [*Canon 1, 2A, 4A, 4C(1) and 4C(3)(b)*].” 2004 Minn. Bd. Of Jud. Standards Ann. Rep. 8.

(2) “Ordering a criminal defendant to pay a fine to a specific charitable organization as a condition of sentence. [*Canons 1, 2A and 2B*].” *Id.*

b. Executive Secretary Advisory Opinion (Apr. 16, 2015).

(1) A judge inquired regarding supporting a funding request for a private non-profit that provided mediation, which was frequently used by the court.

(2) The judge was advised as follows: “Under Rule 3.7(A)(1) and (2), a judge may assist in planning related to fund-raising for charitable and civic organizations but generally may not solicit funds for such organizations. . . . [U]nder . . . Rule 3.2, a judge may ask a government agency to fund a judicial branch project provided that this does not appear to undermine the judge’s independence and impartiality in violation of Rule 3.1. *See* U.S. Comm. on Codes of Conduct, Adv. Op. 50 (2009), <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/published-advisory-opinions.aspx>. The prohibition on fundraising in Rule 3.7 applies to fundraising for charitable and civic organizations, not to applications for government grants for judicial branch projects. However, it is inappropriate for a judge to sign a letter or endorse a grant application seeking private funding for a governmental entity or seeking private or governmental funding for a non-governmental entity, no matter how worthy the cause or how closely related to the law, the legal system or the administration of justice.”

(3) Since the mediation organization is a private non-profit rather than a governmental entity, it would appear inappropriate to submit a reference in support of the organization’s application for a state grant.

E. Soliciting In-Kind Contributions (Executive Secretary Advisory Opinion (May 23, 2014)).

1. A judge asked if she could go the Farmers Market with her daughter and ask for food donations for a food shelf. The judge will not disclose her identity to the persons she solicits. She did this before she was appointed judge and wants to continue doing it.

2. “Rule 3.7(A)(2) indicates that a judge is prohibited from ‘soliciting funds and services’ for a charitable organization. In contrast, the corresponding ABA Model Rule prohibits

‘soliciting contributions for such an organization or entity.’ The Terminology section of the Model Rules defines contribution as ‘both financial and in-kind contributions.’”

3. “Prior Minnesota Canon 4C(3)(b) prohibited only soliciting funds.” The 2007 Supreme Court Sullivan committee “proposed adopting a ‘funds and services’ prohibition rather than the Model Rule’s . . . ‘contribution’ prohibition,” stating that “‘funds and services’ [was] in keeping with the intent of the Model Code’s original definition of contribution.” E. Thomas Sullivan, Minn. Sup. Ct., C4-85-697, Report of the Ad Hoc Advisory Committee To Review the Minnesota Code of Judicial Conduct 6 (2007). The Court accepted the committee’s recommendation on this point (although it rejected the committee’s recommendation to allow a judge to include her title on the letterhead of fundraising letters, which our Board objected to).
4. It thus appears that Minnesota Rule 3.7(A)(2) does not prohibit a judge from soliciting in-kind contributions for a charity. “Other rules could potentially prohibit this activity.” However, if the judge does not identify herself as such, “there is probably not a concern about coercion or improper use of the prestige of office under Rules 1.3 and 3.1(D), and a food shelf is probably not an advocacy organization of the type that could compromise impartiality under Rule 3.1(B) or (C).”

F. 3.7(B), “A judge may encourage lawyers to provide pro bono public legal services.”

1. **ABA Formal Opinion 470 (2015).** ABA Formal Opinion 470 states in its synopsis: “A state supreme court judge may sign a letter printed on the judge’s stationery that is duplicated and mailed by the unified state bar association directed to all lawyers licensed in the state encouraging those lawyers to meet their professional responsibility under Rule 6.1 of the Model Rules of Professional Conduct and provide pro bono legal services to persons in need and to contact the bar association for information about volunteer opportunities.” The opinion is available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_470.authcheckdam.pdf.
2. **Board Formal Opinion 2016-1, “Participation in Charitable, Educational, or Civic Organizations and Activities.”** Regarding ABA Formal Opinion 470, Board Formal Opinion 2016-1 states:
 - a. “The ABA Opinion lists a number of factors that can be considered when judges have to decide whether a specific act involves permitted encouragement or might be impermissibly coercive. For example, according to the opinion, the more the encouragement involves one-on-one contact, or out-reach to a small group, the more likely it might be viewed a coercive.” Minn. Bd. on Jud. Standards, Formal Op. 2016-1, at 11 (2016) (citation omitted).
 - b. “Other factors include the tone of the communication, and whether the judge will learn whether individual lawyers responded positively.” *Id.* at 12 (citation omitted).
 - c. “The Board believes, however, that some departure from the ABA Opinion is appropriate because of Minnesota experience. Minnesota lawyers have provided

pro bono services through ‘access to justice’ organizations for many years. The Board has no record of complaints of coercion based on judicial encouragement for such volunteer work, even when the judge is fully aware of the lawyer’s connection to the organization. With this background, the Board does not expect that judicial encouragement of lawyer volunteer work through organizations that provide legal representation for low income individuals is likely to be viewed as coercive in most situations.” *Id.*

- d. “As Rule 3.7(B) recognizes judicial encouragement of pro bono representation is a special category of charitable/civic activity. Unlike most other charitable and civic activities pro bono representation provides a direct benefit to the court system since pro se cases take up a disproportionate share of court resources. Judicial encouragement of pro bono activity also furthers the courts’ institutional objective of equal administration of justice. Thus, so long as the form and manner of encouragement ‘does not employ coercion, or abuse the prestige of judicial office,’ it is permitted.” *Id.* (quoting Rule 3.7 cmt. 4).

XXXVIII. **RULE 3.8 – APPOINTMENTS TO FIDUCIARY POSITIONS.**

A. Serving as Personal Representative.

1. In 2015, the Executive Secretary gave the following opinions, summarized here, regarding judges who inquired about serving as personal representative (PR) of the estates of a cousin, a sibling, and a close family friend.
2. Under Judicial Code Rule 3.8(A), a judge may serve as PR of the estate of “a member of the judge’s family.” “‘Member of the judge’s family’ means a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.” Code, Terminology.
 - a. As to the sibling’s estate, because the definition of “judge’s family” above includes the judge’s late sibling, the judge may serve as PR for the sibling’s estate.
 - b. As to the estate of the cousin, the judge may serve as PR for the estate if the judge had a “close familial relationship” with the cousin.
 - c. As to the family friend’s estate, under Rule 3.8(A), the judge may serve as PR only if the family friend was a “person with whom the judge maintain[ed] a close familial relationship.” A “close familial relationship” does not necessarily require a blood relationship, marriage, or co-habitation. *See* Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 392 (2d ed. 2011).
 - d. The Executive Secretary’s opinion concluded that the judge may serve as PR for the estate of a friend of the family only if the relationship with the friend resembled a “close familial relationship.” Because that is a fact question, the answer was left to the judge’s judgment.

- e. A 1989 Board advisory opinion states: “Appropriate for a judge to be the personal representative of the estate of a life-long friend and client where the judge had a familial relationship with the decedent and the family.” Minn. Bd. on Jud. Standards, *Summary of Advisory Ops.*, 18 (2016), <http://bjs.state.mn.us/file/advisory-opinions/summary-of-advisory-opinions.pdf>.

(1) The 1989 opinion was based on an earlier version of the Judicial Code, but the relevant language in the earlier Code is similar to that in the current Code.

- B. **Rule 3.8 is applied in Board Formal Opinion 2015-1, “Activities of Retired Judges Appointed to Serve as Senior Judge.”** A section of the opinion is titled, “Second Exception to the Requirement that Senior Judges Comply with the Code – Appointment to Fiduciary Positions.” Bd. on Jud. Standards, Formal Op. 2015-1, at 6 (2015), <http://www.bjs.state.mn.us/file/advisory-opinions/mnbjs-advisory-opinion-2015-1.pdf>.

XXXIX. RULE 3.9 – SERVICE AS ARBITRATOR OR MEDIATOR.

- A. **Prohibition While Serving as Judge.** A judge may not perform Alternative Dispute Resolution (ADR) functions in a private capacity. Rule 3.9. A retired judge may not perform ADR functions “during the period of any judicial assignment.” Rule 3.9(A). This “period” apparently means “while serving as a judge,” rather than while certified as eligible for service as a judge. *See* Code, Application, Part II(A) (“A retired judge subject to recall for service . . . is not required to comply with Rule 3.9(A) . . . except while serving as a judge.”). *See also*, Minn. Bd. on Jud. Standards, Formal Op. 2015-1, at 3-7 (2015), <http://www.bjs.state.mn.us/file/advisory-opinions/mnbjs-advisory-opinion-2015-1.pdf>.
- B. **Board Formal Opinion 2015-1, “Activities of Retired Judges Appointed to Serve as Senior Judge.”** Rule 3.9 is applied in Board Adv. Op. 2015-1. Minn. Bd. on Jud. Standards, Formal Op. 2015-1, at 6 (2015), <http://www.bjs.state.mn.us/file/advisory-opinions/mnbjs-advisory-opinion-2015-1.pdf>. A section of this opinion is titled, “Discussion of Rule 3.9(A), *State v. Pratt*, and Interpretations of the Terms ‘While Serving as a Judge’ and ‘During the Period of Any Judicial Assignment.’” *Id.* at 4.

1. Dictum in *State v. Pratt*, 813 N.W.2d 868, 878 (Minn. 2012), cited Rule 3.9(A).
2. The Board’s position regarding ADR and retired judges was stated in a September 28, 2012 letter to the state court administrator, which is summarized in Formal Opinion 2015-1. Formal Op. 2015-1, at 5.
3. The term “during the period of any judicial assignment” is interpreted in Formal Opinion 2015-1. *Id.*
4. At least one judicial district has a policy of not giving judicial assignments to senior judges who also do ADR work in the district, even though the Code permits such work to be undertaken. *Id.* at 8.

XL. RULE 3.10 – “A JUDGE SHALL NOT PRACTICE LAW.”

- A. **Board Formal Opinion 2015-1.** Rule 3.10 is applied in Board Formal Opinion 2015-1, which is available at <http://www.bjs.state.mn.us/file/advisory-opinions/mnbjs-advisory-opinion-2015-1.pdf>.
- B. **Multiple Prohibitions.** A judge is forbidden to practice law by Rule 3.10 and by Minnesota Statutes sections 2.724, subdivision 3(b), 484.06, and 484.065, subdivision 1 (2016).
- C. **Exception.** “A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge’s family, a person with whom the judge has an intimate relationship, or a member of the judge’s household, but is prohibited from serving as the lawyer for any such person in any forum.” Rule 3.10.
- D. **Informal Opinions.** In Formal Opinion 2015-1, the Board summarized two informal opinions in which the proposed activity appeared to involve the practice of law:
1. “In 2005, the Board cautioned a senior judge against serving in an ‘of counsel’ capacity for a family member’s law firm in a southern state while the judge lived there during the winter.” Minn. Bd. on Jud. Standards, Formal Op. 2015-1, at 3 (2015), <http://www.bjs.state.mn.us/file/advisory-opinions/mnbjs-advisory-opinion-2015-1.pdf>.
 2. “In 2014, a recently retired senior judge was cautioned against providing advice on pending cases to family law and criminal defense practitioners, even though the judge would have no contact with the consulting lawyer’s clients. . . . [T]here was a concern that advising defense attorneys, but not prosecutors, might raise questions about the senior judge’s impartiality if the judge was assigned to hear criminal cases.” *Id.*
- E. **May a Judge, Who Is Subject to a Disciplinary Suspension, Practice Law During Suspension?**
1. *In re Miera*, 426 N.W.2d 850 (Minn. 1988). The Court ordered a one-year suspension in *In re Miera*, 426 N.W.2d at 859. Board documents indicate that Judge Miera asked the Board whether he could practice law during suspension and that the Board advised Judge Miera that he could practice law during suspension. However, the Board’s file does not contain a memorandum or other indication that research was done on the subject. The August 22, 1988 *St. Paul Pioneer Press Dispatch* reported Judge Miera stating that the Board gave him such advice. *A ‘Satisfied’ Miera To Continue Advocacy*, *St. Paul Pioneer Press Dispatch*, Aug. 22, 1988, at 4A.
 2. *In re Blakely*, 772 N.W.2d 516 (Minn. 2009).
 - a. More recently, the Court stated: “We conclude that Judge Blakely’s actions in negotiating and obtaining a substantial legal fee reduction from his personal attorney while contemporaneously appointing the attorney to provide mediation or related services violated Rule 8.4(d) and warrant a public reprimand. If, however, Judge Blakely ceases to be a judge before his term of judicial suspension ends, then

Judge Blakely will be suspended from the practice of law for a term equivalent to the balance of his judicial suspension.” *Id.* at 528. A footnote stated: “Under Rule 3.10, Minnesota Code of Judicial Conduct (eff. July 1, 2009), a judge may not practice law.” *Id.* at 528 n.8.

- b. The phrase, above, “If, however, Judge Blakely ceases to be a judge before his term of judicial suspension ends” implies that Blakely will not automatically have ceased to be a judge, temporarily, by being suspended. *Id.* at 528.
 - c. The Court appears to have intended that Judge Blakely would serve a fixed suspension of six months, whether as a judge or as a lawyer. The opinion states: “His current term expires in January 2011.” *Id.* at 518. The opinion was issued in September 2009. During a six-month judicial suspension, Judge Blakely would not have lost office through election defeat. The Court apparently contemplated the possibility that Judge Blakely would resign his judgeship and seek to practice law. *See id.* at 528. By providing for suspension as a lawyer during this period, the court prevented Blakely from resigning and practicing. *See id.*
3. *Arkansas*. An Arkansas judicial discipline case took the position that a suspended judge could not practice law: “However, during the period of suspension until December 31, 2010, Judge Simes shall be prevented from the practice of law because he is a judge, albeit a suspended one. Judge Simes, of course, can resign and vacate his judgeship at any time, which would allow him to practice law.” *Judicial Discipline and Disability Comm’n v. Simes*, 354 S.W.3d 72, 85 (Ark. 2009).
 4. Board Rule 14(F), effective July 1, 2016, provides that when a hearing panel recommends the suspension or removal of a judge, the Court may decide discipline as a lawyer at the same time it decides discipline as a judge.

XLI. RULE 3.11 – “FINANCIAL, BUSINESS, OR REMUNERATIVE ACTIVITIES.”

A. Serving on Board of For-Profit Organization. Executive Secretary Advisory Opinion (June 3, 2015).

1. A part-time child support magistrate inquired about serving on the board of a for-profit organization. A summary of the Executive Secretary’s response follows:
 - a. The Code includes magistrates in the definition of judge. Application, Part I.(B). The Executive Secretary Advisory Opinion stated: “It appears that a magistrate would be classified as a continuing part-time judge within the meaning of Part II of the Application section. As such, a magistrate is required to comply with many, but not all, of the provisions of the Judicial Code.”
 - b. A full-time judge would be prohibited from serving on the for-profit board under Rule 3.11(B). “However, a part-time judge is not required to comply with Rule 3.11.” Application, Part III.(A)(2).

- c. “Judicial Branch policies may contain restrictions on magistrates’ activities in addition to the restrictions in the Judicial Code. [The Board is] not privy to such policies and express[es] no opinion regarding them.”

XLII. RULE 3.12 – “COMPENSATION FOR EXTRAJUDICIAL ACTIVITIES.”

A. Reasonable Compensation Is Generally Permitted for Permitted Activities. Such compensation is not permitted, however, where “acceptance would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.” Rule 3.12. Such compensation is also not permitted where the compensation is not “commensurate with the task performed.” Rule 3.12 cmt. 1. However, if the compensation is lower than a commensurate amount, the comment should not be read to prohibit the compensation.

B. How Much Time and Commitment Is Involved?

1. *Precedence.* “The judge should be mindful, however, that judicial duties must take precedence over other activities. *See* Rule 2.1.” Rule 3.12 cmt. 1.
2. *Full-Time Judicial Duties, No Conflicts.* “A judge of the district court shall devote full time to the performance of duties . . . shall not engage in any business activities that will tend to interfere with or appear to conflict with the judge’s judicial duties.” Minn. Stat. § 484.065, subd. 1.
3. *Voucher.* In addition, “No part of the salary of a judge of the district court shall be paid unless the voucher therefor be accompanied by a certificate of the judge indicating compliance with this section.” *Id.* § 484.065, subd. 2.

C. Public Reporting. A comment reminds judges, “Compensation derived from extrajudicial activities may be subject to public reporting. *See* Rule 3.15.” Rule 3.12 cmt. 2.

XLIII. RULE 3.13 – “ACCEPTANCE AND REPORTING OF GIFTS, LOANS, REQUESTS, BENEFITS, OR OTHER THINGS OF VALUE.”

A. Bribery and Promises – Criminal Statutes.

1. A public officer who receives or agrees to receive any benefit “upon the understanding that it will . . . influence the person’s performance of the powers or duties” as an employee or officer, is guilty of bribery and forever forfeits public office. Minn. Stat. § 609.42, subd. 1(1)-(2), subd. 2 (2016).
2. A judge is guilty of a misdemeanor if the judge “agrees with or promises another to determine a cause or controversy or issue pending or to be brought before the officer for or against any party.” Minn. Stat. § 609.515(1)(a) (2016).

B. Discounted Fees/Judicial Appointments. Judge Blakely negotiated a discount in legal fees charged in connection with his divorce. *In re Blakely*, 772 N.W.2d 516, 519-20 (Minn. 2009). At the same time, Judge Blakely provided alternative dispute resolution appointments to divorce lawyer’s law firm. *Id.* at 519. His conduct, “created a perception

that he was using his position as a judge to secure a discount on his legal fees by making mediation appointments to his attorney.” *Id.* at 527. The court accepted the hearing panel finding that, “the Board did not establish by clear and convincing evidence an actual quid pro quo.” *Id.* at 526. This conduct was prejudicial to the administration of justice; Judge Blakely was suspended, and he was also disciplined as a lawyer. *Id.* at 528.

C. **Loans by Lawyers to Judge.** Judge Anderson was suspended for undisclosed loans of \$1000 from each of two lawyers, multiple violations of the rule requiring diligence in case dispositions, and other violations. *In re Anderson*, 312 Minn. 442, 447, 449, 252 N.W.2d 592, 594-95 (1977).

D. **Disqualification.**

1. A judge shall not accept things of value “if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.” Rule 3.13(A).
2. Rule 3.13(B) lists numerous items a judge may accept without public reporting, unless Rule 3.13(A) or other law applies. Although Rule 3.13(B) also expressly states that Rule 3.13(A) could apply even where Rule 3.13(B) would not, it appears that where Rule 3.13(B) does not apply, Rule 3.13(A) in fact would very seldom apply. *See* Charles Gardner Geyh, et al., *Judicial Conduct and Ethics* 7-48 (5th ed. 2013) (“In an effort to offer clearer guidance, Rule 3.13(B) . . . proceeds to identify some items of value that are ordinarily harmless for judges to accept, except in the unusual case where doing so would create appearance problems under part A.”).

E. **Legal Services to Judge (Free or Discounted).**

1. Rule 3.13(A) prohibits accepting “things of value, if acceptance . . . would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”
2. Rule 3.13 (B) and (C) allow, if not prohibited by Rule 3.13(A) or by law, accepting things of value of various specified types and categories. Rule 3.13(B) does not require reporting and does not include legal services. Rule 3.13(C) requires reporting and includes things of value “if the source is a party or other person who, directly or indirectly, has come before the judge or is likely to come before the judge, or whose interests have come or are likely to come before the judge.”

XLIV. RULE 3.14 – “REIMBURSEMENT OF EXPENSES AND WAIVERS OF FEES OR CHARGES.”

XLV. RULE 3.15 – “REPORTING REQUIREMENTS.”

A. **Executive Secretary Advisory Opinion (Apr. 26, 2016).**

1. A judge who owns rental properties with a spouse is not required to report rental income to the State Court Administrator, because the judge does not perform services for the

income. No reporting is required regarding a cabin owned by the judge and spouse, because the cabin does not produce income.

2. A judge attends a leadership development program for which no tuition is charged and for which room and board are provided. Under Rule 3.15(A), a judge is required to report gifts and other things of value only if reporting is required by Rule 3.13(C). Rule 3.13(C) in turn provides that a judge is not required to report attendance without charge at events described in Rule 3.13(B)(10). Because the program appears to fall under Rule 3.13(B)(10), the judge's attendance at the program is not reportable under Rule 3.13. *See also* Rule 3.14 (acceptance of reimbursement of expenses and waiver of fees for civic seminars).

XLVI. RULE 4.1 – “POLITICAL AND CAMPAIGN ACTIVITIES OF JUDGES AND JUDICIAL CANDIDATES IN GENERAL.”

A. Rule 4.1 – Assisting in Election Campaigns.

1. In general, a judge may not support a candidate by public endorsement or soliciting contributions. Rule 4.1(A)(3), (4); . Canon 4 permits a judge to engage in political activities for the judge's own campaign, as opposed to activities in support of another candidate's campaign.
2. *No Exception for Family Members.* Rule 4.1 cmt. 5. If a judge's spouse is running for office, the judge may permit the spouse's campaign literature (a) to include the judge's name, but not the judicial title, and (b) to include the judge in a photograph, but not wearing robes. On this subject, there are several helpful articles by a national commentator, Cynthia Gray:
 - a. Cynthia Gray, *Political Activity by Members of a Judge's Family*, American Judicature Society, 1996, at 5, <http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/Publications/PoliticalActivitybyMembersofJudgesFamily.ashx>.
 - b. Cynthia Gray, *When a judge's relative is a political candidate*, National Center for State Courts: Judicial Ethics and Discipline (May 3, 2016), <https://ncscjudicialethicsblog.org/2016/05/03/when-a-judges-relative-is-a-political-candidate/>.
 - c. Cynthia Gray, *Family political activities at a judge's home*, National Center for State Courts: Judicial Ethics and Discipline (May 17, 2016), <https://ncscjudicialethicsblog.org/2016/05/17/family-political-activities-at-a-judges-home/>.

B. Rule 4.1(A)(3) - Shall Not “Publicly” Endorse.

1. With certain exceptions for candidates, “a judge or a judicial candidate shall not: . . . publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office.” Rule 4.1(A)(3).

2. “Judicial candidate” is defined in the Terminology section of the Code to include one seeking appointment to judicial office.
3. In general: “A judge may provide a reference or recommendation for an individual” Rule 1.3 cmt. 2.
4. On October 23, 2015, the Board issued the following opinion: “A judge may write a letter to the Governor or the Commission on Judicial Selection recommending an applicant for judicial office, provided that the judge has personal knowledge of the applicant and the recommendation is not publicly disseminated. See Rule 1.2 cmt 2, and Rule 4.1(A)(3).” Minn. Bd. on Jud. Standards, *Summary of Advisory Ops.*, 29 (2016), <http://bjs.state.mn.us/file/advisory-opinions/summary-of-advisory-opinions.pdf>.

C. Rule 4.1 – Humphrey dinner (Executive Secretary Advisory Opinion (Feb. 8, 2016)).

1. May a judge attend the DFL Humphrey Dinner, where a friend, who is also a lawyer, has paid for a table and invites the judge to have one seat?
2. A judge shall not “attend or purchase tickets for dinners or other events sponsored by a candidate for public office.” Rule 4.1(A)(5). This rule prohibits attending certain events even if the judge does not purchase a ticket. Is the Humphrey dinner “sponsored by a candidate?” According to the dinner’s website, the event is “Prepared and paid for by the Minnesota DFL Party, www.dfl.org, and not authorized by any candidate or candidate’s committee.” Humphrey-Mondale Dinner, <http://humphreymondaledinner.com/>.
3. The distinction between candidate and political party is significant. A judge may not publicly endorse a candidate. Rule 4.1(A)(3); *Wersal v. Sexton*, 674 F.3d 1010, 1028 (8th Cir. 2012). On the other hand, a judge may attend political gatherings. *Republican Party of Minnesota v. White*, 416 F.3d 738, 766 (8th Cir. 2005) (en banc).
 - a. Attendance is not prohibited based on the “appearance of impropriety.” Rule 1.2. Especially where First Amendment protection might apply, the appearance of impropriety prohibition should not be used to prohibit conduct that is permitted by more specific rules.

D. Rule 4.1(A)(7) - Shall Not Use Campaign Contributions for Private Benefit.

1. *Filing Fee May Be Paid From Campaign Funds.* In 2016, the Board adopted the following advisory opinion: “A candidate for judicial office may pay the election filing fee from campaign funds. Minnesota Statutes sections 211B.12 and 10A.01, subdivision 26(15) (2016) permit judicial candidates to use campaign funds to pay the filing fee. Rule 4.1(A)(7) of the Code does not prohibit the payment of the filing fee because the filing fee is not ‘for the private benefit of the judge, the candidate, or others.’” Minn. Bd. on Jud. Standards, *Summary of Advisory Ops.*, 4 (2016), <http://bjs.state.mn.us/file/advisory-opinions/summary-of-advisory-opinions.pdf>.

2. *Prior Board Opinions.* This opinion superseded prior opinions, which had advised that a candidate could not pay the filing fee from campaign funds.

E. *In re Charges of Judicial Misconduct*, 404 F.3d 688 (2d Cir. Jud. Council, 2005).

1. *Forum.* Second Circuit Judge Calabresi made remarks from the floor of a convention of an organization, the American Constitutional Society (ACS), which styles itself as a progressive legal organization. *Id.* at 693. The ACS is also non-profit, tax-exempt and non-partisan. *Id.* The organization is clearly left of center. *Id.* The remarks were made after a panel discussion, “The Election: What’s at Stake for American Law and Policy.” *Id.* at 691.
2. *Bush v. Gore, Mussolini, Hitler, Apology, Complaints.* Some of the remarks compared the manner by which George W. Bush was declared president, in effect, in *Bush v. Gore*, to the manner in which Mussolini and Hitler came to power. *Id.* at 691. Judge Calabresi criticized the Court’s decision. *Id.* After making the remarks, Judge Calabresi promptly acknowledged they were improper and apologized. *Id.* at 692. Five ethics complaints were filed. *Id.* at 690.
3. *Canon 7A(2) / Rule 4.1(A)(2).* The Council found that Judge Calabresi did not violate the Code antecedent to Rule 4.1(A)(2): “Except as permitted . . . a judge . . . shall not . . . make speeches on behalf of a political organization.” *Id.* at 694. The ACS is not a political organization. *Id.* at 693. A “political organization . . . likely refers to groups organized *primarily* for political purposes, such as political parties” *Id.*
4. *Permission to Attend or Speak.* “A judge may attend or speak at an event even if it is sponsored by a group that has an identifiable political or legal orientation or bias. It does not follow therefrom that the judge is an adherent of the group’s political or legal mission, or a fellow traveler.” *Id.*
5. *Apology, Admonition.* Judge Calabresi acknowledged that his remarks could reasonably be interpreted to involve opposition to reelection of President George W. Bush. *Id.* at 692. These remarks violated the predecessor to Rule 4.1(A)(3). *Id.* at 700. Given Judge Calabresi’s apology, and the publication of that apology, an admonition was determined to be sufficient discipline. *Id.*
6. *Dismissals.* Other complaints – e.g., that his activities showed political bias, that his comparisons to Hitler and Mussolini were inflammatory and unfair, and that his critique of *Bush v. Gore* showed incompetence – were dismissed. *Id.*

- F. **2015 Violation.** In 2015, Federal District Court Judge Richard Kopf (Neb.) posted in his blog that, “Senator Ted Cruz is not fit to be President.” Richard Kopf, *Senator Ted Cruz Is Not Fit to Be President*, Hercules and the Umpire (July 6, 2015). Cruz was at that time a candidate for the Republican nomination. Judge Kopf acknowledged his Code violation. Richard Kopf, *Professor Orin Kerr Is Correct on Canon 5, and for That I Apologize*, Hercules and the Umpire (July 9, 2015). He discontinued his blog because court employees believed the blog was an embarrassment to the court. Richard Kopf, *Some Things Are More Important Than Others*, Hercules and the Umpire (July 9, 2015),

<https://wednesdaywiththedecentlyprofane.me/2015/07/09/some-things-are-more-important-than-others-2/>.

XLVII. RULE 4.1(A)(9) – KNOWING OR RECKLESS FALSE OR MISLEADING CAMPAIGN STATEMENTS.

A. *In re Pendleton*, 870 N.W.2d 367 (Minn. 2015).

1. *Facts*. Judge Pendleton filed an Affidavit of Candidacy, in which he falsely listed his address as that of a townhouse he had sold and moved from six months before. *Id.* at 378. The portion of the affidavit relating to residence was not under oath. Addendum at 19, *In re Pendleton*, 870 N.W.2d 367 (Minn. 2016), <http://www.bjs.state.mn.us/file/public-discipline/pendleton/1449-boards-supreme-court-addendum.pdf>. Judge Pendleton claimed that he filed the Affidavit hastily, and without consideration, but the panel did not make any such finding. 870 N.W.2d at 873, 875. However, he admitted this statement was inaccurate and that he knew it was inaccurate when he made the statement. *Id.* at 873. He explained that he acted in haste and without deceitful intent. *Id.*
2. *Knowledge and Intent*.
 - a. *Complaint, Panel Finding*. The Formal Complaint alleged that Judge Pendleton filed his false affidavit with intent to deceive. *Id.* at 380. The hearing panel found “Judge Pendleton’s testimony that he lacked any intent to deceive incredible when viewed in the context of the whole record.” *Id.* at 375.
 - b. *Supreme Court – Knowingly False Statement*. “Judge Pendleton admitted that he knew this address was not accurate when he completed the affidavit. These admissions establish that Judge Pendleton made a knowingly false statement of fact on his affidavit of candidacy.” *Id.* at 380.
 - c. *Supreme Court – Intent to Deceive*. The Court held that proof of intent to deceive was not needed to sustain a violation of Rule 4.1(A)(9). “Moreover, even if these rules required a finding that the judge intended to deceive, intent to deceive may be proven by showing a person made a knowingly false statement of fact.” *Id.* at 380 (citing *In re Czarnik*, 759 N.W.2d 717, 223 (Minn. 2009); *Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986)). The Court also noted as proof of intent that Judge Pendleton made no attempt to correct the affidavit. *Id.* Judge Pendleton’s intent to deceive the electorate was an important factor in the Court’s decision to remove him from office.
3. *Discipline*.
 - a. *Violating Karasov Warning Regarding Residency*. “Just 2 years after we gave this clear warning and despite being fully aware of our decision in *Karasov*, Judge Pendleton deliberately chose to reside outside of his judicial district for even longer than Judge Karasov did. . . . Judge Pendleton consciously disregarded both his constitutional obligations and our decision in *Karasov*.” *Id.* at 388.

- b. **Particularly Serious False Statement.** “Judge Pendleton’s intentional misrepresentation is particularly serious because it was made to the voters of his judicial district and was about a fundamental requirement to hold office. *See [In re Renke, 933 So.2d 482, 495 (Fla. 2006)]* (removing a judge from office, in part, for making misrepresentations about his qualifications for office during the campaign). The integrity of the judiciary is severely undermined if a judge deceives voters by falsely representing that he or she satisfies a constitutional requirement to hold office.” *Id.*
 - c. **Removal Warranted.** “Considering the totality of the circumstances of this case, we hold that Judge Pendleton must be removed from office. Judge Pendleton committed two very serious violations. Each of his violations severely undermines the public’s trust in their judicial system. When we assess Judge Pendleton’s violations and the cumulative impact his misconduct has on the public’s faith in the integrity of the judicial system, we conclude that the sanction of removal from office is the only sanction adequate to ensure that the people of Minnesota can have continued faith in the integrity of their justice system.” *Id.* at 389.
- B. Minnesota Statutes sections 204B.03 and 204B.06.** These statutes require a judicial candidate to file an affidavit of candidacy.
- C. Election Loser Sues Winning Judge.**
1. *Judge Loses and Sues.* A lawyer, Christensen, defeated incumbent Judge Bundlie in an election. *Bundlie v. Christensen, 276 N.W.2d 69, 70 (Minn. 1979).* Bundlie sued to set aside the election under the Minnesota Fair Campaign Practices Act and under the Code of Judicial Conduct and the Code of Professional Responsibility. *Id.*
 2. *Statements.* Christensen’s campaign emphasized purportedly excessive spending in the judicial district. *Id.* There was no evidence the spending was excessive, nor that Bundlie was responsible for any excess. *Id.* The court found Christensen’s “statements told only one side of the story; they were very probably ‘unfair’ and ‘unjust,’ but they were not untrue.” *Id.* at 71.
 3. *Codes.* Bundlie’s first claims were based on alleged statutory violations. *Id.* “It is Appellant Bundlie’s next contention that even if 210A.04 has not been violated, the election should be set aside because Christensen has violated Canon 7B of the Code of Judicial Conduct and DR8-103 of the Code of Professional Responsibility.” *Id.* at 71. The Court affirmed denial of this contention. “The district court noted that even if the ethical codes applied directly, they were not violated. We see no reason to hold otherwise.” *Id.* at 72.
- D. Financial Misconduct Related to Campaign.** A lawyer who committed misconduct while on the bench, thereafter pled guilty to a crime, and resigned his judicial office. *In re Bartholet, 293 Minn. 495, 496, 198 N.W.2d 152, 153 (1972).* Judge Bartholet appointed appraisers of probate properties and caused them to be paid exorbitantly, with the understanding that the appraisers would contribute generously to Judge Bartholet’s

campaign account. *Id.* at 498, 198 N.W.2d at 154. Unlike other judges who did somewhat similar things, Judge Bartholet used his campaign account for personal purposes. *Id.* at 499, 198 N.W.2d at 155. Proceedings were apparently lengthy, having been initiated in or before 1970 and concluded on May 19, 1972. *Id.* at 496, 198 N.W.2d at 152 n.1.

XLVIII. RULES 4.1(A)(3) and (4), 4.2(B)(3) – POLITICAL AND CAMPAIGN ACTIVITIES.

A. Solicitation of Funds. *Williams-Yulee v. Florida Bar*. 575 U.S. ___, 135 S. Ct. 1656 (2015).

1. Judge Williams-Yulee was disciplined for personally soliciting campaign funds, in violation of Canon 7C(1), Florida Code of Judicial Conduct. *Id.* at 1663-64. This canon provided that judicial candidates, “shall not personally solicit campaign funds . . . but may establish committees of responsible persons” to raise money for election campaigns. *Id.* at 1663. The Florida Code also allows candidates to send thank-you notes for contributions. *Id.*
2. Judge Williams-Yulee sought review on First Amendment grounds. *Id.* at 1664. A majority of the Supreme Court held that a state’s compelling interest in judicial integrity and the appearance of integrity allowed the state to ban personal solicitations by judges. *Id.* at 1673.
3. For the majority, Chief Justice Roberts wrote:
 - a. “Judges are not politicians, even when they come to the bench by way of the ballot. And a state’s decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office. A state may assure its people that judges will apply the law without fear or favor—and without having personally asked anyone for money.” *Id.* at 1662.
 - b. “Unlike the executive or the legislature, the judiciary ‘has no influence over either the sword or the purse; . . . neither force nor will but merely judgment.’ The Federalist No. 78, at 465 (Alexander Hamilton) (C. Rossiter ed., 1961). The judiciary’s authority therefore depends in large measure on the public’s willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, ‘justice must satisfy the appearance of justice.’ *Offutt v. United States*, 348 U.S. 11, 14 (1954). It follows that public perception of judicial integrity is ‘a state interest of the highest order.’ *Caperton v. Massey*, 556 U.S. 868, 889 (2009).” *Id.* at 1667.
4. The case is discussed in Cynthia Gray, *The First Amendment and Solicitation of Campaign Contributions: Williams-Yulee v. Florida Bar*, Jud. Conduct Rptr., Spring 2015, at 4.

B. *Wersal v. Sexton*, 674 F.3d 1010 (8th Cir. 2012), cert. denied.

1. Wersal challenged three Rules in the Code of Judicial Conduct that govern campaign conduct. *Id.* at 1013. His challenges were unsuccessful. *Id.* at 1031.
2. A judge shall not “publicly endorse or, except for the judge or candidate’s opponent, public oppose another candidate for public office.” Rule 4.1(A)(3).
3. A judge may “make a general request for campaign contributions when speaking to an audience of 20 or more people.” Rule 4.2(B)(3)(a).
4. After *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (White I) and *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) (White II), judicial candidates may:
 - a. Express their views on disputed legal and political issues;
 - b. List themselves as members of a political party and attend political party meetings;
 - c. Seek and accept (and advertise) party endorsements;
 - d. Establish campaign committees to solicit and raise funds;
 - e. Sign letters used by those committees; and
 - f. Personally solicit funds from groups of 20 or more.

C. Articles.

1. Martin A. Cole, *Judicial Election Rules Upheld*, Bench & B. of Minn., Nov. 2012, at 11. <http://mnbenchbar.com/2012/11/judicial-election-rules-upheld/>.
2. Jon C. Blue, *A Well-Tuned Cymbal? Extrajudicial Political Activity*, Geo. J. Legal Ethics 1 (2004).

XLIX. RULE 4.2(B)(3) – REQUEST FOR CAMPAIGN CONTRIBUTIONS.

- A. **Contributions by Judges.** Until 2016, Rules 4.1 and 4.2 were inconsistent regarding judicial contributions to campaigns of judicial candidates. Former Rule 4.2(B)(3)(c) allowed a judge to personally solicit campaign contributions from other judges, but Rule 4.1(A)(4)(b) prohibited a judge from making a contribution to a candidate. The Model Rules did not have this inconsistency. Model Rule 4.2(B)(6) provides that a judge may, “contribute to a political organization or candidate for public office, but not more than \$[insert amount] to any one organization or candidate.”
- B. **Petition for Amendment.** In December 2015, the Board filed a petition to delete the permission in Rule 4.2(B)(3)(c), thereby eliminating the inconsistency. Effective July 1, 2016, the Supreme Court granted the petition and amended the rule accordingly. Order

Promulgating Amendments to the Rules of the Board on Judicial Standards, No. ADM10-8032 (Minn. Feb. 24, 2016).

L. AGGRAVATING AND MITIGATING FACTORS.

A. Recognition, Remorse or Lack Thereof.

1. *Lack of Insight.* In a judicial discipline case, the Supreme Court has noted a judge's lack of insight: "We also are troubled greatly by Judge Blakely's continued lack of insight into his misconduct." *In re Blakely*, 772 N.W.2d 516, 526 (Minn. 2009). However, the Court has not regularly addressed such issues.
2. *Consciously Disregarded Supreme Court Decision.* Judge Pendleton was fully aware that the Court had suspended Judge Karasov for residing outside her judicial district, but he nonetheless moved outside his judicial district. *In re Pendleton*, 870 N.W.2d 367, 388 (Minn. 2015). In removing Judge Pendleton from office, the Court expressed its dismay. "Just 2 years after we gave this clear warning and despite being fully aware of our decision in *Karasov*, Judge Pendleton deliberately chose to reside outside of his judicial district for even longer than Judge Karasov did. . . . Judge Pendleton consciously disregarded both his constitutional obligations and our decision in *Karasov*." *Id.*

- B. Self-Reporting.** A judge's report to the Board of his or her own conduct can be a mitigating circumstance. "The board recommended that Judge Stacey be assessed a civil penalty of \$3,000. In light of Judge Stacey's commendable decision to bring this matter to the attention of the Board on Judicial Standards, and given that the purpose of a judicial sanction is not to punish but to insure the integrity of the judicial system, we conclude that a monetary penalty is neither necessary nor warranted here." *In re Stacey*, 737 N.W.2d 345, 351 (Minn. 2007).

C. Mental Illness.

1. *Mitigation Standards.* The Court has adopted lawyer standards for determining whether mental illness, chemical dependency, or similar circumstances mitigate otherwise appropriate discipline. "The Board urges us to articulate standards that should be used to determine whether mental illness or similar disability should mitigate the discipline otherwise appropriate for guidance in future cases. We agree that mitigation standards applicable to judges cannot be less stringent than those applied to lawyers, and accordingly adopt the requirements identified in *Weyhrich* as applicable in judicial discipline cases as well as lawyer discipline cases. Those factors are (1) proof of a serious mental illness that (2) caused the misconduct, coupled with (3) proof of treatment that (4) has abated the cause of the misconduct such that (5) the misconduct is not apt to recur. These requirements are particularly appropriate where a judge seeks mitigation of discipline that would allow him to remain on the bench. We also agree that, as in lawyer discipline cases, when a judge asserts mental illness or other disability as an affirmative defense to mitigate the discipline, the judge should bear the burden of proof to establish the *Weyhrich* requirements by clear and

- convincing evidence.” *In re Ginsberg*, 690 N.W.2d 539, 551 (Minn. 2004) (citing *In re Weyhrich*, 339 N.W.2d 274, 279 (Minn. 1983)).
2. *In re Rice*, 515 N.W.2d 53 (Minn. 1994). Judge Rice’s mental illness was a factor relating both to misconduct and discipline, but was not regarded as a mitigating factor.
 - a. Judge Rice engaged in numerous angry behaviors directed at staff, “all of which conduct had the effect of harassing, humiliating, intimidating and causing members of his staff to feel physically threatened and creating a hostile working environment for them.” *Id.* at 55. The state had to pay settlement amounts to some of the employees. *Id.*
 - b. Judge Rice was treated for many years for bipolar disorder. *Id.* at 54. Three psychiatrists provided opinions. *Id.* Judge Rice and the Board entered into a stipulation, approved by the court. *Id.* Judge Rice admitted Code violations, including bringing the judiciary into disrepute. *Id.* at 55. Judge Rice agreed to a 60-day suspension, to pay \$3500, to be subject to monitoring, to follow psychiatric treatments, disclose treatment information to the Board, and be on probation. *Id.* at 55-56.

LI. APPELLATE STANDARDS.

- A. **Summary.** The Supreme Court makes an “independent assessment” both of panel conclusions of law and of a judge’s due process arguments, but the burden is on the Board for the former and on the judge for the latter. *In re Karasov*, 805 N.W.2d 255, 263-64 (Minn. 2011); Board Rule 14(e). The Supreme Court by rule must “giv[e] deference to the facts’ found by the panel” and that deference is expressed in the “clearly erroneous” standard. *Karasov*, 805 N.W.2d at 264 (quoting former Board Rule 14(e)). Special deference is given to fact-finder assessments of credibility. *In re Miera*, 426 N.W.2d 850, 854 (Minn. 1988). The standard of proof of facts and violations is clear and convincing evidence. *Karasov*, 805 N.W.2d at 264; Board Rule 11(a) and (b). The Supreme Court has repeatedly said it gives no special deference to panel recommendations as to discipline. *Karasov*, 805 N.W.2d at 276.
- B. **Court “Deference” to Panel Findings of Fact - Rule 14(e) (2009, 2016).** A 2009 amendment to Rule 14(e) made a substantive change. It provided that, when the panel recommends discipline, “the Court shall review the record of the proceedings, giving deference to the facts” Rule 14(e). Referring to this amendment, *Karasov* stated: “Prior decisions indicated that we were not required to give deference to the panel’s factual findings and suggested that we could reach our own factual conclusions. *See In re Murphy*, 737 N.W.2d 355, 361 (Minn. 2007); *In re Miera*, 426 N.W.2d 850, 855 (Minn. 1988); *In re McDonough*, 296 N.W.2d 648, 691 (Minn. 1979). Given this rule change, these cases no longer accurately state the standard of review regarding the panel’s factual findings.” *Karasov*, 805 N.W.2d at 263, n.3. A 2016 amendment to Rule 14(e) clarified that deference is to the “panel’s findings of fact,” rather than “to the facts.”

- C. **“Independent Assessment” and “Clearly Erroneous” Standards.** It appears that the Supreme Court applies the “clearly erroneous” standard to hearing panel factual findings. It also appears that the Court makes its own “independent assessment” of panel conclusions regarding Code violations. *Karasov* held, “We make an independent assessment of whether the Board has proven that a judge violated a provision of the Code of Judicial Conduct. See Rule 14(e), Rules of the Board on Judicial Standards; see also *In re Blakely*, 772 N.W.2d 516, 522 (Minn. 2009); *In re Murphy*, 737 N.W.2d 355, 361-66 (Minn. 2007); *In re Miera*, 426 N.W.2d 850, 853-57 (Minn. 1988). In so doing, we ‘giv[e] deference to the facts’ found by the panel. Rule 14(e), Rules of the Board on Judicial Standards. Accordingly, we will defer to the panel’s factual findings unless they are clearly erroneous. Cf. *In re Pinotti*, 585 N.W.2d 55, 62 (Minn. 1998) (holding that in attorney discipline cases, we uphold a referee’s factual findings unless they are clearly erroneous).” *In re Karasov*, 855 N.W.2d 255, 263-64 (Minn. 2011). *Miera* also said, “Moreover, while the court makes an independent review of the evidence in judicial disciplinary proceedings, we are sensitive to the fact the panel had the opportunity to view the witnesses as they testified and is therefore in a superior position to assess credibility.” 426 N.W.2d at 854.
- D. **Due Process Arguments.** The Supreme Court has not announced any standard of review for due process challenges made by judges to procedures followed by the Board, or to the Board Rules, or to the Code. It appears the Court considers these challenges de novo. As *Karasov* indicates, the burden is on the judge to establish any such violation. 855 N.W.2d at 275. In *Pendleton*, the Court based its rejection of due process claims in part on a failure to show any prejudice. *In re Pendleton*, 870 N.W.2d 367, 385 (Minn. 2015).
- E. **Discipline Recommendations.** *Karasov* stated: “We ‘afford no particular deference’ to the recommended sanction of the panel or the Board, and independently review the record to determine the discipline, if any, to impose. *In re Blakely*, 772 N.W.2d 516, 523 (Minn. 2009).” 855 N.W.2d. at 275.

LII. AUTHORITY OF LEGISLATURE, COURT, BOARD, GOVERNOR.

A. Constitution.

1. *Impeachment.* Minnesota Constitution article VIII, sections 1-3 provide for the House of Representatives to have the sole power of impeachment of judges.
2. *1972 Amendments.* These amendments reorganized the state judicial system, permitted appointment of clerks of district court, and authorized the Legislature to provide for discipline and removal of judges. Minn. Const. art. VI (amended 1972).
3. *Case Law Historical Note.* Minnesota Constitution article VI, section 9, authorizes the Legislature to “provide for the retirement, removal or other discipline of any judge who is disabled, incompetent or guilty of conduct prejudicial to the administration of justice.” The Supreme Court noted: “Prior to the adoption of the predecessor of this provision in 1972, judges could be removed from office only by impeachment or defeat at the polls.” *In re Ginsberg*, 690 N.W.2d 539, 545 n.5 (Minn. 2004) (quoting *In re Kirby*, 350 N.W.2d 344, 346-47 (Minn. 1984)).

B. Legislature / Court.

1. *“Prejudicial to the Administration of Justice.”* The Legislature authorized the Minnesota Supreme Court to discipline a judge for “incompetence in performing the judge’s duties, habitual intemperance, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.” Minn. Stat. § 490A.02, subd. 3 (2016). *See* Board Rule 4(a)(3)-(5). These provisions were challenged on due process grounds as vague and overbroad, but the charge was rejected. *In re Gillard*, 271 N.W.2d 785, 809 Minn. (1978).
2. *Implementing Rules.* The Legislature also authorized the Supreme Court to make rules to implement judicial discipline. Minn. Stat. § 490A.02, subd. 7 (2016). Among these rules are rules authorizing both the Board and hearing panels to issue public reprimands. Board Rules 6(f)(5)(iii), 11(b)(1).

C. Court’s Inherent Power to Discipline (But Not Remove) / Vacatur of Residence and Office.

1. *State v. Irby*, 848 N.W.2d 515 (Minn. 2014).
 - a. Judge Karasov presided over Irby’s first and second trial, including pre-trial proceedings. *Id.* at 517. During some of the second pre-trial proceedings, Judge Karasov was not a Hennepin County resident. *Id.* Irby argued his conviction should be vacated because Judge Karasov vacated her office, under Minnesota Statutes section 351.02(4), and was not re-appointed. *Id.*
 - b. With one dissent, the Supreme Court held that § 351.02(4) did not result in vacatur of office, primarily because the statute applies only when “the office is local,” and a district court judgeship is statewide, not local. *Id.* at 522, 527.
 - c. The Court also held: “While Minn. Const. art. VI, § 9, also gives the Legislature power to discipline judges . . . our case law suggests that the Legislature’s ability to discipline judges is limited to the impeachment process.” *Id.* at 521. However, the Court previously stated that the effect of the 1972 Constitutional amendment was “to create a separate and distinct method for retirement, removal or other discipline of a judge who was disabled, incompetent or guilty of conduct prejudicial to the administration of justice. The adoption of this article did not remove from the constitution the impeachment powers of the Legislature.” *In re Kirby*, 350 N.W.2d 344, 347 (Minn. 1984).
 - d. In addition to dissent on this point, by Justice Page, Justice Stras’s concurrence stated: “[T]here is no doubt that the grant of authority to the Legislature in Article VI, Section 9, would render our authority to discipline judges concurrent rather than exclusive.” *Irby*, 848 N.W.2d at 523. In addition, Justice Wright recused. *Id.*
 - e. Although the Court cloaked its constitutional analysis in the canon of avoiding separation of powers disputes, Justice Stras viewed the Court’s determination as

instead going beyond the issue presented, which was determinable solely by statutory construction of the term “local.” *Id.*

- f. It also appears that in *Kirby*, the Court regarded its power to remove as having been granted by the Legislature, while in *Irby* the Court regarded its powers as inherent and the Legislature as not having the power to remove, except by impeachment. *Kirby*, 350 N.W.2d at 347-48; *Irby*, 848 N.W.2d at 521.
2. *Suspension / Removal / Inherent or Legislative Power.* Any suspension of a judge with pay determined by the Supreme Court would be under its inherent power to discipline the judiciary; only when the Supreme Court is asked to remove a judicial officer is the court functioning under the legislative directive established pursuant to amendment to the State Constitution. *In re Kirby*, 350 N.W.2d 344, 347-48 (Minn. 1984).
 3. *Inherent Authority to Direct Termination of Investigation.* The court cited its inherent authority to direct the Board to terminate an investigation in a matter, where very extensive discipline proceedings had already resulted in substantial discipline and use of enormous resources. *In re McDonough*, 296 N.W.2d 648, 701 (Minn. 1979). In another case, the Board had obtained an investigative subpoena, which had been quashed in district court. The Supreme Court affirmed the district court insofar as the subpoena related to a complaint regarding adultery, but reversed the district court insofar as the complaint related to a complaint of excessive use of alcohol. *In re Agarter*, 353 N.W.2d 908, 915 (Minn. 1984).
 4. *Inherent Authority / Expungement.* In *State v. M.D.T.*, 831 N.W.2d 276 (Minn. 2013), the court held that its inherent authority was limited in various ways and does not extend to expungement of court-created records held in the executive branch. *Id.* at 283-84.
- D. **Legislature / Board Challenges Rejected.** The Legislature created the Board on Judicial Standards to assist in disciplining judges. Minn. Stat. § 490A.02. This delegation was challenged as unconstitutional but the Court rejected the challenge. *In re Gillard*, 271 N.W.2d 785, 806-07 (Minn. 1978). The Board’s procedural rules were challenged as not providing due process, but the challenge was also rejected. *Id.* at 807-08.
- E. **Legislature / Governor.** The Legislature authorized the governor to appoint Board members, subject to confirmation by the Senate for members. Minn. Stat. § 490A.01, subd. 2(b) (2016). Judicial members do not need Senate confirmation. *Id.* Prior to 1986, the governor could remove from office any “judge of probate, judge of any municipal court, [or] justice of the peace . . . [for] malfeasance or nonfeasance in the performance of his official duties.” Minn. Stat. § 351.03 (repealed 1986). See *Martin v. Burnquist*, 141 Minn. 308, 170 N.W. 201 (1918), discussed above.
- F. **President of the United States/Removal.** The first Supreme Court justice of the Minnesota territory, Aaron Goodrich, was removed by President Fillmore. *United States ex rel. Goodrich v. Guthrie*, 58 U.S. 284 (17 How.) 284, 301 (1854). Apparently political

considerations were the motivation. Voight, Robert C., *Aaron Goodrich: Stormy Petrel of the Territorial Bench*, 39 Minn. Hist. Mag. 141, 151 (1964).

LIII. BOARD APPOINTMENTS, DISQUALIFICATIONS, AND RECUSALS.

A. **Rule, Statute.** Board members are appointed by the governor. The Senate confirms such appointments, except those of judge-members. Minn. Stat. § 490A.01, subd. 2(b) (2016); Board Rule 1(a).

B. ***In re Karasov*, 805 N.W.2d 255 (Minn. 2011).**

1. Judge Karasov claimed due process violations because a Board member, Judge Mabley, failed to recuse. *Id.* at 271-72. Judge Mabley allegedly was a friend of Judge Karasov's ex-husband, Judge Fred Karasov, and allegedly disclosed confidential information to Fred Karasov. *Id.*
2. Citing *Kirby* and giving three reasons, the Court found no due process violation. *Id.* at 272-73. Judge Mabley did not participate in the decision to charge Judge Karasov. *Id.* at 272. Judge Mabley was only one of ten Board members. *Id.* Judge Karasov failed to show that Judge Mabley was actually biased. *Id.* Even if Judge Mabley violated the Board's Code of Ethics by disclosing information to Fred Karasov (and the Court made no determination of any such violation), the disclosure does not show bias. *Id.* The Court explained, "Judge Karasov has failed to make an affirmative showing of bias on the part of Judge Mabley, and the impartiality of the remaining Board members countermands any possible bias on the part of Judge Mabley." *Id.*

C. ***In re Kirby*, 354 N.W.2d 410 (Minn. 1984).**

1. Judge Kirby petitioned the presider of the hearing panel to remove a Board member, Judge Segell, from the matter. *Id.* at 413. At the time, the hearing panel made only recommendations and the Board acted as the fact-finder. *See* Board Rule 9(a)(1) (1978). The petition was denied. *Kirby*, 354 N.W.2d at 413. Judge Kirby argued to the Supreme Court that the denial was error and violated his due process rights. *Id.* at 420.
2. The Court rejected Judge Kirby's claim, "Judge Kirby gave no reasons for petitioning to remove Judge Segell from serving as a Board member reviewing his case other than the fact that Judge Segell was a colleague of Judge Kirby's on the Ramsey County bench. Neither does Judge Kirby suggest any rule or authority requiring Judge Segell to recuse himself. Nonetheless Rule 9(b) demands that the judge be accorded due process of law in a formal hearing before the Board and due process at a minimum demands an impartial tribunal. Rule 1(b) contemplates possible disqualification of a Board member and outlines the method of replacement by alternate members. We suggest the statutory authority to appoint alternates be exercised so that in these situations a challenged Board member might step aside and have an alternate serve. The failure of Judge Segell to disqualify himself does not amount to a violation of the due process requirement of a neutral arbiter because the Board consists of nine members, not a sole judge. The impartiality of the remaining eight Board members

would have countermanded any possible bias on the part of Judge Segell and no affirmative showing was made that Judge Segell could not be fair and impartial.” *Id.* at 420.

3. Board Rule 1(b) (1978) provided: “Alternate members, to take the place of those disqualified or absent, shall be selected at the time and in the manner prescribed for initial appointments in each representative class, and shall serve at the call of the board chairperson.” The 1986 Board Rule amendments did not carry this provision forward.

D. **Board Policies.** The Board posts its Policies on its website. The Policies includes a policy on recusals of Board members. Minn. Bd. on Jud. Standards, *Board Policies* (2016), <http://www.bjs.state.mn.us/file/board-organization/bjs-policy-manual-web.pdf>.

LIV. BOARD PROCEDURAL RULES USED AS DISCIPLINARY RULES.

1. Board Rule 4(a), “Grounds for Discipline or Other Actions Shall Include” is based on Minnesota Statutes section 490A.02, subdivision 3 (2016). The statute and rule list several grounds for discipline and disability determination.

LV. BOARD RULE 4(a)(5) – CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

A. **Constitution, Statute, Rule.** The Minnesota Constitution authorizes the Legislature to “provide for the retirement, removal or other discipline of any judge who is disabled, incompetent or guilty of conduct prejudicial to the administration of justice.” Minn. Const. art. 6, § 9. Pursuant to this authority, the Legislature provided that the Supreme Court may discipline a judge for misconduct including “conduct prejudicial to the administration of justice that brings the judicial office into disrepute.” Minn. Stat. § 490A.02, subd. 3 (2016). The Supreme Court carried this same standard forward into Board Rule 4(a)(5).

B. **Code Focus.** The Supreme Court has stated: “The Code of Judicial Conduct focuses on conduct prejudicial to the administration of justice, which includes but is not limited to criminal conduct.” *In re Winton*, 350 N.W.2d 337, 339 (Minn. 1984). For further general guidance, the Court also stated: “Willful violations of law or other misconduct by a judge, whether or not directly related to judicial duties, brings the judicial office into disrepute and thereby prejudices the administration of justice. A judge’s conduct in his or her personal life adversely affects the administration of justice when it diminishes public respect for the judiciary.” *Id.* at 340.

C. Witness Contacts by Judges.

1. See Section X.G. for a discussion of *In re Murphy*, 737 N.W.2d 355 (Minn. 2007), *In re Galler*, 805 N.W.2d 240 (Minn. 2011), and *In re Armstrong*, No. A11-121 (Minn. Oct. 31, 2011).

D. ***In re Nordby*, No. A10-1847 (Minn. May 11, 2011).** (Facts described above.) The Panel dismissed Rule 4(a)(5) charges, citing Rule 4(c): “In the absence of fraud, corrupt motive or bad faith, the Board shall not take action against a judge for making findings of fact,

reaching a legal conclusion or applying the law as understood by the judge.” Findings of Fact and Conclusions of Law 11.

- E. ***In re Ginsberg*, 690 N.W.2d 539 (Minn. 2004).** Ginsberg dismissed criminal charges without allowing the prosecutor to be heard, retaliated against lawyers who filed ethics complaints, and forced a criminal defendant to choose among three deputies he would fight with. *Id.* at 545-48. “It is likely that, standing alone, this series of judicial violations would not warrant removal from office.” *Id.* at 549. Ginsberg was, however, removed because he also committed two crimes and lied about the crimes. *Id.* at 549-50.
- F. ***In re Snyder*, 336 N.W.2d 533 (Minn. 1983).** Judge Snyder had an adulterous relationship, that “became the subject of discussion among certain members of the community,” and conspired with his lover to deceive her husband, including fabricating a false notice of a secretarial course. *Id.* at 535. Pursuant to stipulation, the Court censured Judge Snyder. *Id.* at 536. The stipulation did not cover the charge in the complaint that Judge Snyder signed orders to show cause in his lover’s divorce proceeding. *Id.* at 534, 536. The court dismissed this charge, because the orders “required neither independent conclusions nor exercise of judgment by Respondent and that such action by him was not such as to warrant discipline.” *Id.* at 536. *See In re Agerter*, 353 N.W.2d 908, 912 (Minn. 1984).
- G. ***In re Mann*, No. 50982 (Minn. Mar. 4, 1980).** Judge Mann engaged in prostitution with an adult woman “10 times or better” in a year. Statement of Allegations 1, *In re Mann*, No. 50982 (citation omitted). There were apparently no criminal charges or conviction. The conduct resulted in media attention. *Id.* at 2. Judge Mann gave an interview with the *Minneapolis Star*. *Id.* at 1. In the interview, he commented on the humanity of prostitutes and opined that prostitution laws should be repealed. *Id.* Judge Mann admitted his conduct, including the interview, violated several standards, including the Board rule proscribing conduct prejudicial to the administration of justice. Stipulation and Agreement at 2, *In re Mann*, No. 50982. Judge Mann received a public censure. Judgement at 1, *In re Mann*, No. 50982.

LVI. CONFIDENTIALITY.

- A. Litigants have no right of access to the communications between judge and law clerk. *Greene v. Gassman*, No. 11-CV-0618, slip op. at 3 (D. Minn. May 2, 2012).
- B. Confidentiality regarding Board investigations, proceedings, and dispositions is governed by Board Rule 5.

LVII. CONSTITUTIONAL ISSUES – JUDGE’S DUE PROCESS RIGHTS.

A. Judge Has Due Process Right in Discipline Proceedings.

- 1. A judge is guaranteed due process of law in a disciplinary investigation and hearing. *In re Kirby*, 354 N.W.2d 410, 415 (Minn. 1984).

- a. Criminal Standards Do Not Apply. “The due process guarantees of a criminal proceeding are not applicable; judicial removal is neither civil nor criminal in nature, but sui generis, designed to protect the citizenry by insuring the integrity of the judicial system.” *In re Gillard*, 271 N.W.2d 785, 812 (Minn.1978).
- b. *Ruffalo, Rerat*. In *Gillard*, the Court discussed at length *In re Ruffalo*, 390 U.S. 544 (1968). *Id.* at 807-08. The court concluded that it had anticipated *Ruffalo* in *In re Rerat*, 224 Minn. 124, 128, 28 N.W.2d 168, 172 (1947). *Id.* at 808. *Rerat* essentially held that a lawyer (or a judge) is “entitled to a fair and impartial hearing and to a reasonable opportunity to meet the charges brought against him.” *Id.* at 808 (quoting *Rerat*, 224 Minn. at 128, 28 N.W.2d at 172).

B. Sufficiency and Specificity of Charges.

1. “To meet due process requirements, ‘the charges of professional misconduct, though informal, should be sufficiently clear and specific, in the light of the circumstances of each case, to afford the respondent an opportunity to anticipate, prepare, and present his defense’” *Id.* (quoting *In re Rerat*, 224 Minn. 124, 129, 28 N.W.2d 168, 172–73 (1947)).

C. Allegations of Judge’s Misconduct During Discipline Proceedings.

1. *In re Tayari-Garrett*, 866 N.W.2d 513 (Minn. 2015) (Lawyer Discipline). “We are also concerned by the referee’s finding that the sanction for Tayari-Garrett’s misconduct was aggravated by the discovery of ‘additional misrepresentations’ during the disciplinary hearing—namely that Tayari-Garrett told substitute counsel and a paralegal assisting her that she was admitted to the hospital on May 1 when she was not admitted until May 2. ‘[T]his court observes due process in exercising disciplinary jurisdiction.’ *In re Gherity*, 673 N.W.2d 474, 478 (Minn. 2004) (explaining that to comply with due process, disciplinary charges must ‘be sufficiently clear and specific and the attorney must be afforded an opportunity to anticipate, prepare and present a defense’ at the disciplinary hearing). Such due process protections are weakened if the referee is permitted to consider uncharged violations of the Minnesota Rules of Professional Conduct under the guise of aggravating factors instead of requiring that allegations of additional misconduct be brought in a supplementary petition. However, we need not decide whether the referee clearly erred by finding either of these aggravating factors because their existence does not affect the discipline we impose in this case.” *Id.* at 520, n.4.
2. *In re Miera*, 426 N.W.2d. 850 (1988). A transcript was made of a district court meeting that was conducted while judicial discipline charges against Miera were pending. *Id.* at 857. The transcript was submitted by both parties to the Supreme Court. *Id.* The Board did not make charges against Miera regarding the transcript. *Id.* However, the Supreme Court considered the transcript for a limited but important purpose. *Id.* at 858. “In disciplinary matters, we have taken into account whether the respondent ‘considers himself obligated to conform to the canons of ethics.’ *See, e.g., In re Franke*, 345 N.W.2d 224, 230 (Minn. 1984) (lawyer discipline case). Regrettably, the renewed

outburst of January 8 suggests Judge Miera’s concern for the importance of showing respect for the judicial system is not what it should be.” *Id.*

D. Right to Fair and Impartial Tribunal.

1. A judge has a right to a fair and impartial tribunal. However, bias by a single member would not violate due process because of large size of board. *In re Karasov*, 805 N.W.2d 255, 272 (Minn. 2011); *In re Kirby*, 354 N.W.2d 410, 420 (Minn. 1984).

E. If No Prejudice or Harm, No Due Process Violation or No Basis for Relief.

1. *In re Pendleton*, 870 N.W.2d 367 (Minn. 2015). Judge Pendleton argued that his due process rights were violated in various ways. *Id.* at 381. Judge Pendleton included in “due process” disparate claims, e.g., the presider not sustaining Judge Pendleton’s evidentiary objections. *Id.* at 384-85. The Court rejected the due process claims both because there was no error as to some and, as to those where there was or might have been imperfection, because no prejudice resulted. *Id.* at 386. Thus, the court reasoned as to one claim, “even if this evidence was improperly admitted, Judge Pendleton has not shown this error was prejudicial For these reasons, we conclude his due process argument is without merit.” *Id.*
2. *In re McDonough*, 296 N.W.2d 648 (Minn. 1979). The Court in *McDonough* concluded that violation of the Board’s rule that required “either a verified grievance or a motion of the Board before an investigation is initiated” was purely technical and harmless and was not grounds for dismissal or remand. *Id.* at 688.
3. *In re Karasov*, 805 N.W.2d 255 (Minn. 2011). “Judge Karasov has provided no explanation of how she was prejudiced before the panel by the allegations in the formal complaint regarding these two claims.” *Id.* at 274 n.19.
4. *In re Gillard*, 271 N.W.2d 785 (Minn. 1978). The Court in *Gillard* held, in response to an argument that the Board acted without a quorum required by its rules, that “[b]ecause this court conducts an independent review of the evidence and accords the Judicial Board’s disciplinary recommendations no presumptive weight, the absence of a quorum should not be fatal” *Id.* at 813.

F. Purported Right to Notice of Investigation.

1. Courts have rejected claims that due process requires notice of investigation. *Karasov*, 805 N.W.2d at 273-74. Almost all due process protections apply after the investigative stage. *See id.* at 273.
2. “Despite our concern about the insufficient notice Judge Kirby received, we do not find the Board’s actions in ignoring its own rules so violative of due process as to raise the concern that fundamental fairness may not have attached. *Behagen v. Intercollegiate Conference of Faculty Representative*, 346 F.Supp. 602, 606 (D. Minn. 1972). The allegations of intoxication and discourtesy were sufficiently specific to have apprised Judge Kirby with reasonable certainty of the allegations against him and were not so

vague as to mislead him or prevent him from preparing an adequate defense.” *Kirby*, 354 N.W.2d 410, 416 (Minn. 1984).

G. **Purported Right to a Meeting.** The fact that a judge was invited to a meeting, and then disinvented, was unfortunate from the viewpoint of clarifying some matters, but it did not violate any right the judge had. *In re McDonough*, 296 N.W.2d 648, 689 (Minn. 1979).

H. **Board’s Departures From Rules and Standards.**

1. *Variations by Themselves Do Not Violate Due Process.* “Variations from or violations of the Rules of the Board on Judicial Standards during the investigation or hearing process, however, do not, in and of themselves, constitute a due process violation. See *In re Kirby*, 354 N.W.2d at 416 (holding that while the Board violated its own rules, which required giving the judge an opportunity to respond to each allegation prior to making the allegations public, the judge was not denied due process of law); *In re Gillard*, 271 N.W.2d at 812-13 (holding in response to an argument that the Board acted without a quorum required by its rules that ‘[b]ecause this court conducts an independent review of the evidence and accords the Judicial Board’s disciplinary recommendations no presumptive weight, the absence of a quorum should not be fatal’); see also *In re McDonough*, 296 N.W.2d 648, 688 (Minn.1979) (concluding that violation of the Board’s rule that required ‘either a verified grievance or a motion of the Board before an investigation is initiated’ was purely technical and harmless and was not grounds for dismissal or remand).” *Karasov*, 805 N.W.2d at 271.
2. *Board Violation of Code of Ethics is not a Due Process Violation.* “The code of ethics for the Board on Judicial Standards describes ‘ethical standards expected of a Board Member,’ but it ‘does not confer any substantive or procedural due process rights.’” *Karasov*, 805 N.W.2d at 272 n.13 (quoting Bd. on Jud. Standards, Bd. Member Code of Ethics, A).
3. *Harmless, Technical Rule Violation Does Not Violate Due Process.* *In re McDonough*, 296 N.W.2d 648, 689 (Minn. 1979).

I. ***In re Karasov*, 805 N.W.2d 255 (Minn. 2011).**

1. Board member’s alleged violations of confidentiality and bias standards did not violate due process. *Id.* at 272-73
2. Courts have rejected claims that due process requires notice of investigation. *Id.* at 273. In addition, at the time of most of the investigation of Karasov, Board Rules did not require notice. *Id.* 273-74. “In the end, we conclude that due process does not require notice of a judicial discipline investigation. As a result, we hold that Judge Karasov was not denied due process of law by the failure of the Board to provide her notice of its investigation.” *Id.* at 274.

J. *In re Pendleton*, 870 N.W.2d 367 (Minn. 2015).

1. The hearing panel, following precedent in *In re Karasov*, received evidence regarding Judge Pendleton's due process claims, but did not make findings. *Id.* at 386 n.9.
2. Judge Pendleton raised numerous claims of due process violations by the Board. *Id.* at 381. Almost all of the claims related to the investigative stage of proceedings. *See id.* The Court rejected claims of due process violations. *Id.* at 386. The Court found that, although the Board violated a procedural rule and asked an isolated intrusive question, Judge Pendleton's due process rights were not violated. *Id.* at 384-86.
3. "*Better Practice*" and *Due Process Distinguished*. Judge Pendleton claimed that his due process rights were violated during investigation when he was not informed, prior to giving a sworn statement before the Board, that one subject of inquiry would be his affidavit of candidacy. *Id.* at 382. The Court found due process was not violated, although it stated: "The better practice would have been to inform Judge Pendleton, prior to his appearance before the Board, that the Board intended to question him about the affidavit of candidacy." *Id.*
4. *Without Proof of Prejudice, No Due Process Violation*. In his brief to the hearing panel, Judge Pendleton did not claim any prejudice resulting from these alleged violations. *See id.* at 385. Thereafter, Judge Pendleton made claims of "ambush," and the like, without specifically describing alleged prejudice. *See id.* The Court found that without a showing of prejudice, there was no due process violation. *Id.* As to the Board counsel's late production of certain documents, the Court held: "Because Judge Pendleton has not shown prejudice, we hold that the untimely disclosure of these documents did not violate his right to due process." *Id.* The Court also cited lack of prejudice in denying Judge Pendleton's claim that Board counsel posed improper questions at hearing. *Id.* at 386. Similarly, although the Court did not condone one question at an interview with the Boar, about Judge Pendleton's relationship with his wife, the Court held that "the Board's single invasive question did not rise to the level of a due process violation," because the Board did not use the question and answer and Judge Pendleton "does not suggest that the question influenced the panel's decision in any way or affected the fundamental fairness of the proceeding before the panel or our court." *Id.* at 384.
5. *In re Ruffalo Distinguished*. Jude Pendleton's due process arguments relied largely on *In re Ruffalo*, 390 U.S. 544 (1968). *Id.* at 383. However, the Court found *Ruffalo* inapplicable because it involved adding charges at or after a disciplinary hearing. *Id.* The Court explained further, "We have not held that due process requires a complaint to allege every piece of evidence the Board will use to prove the charges of judicial misconduct alleged in the complaint, or that a complaint must disclose every argument the Board will make regarding why the panel or this court should conclude the judge committed the charges of misconduct alleged in the complaint. In this case, the complaint charged Judge Pendleton with two specific and clear acts of misconduct. The misconduct the panel concluded Judge Pendleton committed was alleged in the complaint." *Id.* at 386.

6. Most prominent among Judge Pendleton’s procedural due process claims were:
 - a. That the Board failed to give a supplemental notice of investigation regarding Judge Pendleton’s false affidavit of candidacy before asking Judge Pendleton questions on the subject. *Id.* at 382. However, Board Rules do not require supplemental notice, and *In re Karasov*, 805 N.W.2d 255, 273 (Minn. 2011) held that due process was not violated when the Board did not give any notice of investigation whatsoever for several months after commencing investigation. *Id.* at 383.
 - b. That the Board posed an intrusive question about the date of commencement of Judge Pendleton’s “intimate relationship” with his wife. *Id.* However, this is not a procedural due process claim and Judge Pendleton claimed only embarrassment, rather than prejudice. *Id.* at 384.
 - c. That, at hearing, the Board posed questions about Judge Pendleton’s living arrangements in 2008. *Id.* at 385. Judge Pendleton objected to these questions on relevance grounds, but the objections were not sustained. *Id.* at 385-86.
 - d. That the Board did not obtain and produce Tenth District rosters until three days before hearing. *Id.* at 384-85. However, Judge Pendleton thwarted the Board’s earlier attempt at obtaining these records and the Board produced them as soon as the judicial administrator produced them. *See id.*

K. Purported Right to Judicial Review. Cases relevant to whether a judge has a due process right to judicial review of private disciplines include *Miller v. Wash. State Bar Assoc.*, 679 F.2d 1313 (9th Circ. 1982); *Oberholzer v. Comm’n on Judicial Performance*, 975 P.2d 663 (Cal. 1999); *Mosley v. Comm’n on Judicial Discipline*, 22 P.3d 665 (Nev. 2001).

LVIII. DISPOSITIONS INVOLVING PSYCHOLOGICAL AND CHEMICAL PROBLEMS.

A. *In re Sandeen*. No. 48183 (Minn. Oct. 27, 1977).

1. The Supreme Court approved a stipulation between Judge Sandeen and the Board. *Id.* slip op. at 1. Judge Sandeen acknowledged that he is an alcoholic, averred that he has received in-patient treatment and is active in Alcoholics Anonymous, and agreed to abstain from alcohol and to be supervised by a person who will be chosen by the Board and report to the Board. Stipulation at 1, *In re Sandeen*, No. 48183. Judge Sandeen also agreed that “should he again indulge in the use of alcohol,” he may be removed from office. Stipulation at 2, *In re Sandeen*, No. 48183.
2. In the stipulation, Judge Sandeen ceased contesting the Board’s complaint and admitted its allegations, principally that of “habitual intemperance, persistent failure to perform his duties and conduct prejudicial to the administration of justice” Complaint at 2, *In re Sandeen*, No. 48183. More specifically Judge Sandeen admits he “has conducted court and attempted to conduct court while under the influence of alcohol, has been drunk and offensive in public places and in places where he was likely to be observed and where he was observed by persons in his jurisdiction, was drunk and offensive in

such degree as to require restraint by peace officers, operated automobiles while under the influence of alcohol with resulting accidents and damage, made false statements, charges and accusations to police officers while intoxicated, and compelled unauthorized persons to substitute for him in his judicial functions while he was incapacitated by the effects of alcohol.” *Id.*

B. *In re Ginsberg*, 690 N.W.2d 539 (Minn. 2004).

1. Judge Ginsberg was placed on medical leave in June 2003 and ceased performing judicial duties. *Id.* at 542. In August 2003, the Board filed its Formal Complaint against Judge Ginsberg, based on misconduct in and before June 2003. *Id.* In December 2003, a psychiatrist informed the Board that Judge Ginsberg was, in her opinion, incapable of assisting in his defense. *Id.* In January 2004, the Board filed a second Formal Complaint and recommended that Judge Ginsberg be retired based on mental disability. *Id.* at 542-43. In June 2004, the Board filed a third Formal Complaint, alleging that Judge Ginsberg had been charged with a felony, involving criminal damage to property. *Id.* at 543.
2. Judge Ginsberg dismissed criminal charges without allowing the prosecutor to be heard, retaliated against lawyers who filed ethics complaints, and forced a criminal defendant to choose among three deputies he would fight with. *Id.* at 545-48. “It is likely that, standing alone, this series of judicial violations would not warrant removal from office.” *Id.* at 549. Judge Ginsberg was, however, removed because he also committed two crimes and lied about the crimes. *Id.* at 549-50.
3. “In his submission to our court, Judge Ginsberg argues that removal from the bench is an unnecessary disciplinary sanction, not because his mental illness mitigates his misconduct, but because he has already been suspended from his position as a judge and he did not file for reelection, which means that his term expires at the end of this year. He asserts that he is, in essence, “already gone.” Therefore, as we understand it, Judge Ginsberg’s primary argument concerning disability is not that his disability bars disciplinary removal, but that it entitles him to disability retirement.” *Id.* at 550-51.
4. The Court rejected Judge Ginsberg’s argument: “[N]otwithstanding the evidence of Judge Ginsberg’s mental illness, we adhere to our conclusion that the Board established significant misconduct that warrants Judge Ginsberg’s removal from office.” *Id.* at 551.
5. The Court ordered Judge Ginsberg removed and retired, and determined that notwithstanding removal, he would receive retirement benefits. *Id.* at 553.

C. *In re Rice*, 515 N.W.2d 53 (Minn. 1994).

1. Judge Rice engaged in numerous angry behaviors directed to staff, “all of which conduct had the effect of harassing, humiliating, intimidating and causing members of his staff to feel physically threatened and creating a hostile working environment for them.” *Id.* at 55. The state had to pay settlement amounts to some of the employees. *Id.*
2. Judge Rice was treated for many years for bipolar disorder. *Id.* at 54. Three psychiatrists provided opinions. *Id.* Judge Rice and the Board entered into a stipulation, approved by the court. *Id.* Judge Rice admitted Code violations, including bringing the judiciary into disrepute. *Id.* at 55. Rice agreed to a 60-day suspension, to pay \$3500, to be subject to monitoring, to follow psychiatric treatments, disclose treatment information to the Board, and be on probation. *Id.* at 55-56.

D. *In re McDonough*, 296 N.W.2d 648, 697 (Minn. 1979). The Supreme Court considered Judge McDonough’s “medical and alcohol problems” in determining the appropriate discipline.

LIX. **DISABILITY PROCEEDINGS AND DETERMINATIONS – RULE 16.**

- A. **Constitution.** Minnesota Constitution article 6, section 9 authorizes the Legislature to “provide for the retirement, removal or other discipline of any judge who is disabled, incompetent or guilty of conduct prejudicial to the administration of justice.”
- B. **Disability Determination – Rule 16.** Board Rule 16 is titled, “Special Provisions for Cases Involving Disability.” Rule 16(a) provides: “When it appears that a judge may have a disability as defined by these rules, the board shall follow the same procedure used with respect to misconduct, except as modified by this rule.”
- C. **Disability Benefits – 2006 Statutory Amendments.** In 2006, the Minnesota Legislature amended the statutes related to the retirement of judges based on disability. 2006 Minn. Session Laws, ch. 271, art. 11, § 145. The pre-2006 statute permitted the Governor or the Supreme Court to retire a judge based on disability and to provide for the judge to receive disability benefits. *See* Minn. Stat. § 490.101, subd. 2 (2004). Although the Supreme Court continues to have the authority to retire a judge due to disability, only a Governor-ordered disability retirement entitles a judge to receive disability benefits. Minn. Stat. § 490A.02, subds. 3, 5(b) (2016); Minn. Stat. § 490.124, subd. 4 (2016).
- D. **Appointment of Counsel.** Rule 16(h) provides that where a judge in disability proceedings “is not represented by counsel,” the Board or presider “shall appoint an attorney to represent the judge at public expense.” The ABA Model Rule provides that counsel “may” be appointed. ABA Model Rules for Judicial Disciplinary Enforcement r. 27(3) (Am. Bar Ass’n 1994).
- E. *In re Ginsberg*, 690 N.W.2d 539 (Minn. 2004). See discussion in Dispositions Involving Psychological and Chemical Problems, above.

- F. **2013 Disability Determination.** During a disciplinary investigation, a judge asserted a psychological disability. The Board then initiated an investigation under Board Rules 6(d) and 16. The judge submitted a letter to the Governor applying for disability retirement. The Governor then “order[ed] and direct[ed] the disability retirement” of the judge pursuant to Minnesota Statutes chapter 490, which entitled the judge to retirement compensation. The Board ended its inquiry and closed the file.

LX. DISCIPLINE, SANCTIONS, PURPOSE.

- A. **Sanctions.** The types of discipline are called “sanctions.” Board Rule 11(b)(2).

B. Purpose Not to Punish But to Protect.

1. “In determining the appropriate sanction, we are guided by the principle that the purpose of judicial discipline is not to punish, but ‘to protect the public by insuring the integrity of the judicial system.’” *In re Ginsberg*, 690 N.W.2d 539, 548 (Minn. 2004) (quoting *In re Miera*, 426 N.W.2d 850, 858 (Minn. 1988)). The sanction imposed ‘must be designed to announce our recognition that misconduct has occurred, and our resolve that similar conduct by this or other judges will not be condoned in the future.’ *In re Miera*, 426 N.W.2d at 858. We ‘afford no particular deference’ to the recommended sanction of the panel or the Board, and independently review the record to determine the discipline, if any, to impose. *In re Blakely*, 772 N.W.2d 516, 523 (Minn. 2009).” *In re Karasov*, 805 N.W.2d 255, 275 (Minn. 2011).

C. Penalties and Fines – Rejected or Withdrawn.

1. *In re Perez*, 843 N.W.2d 562 (Minn. 2014). The Board’s initial brief to the Supreme Court recommended a civil penalty. *Id.* at 568 n.12. The Board’s reply brief withdrew this request. *Id.*
2. *In re Stacey*, 737 N.W.2d 345 (Minn. 1981). “The board recommended that Judge Stacey be assessed a civil penalty of \$3,000. In light of Judge Stacey’s commendable decision to bring this matter to the attention of the Board on Judicial Standards, and given that the purpose of a judicial sanction is not to punish but to insure the integrity of the judicial system, we conclude that a monetary penalty is neither necessary nor warranted here.” *Id.* at 351.
3. *In re Roberts*, No. 51071 (Minn. Jan. 20, 1981). The Board recommended a public reprimand and a fine of \$10,000. *Id.* slip op. at 1. The Supreme Court stated that “the recommended reprimand is hereby imposed,” but the Court then stated: “Therefore, it is the judgment of this Court that Richard S. Roberts be and hereby is publicly censured.” *Id.* slip op. at 1-2. The Court abated the fine, stating that Roberts had lost his bid for re-election and that his judicial service ended December 31, 1981. *Id.* slip op. at 1.

D. Penalties, Fines, Forfeitures – Imposed.

1. *In re Thuet*, File No. 06-100 (Apr. 19, 2007). The Board issued a public reprimand and a \$3500 penalty for Judge Thuet's handling an acquaintance's tickets without notice to the County Attorney. *Id.* at 1.
2. *In re McDonough*, 296 N.W.2d 648 (Minn. 1979). The Supreme Court ordered "that Judge McDonough is censured for the violations of the Code of Judicial Conduct inherent in the incidents discussed herein and shall forfeit 3 months' salary as a fine." *Id.* at 649.
3. *In re Sovis*, File No. 08-31 (Aug. 12, 2008). The Board issued a public reprimand and imposed a civil penalty of \$1000. *Id.* at 1.
4. *In re Snyder*, 336 N.W.2d 533 (Minn. 1983). The Court approved a stipulation pursuant to which Snyder would be censured and would pay \$5000 toward costs of the proceeding. *Id.* at 536.

E. Probation.

1. *In re Sandeen*, No. 48183 (Minn. Oct. 27, 1977).
 - a. The Supreme Court approved a stipulation between Judge Sandeen and the Board. *Id.* slip op. at 1. Sandeen acknowledged that he is an alcoholic, averred that he has received in-patient treatment and is active in Alcoholics Anonymous, and agreed to abstain from alcohol and to be supervised by a person who will be chosen by the Board and report to the Board. Stipulation at 1, *In re Sandeen*, No. 48183. Sandeen also agreed that "should he again indulge in the use of alcohol," he may be removed from office. Stipulation at 2, *In re Sandeen*, No. 48183.
2. *In re Sears*, No. 81-1264 (Minn. July 28, 1982). Judge Sears agreed to removal if he resumes the use of alcoholic beverages. Stipulation at 4, *In re Sears*, No. 81-1264.
3. See "Habitual Intemperance" above for more detail.

F. Suspensions.

1. *In re Anderson*, 312 Minn. 442, 252 N.W.2d 592 (1977). Judge Anderson was suspended for three months for undisclosed loans from lawyers, multiple violations of the 90-day rule and other violations. *Id.* at 448, 252 N.W.2d at 595. At the beginning of discipline proceedings, Anderson had 12 pending matters more than 90-days old, one of them submitted in 1969. *Id.* at 445, 252 N.W.2d at 593. The Referee did not find credible Anderson's claim that his tardiness was occasioned by a "mental sickness." *Id.* at 445-46, 252 N.W.2d at 593.
2. *In re Rice*, 515 N.W.2d 53 (Minn. 1994). Over several years, Judge Rice exhibited extreme anger toward his judicial staff. *Id.* at 55. The conduct included shouting, slamming a door hard enough to cause a clock to fall from the wall, approaching staff so abruptly and angrily that other staff intervened, ignoring staff whom he had invited into chambers for lengthy periods, and engaging in harsh and unjustified criticism. *Id.*

- Staff members sued, alleging a hostile work environment and the State of Minnesota paid substantial settlements. *Id.* The judge suffered from bipolar disorder and other psychological problems. *Id.* at 54. Pursuant to stipulation, the Supreme Court suspended the judge for 60 days, placed him on probation, provided for monitoring his judicial performance and continuation of psychological treatment, and ordered him to pay the Board \$3500. *Id.* at 55-56.
3. *In re Miera*, 426 N.W.2d 850 (Minn. 1988). Judge Miera sexually harassed his court reporter, Johnson. *Id.* at 854. “[O]n two occasions, while staying at Johnson’s apartment, Miera lay down next to Johnson and touched Johnson’s back against Johnson’s wishes; Miera told Johnson that someday the two of them would have sexual relations; and Miera kissed Johnson on the lips in Miera’s court chambers without Johnson’s consent.” *Id.* The Court found that these acts “demonstrate a serious abuse of the power inherent in Judge Miera’s position. That conduct jeopardizes confidence in the integrity of the judiciary and brings the office into disrepute.” *Id.* at 856. Judge Miera thereby violated Canon 2, by impairing public confidence in the integrity of the judiciary, and other standards. *Id.* at 855-56. The Court rejected Judge Miera’s argument that he had not violated a statute prohibiting harassment, because that statute was enacted for civil liability purposes, not judicial discipline. *Id.* at 856. Judge Miera was suspended for one year. *Id.* at 859.
 4. *In re Blakely*, 772 N.W.2d 516 (Minn. 2009). Judge Blakely negotiated a discount in legal fees charged in connection with his divorce. *Id.* at 519-20. At the same time, Judge Blakely provided alternative dispute resolution appointments to divorce lawyer’s law firm. *Id.* at 519. His conduct, “created a perception that he was using his position as a judge to secure a discount on his legal fees by making mediation appointments to his attorney.” *Id.* at 527. The court accepted the hearing panel finding that “the Board did not establish by clear and convincing evidence an actual quid pro quo.” *Id.* at 526. This conduct was prejudicial to the administration of justice; Judge Blakely was suspended, and he was also disciplined as a lawyer. *Id.* at 528.
 5. *In re Karasov*, 805 N.W.2d 255 (Minn. 2011). Judge Karasov was found not to have maintained a residence in Hennepin County for three months. *Id.* at 265. She also was found to have made false or misleading statements to the Board regarding residence. *Id.* at 270. The hearing panel recommended a 90-day suspension, but the Court imposed a six month suspension. *Id.* at 263, 275.
 6. *In re McDonough*, 296 N.W.2d 648 (Minn. 1979). The Supreme Court ordered “that Judge McDonough is censured for the violations of the Code of Judicial Conduct inherent in the incidents discussed herein and shall forfeit 3 months’ salary as a fine.” *Id.* at 649.

G. Interim Suspension.

1. *Rule 15*. Board Rule 15 provides for interim suspension upon a judge being charged with a felony, or “in any proceeding under these rules.” Rule 15(a), (b). In the latter case, Rule 15(c) provides for a prompt hearing “upon application for review of the interim suspension order.”
2. *Statutory Background*. A statute provides that the Supreme Court “may” suspend a judge if certain criminal charges are brought, or the Board recommends removal or retirement. Minn. Stat. § 490A.02, subd. 1 (2016). The statute also provides that, after such suspension, “the conviction becomes final, the Supreme Court shall remove the judge from office.” *Id.* § 490A.02, subd. 2.
3. *In re Pendleton*, 870 N.W.2d 367 (Minn. 2015).
 - a. Pursuant to Rule 15(b), the Supreme Court sua sponte suspended Judge Pendleton as of the close of business on the day of oral argument, “pending a final decision by the court as to the ultimate discipline.” *In re Pendleton*, No. A14-1871 (Minn. Sept. 8, 2015). Interim suspension was not a subject of oral argument or briefing. Judge Pendleton did not apply for review of the interim suspension order.
 - b. The hearing panel found that Judge Pendleton had filed a false Affidavit of Candidacy, with intent to deceive. *See Pendleton*, 870 N.W.2d at 375. The panel also found that he intentionally abandoned residence in his judicial district for a period of four and one-half months. At oral argument, Judge Pendleton’s counsel acknowledged that Judge Pendleton had committed each of the elements of perjury, but one day after oral argument, counsel for the Board filed a correction, stating that the false portion of the Affidavit of Candidacy, relating to residence, was not under oath. Letter from William J. Egan, Atty. for the Board, to Minn. Sup. Ct. JJ. (Sept. 9, 2015) (on file with Minn. Sup. Ct.), *In re Pendleton*, 870 N.W.2d 367 (Minn. 2016) (No. A14-1871). The Formal Complaint also stated that this portion of the Affidavit was not under oath. Formal Compl. at 2, *In re Pendleton*, 870 N.W.2d (Minn. Oct. 31, 2014).
 - c. The hearing panel recommended suspension of Judge Pendleton for a period of at least six months, with panel members individual recommending six, sixteen, and somewhere between six and sixteen months. 870 N.W.2d at 375. The Board recommended an eight-month suspension. *Id.* at 387. Judge Pendleton was ultimately removed from office and, by separate proceeding, was suspended as a lawyer for 90 days, beginning March 1, 2016. *Id.* at 389; *In re Pendleton*, 896 N.W.2d 296, 296 (Minn. 2016).
4. *In re Finley*, 572 N.W.2d 733 (Minn. 1997).
 - a. Before becoming a judge, Finley notarized documents in blank, to which others affixed false signatures. *Id.* at Finley was convicted of a misdemeanor and received a public censure as a lawyer. *In re Finley*, 261 N.W.2d 841, 842, 845-46 (Minn. 1978).

- b. On August 26, 1997, the Supreme Court denied, as premature, a Board petition for interim suspension of Judge Finley. *In re Finley*, 572 N.W.2d 733, 733 (Minn. 1997). However, Judge Finley thereafter applied for interim suspension and the Court granted the application, “until final disposition of any pending criminal and disciplinary proceedings or until further order of this court.” *Id.*
5. *In re Kirby and Winton*, 350 N.W.2d 344 (Minn. 1984).
- a. This case includes extensive discussion of allocation of authority in judicial discipline matters, as between the Court and the Legislature. *Id.* at 346-49.
 - b. The judges, both of whom were subject to formal complaints by the Board, challenged the constitutionality of Minnesota Statute section 490.16, subdivision 1 (1982), “if [the statute] is interpreted to provide automatic suspension with pay upon the filing of a recommendation for removal by the Board.” *Id.* at 346. *See* Minn. Stat. § 490.16, subd. 1 (1982) *replaced by* Minn. Stat. §490A.02, subd. 2 (2006).
 - c. The Court held that the statute “does not preclude the exercise of discretion by this Court in determining whether to suspend a judge recommended for removal by the Board on Judicial Standards.” 350 N.W.2d at 349.
 - d. Because Winton had already been permanently removed from office, his challenge to the statute was dismissed as moot. *Id.*
 - e. “With respect to respondent, Judge Kirby, we decline to suspend him pending disposition of the board’s recommendations, and the order to show cause is discharged.” *Id.*
- H. **Removals.** *In re Pendleton*, 870 N.W.2d 367 (Minn. 2015); *In re Perez*, 843 N.W.2d 562 (Minn. 2014); *In re Ginsberg*, 690 N.W.2d 539 (Minn. 2004); *In re Winton*, 350 N.W.2d 337 (Minn. 1984); *In re Gillard*, 271 N.W.2d 785 (Minn. 1978). At the instigation of the Governor, *Perez* was denied confirmation by the Senate, resulting in his immediate removal from office. *Perez*, 843 N.W.2d at 563. The Board sought removal by the Minnesota Supreme Court as well, but the Court censured him. *Id.* at 570. *Ginsberg* and *Winton* both involved criminal convictions, both misdemeanors. *Ginsberg*, 690 N.W.2d at 555; *Winton*, 350 N.W.2d 342. *Gillard* involved multiple acts of serious misconduct committed before becoming a judge. *Gillard*, 271 N.W.2d at 813.

LXI. INVESTIGATIONS AND SUBPOENAS.

- A. **Basis for Investigation – Reasonable Basis to Believe Code Violation May Have Occurred.**
- 1. *Subpoena.* The Board asked Judge Agerter to give a recorded statement regarding two subjects of complaint – his alcohol use and his having an affair. *In re Agerter*, 353 N.W.2d 908, 910 (Minn. 1984) Judge Agerter declined. *Id.* The Board issued a subpoena. *Id.* On Judge Agerter’s motion, the Ramsey County District Court quashed

the subpoena. *Id.* The Board sought a writ of prohibition. *Id.* at 910-11. The Minnesota District Judges Association and the Minnesota Civil Liberties Union joined Judge Agerter as amici. *Id.* at 911.

2. *Supreme Court.* The Minnesota Supreme Court found the subpoena to have been properly issued. *Id.* at 913. As to the alcohol use issue, the Court granted a writ prohibiting quashing of the subpoena. *Id.* at 915. As to the adultery issue, the Court sustained the order quashing the subpoena. *Id.* The Court explained by balancing the right to privacy, the lack of allegation of public misbehavior or commercial sex, and the Board's interest in the integrity of the judiciary. *Id.*
3. *Explanation.* "We hold, therefore, consistent with its rules and due process, that the Board has the authority to proceed with a preliminary investigation when, on the information before it, the Board has a reasonable basis to believe there might be a disciplinary violation." *Id.* at 912.

- B. **"Baseless Complaint."** Baseless complaints are sometimes investigated, because the fact that the complaint has no merit cannot be determined from the complaint itself. "Even the baseless complaint—an occupational hazard of judges, unfortunately—may deserve inquiry, if only to vindicate the judge by its dismissal and to ensure public confidence in the judicial system." *Id.* at 913.

LXII. JUDICIAL AND LAWYER DISCIPLINE FOR CONDUCT AS A LAWYER BEFORE BECOMING A JUDGE.

A. **Board Rule 6Z, "Procedure for Conduct Occurring Prior to Assumption of Judicial Office."**

1. *Notice, Investigation.* Complaints of a judge's unprofessional conduct before assuming judicial office are primarily investigated by the Office of Lawyers Professional Responsibility, under the Rules on Lawyers Professional Responsibility (RLPR), the procedural rules applicable to lawyers. Board Rule 6Z(b). OLPR and the Board must notify each other of such matters. Board Rule 6Z(a).
2. *Board Formal Complaint.* If a public disciplinary proceeding is authorized and commenced by OLPR under the RLPR, the Board "may, after finding reasonable cause . . . proceed directly to the issuance of a Formal Complaint . . ." Board Rule 6Z(c).
3. *Record of Lawyer Discipline Admissible in Judicial Disciplinary Proceeding.* The lawyer discipline record, including transcript, findings and conclusions, is admissible in a related judicial discipline proceeding. Board Rule 6Z(d). "[A]dditional evidence, relevant to alleged violations of the Code of Judicial Conduct," is also admissible. *Id.*

B. *In re Gillard*, 260 N.W.2d 562 (Minn. 1977) (*Gillard I*); 271 N.W.2d 785 (Minn. 1978) (*Gillard II*).

1. *The Office of Lawyers Professional Responsibility*. In 1976, the Lawyers Professional Responsibility Board (LPRB) commenced disciplinary action against Judge Gillard for alleged violations of the Code of Professional Responsibility occurring before Judge Gillard became a judge. *Gillard I*, 260 N.W.2d at 563. Judge Gillard sought a writ of prohibition, alleging that LPRB lacked jurisdiction. *Id.* After trial before the Supreme Court's referee, disbarment was recommended. *Id.* At oral argument, the Board argued that if Judge Gillard was disbarred, he should also be removed from judicial office. *Gillard II*, 271 N.W.2d at 787. The Court directed the Board to conduct a hearing to give Judge Gillard any opportunity to state his position regarding judicial discipline, and stated that the referee's findings would be received in evidence and could not be attacked. *Id.* at 805.
2. *Judicial Board Jurisdiction*. The Court explained its directive: "In finding that the Board on Judicial Standards has authority to scrutinize allegations of misconduct which occurred prior to elevation to judicial office, we adopt a position consistent with the broad language of Minn. St. § 490.16, subd. 3, and consistent with the better-reasoned opinions of other jurisdictions construing similar statutes." *Gillard I*, 260 N.W.2d at 564 n.2. (In 2006, the cited statute was repealed and replaced with Minnesota Statutes § 490A.02.)
3. *Judicial Board Hearing and Recommendation*. The Board accepted the referee's report from the LPRB as final and did not conduct any independent investigation. *Gillard II*, 271 N.W.2d at 810. The Court rejected Judge Gillard's due process argument against this procedure. *Id.* at 813. The Board considered only what judicial discipline was warranted on the basis of the misconduct already found. *Id.* The Board recommended removal. *Id.* at 787. The Court agreed. *Id.* at 813.

C. *In re Finley*, File No. 97-65 (Mar. 13, 1998); 572 N.W.2d 733 (Minn. 1997).

1. *Public Reprimand*. In March 1998, the Board issued a public reprimand to Judge Finley. The Board's March 13, 1998 news release, the 1997 Supreme Court order cited above, and a March 21, 1998 *Minneapolis Star Tribune* article provide the basis for the following summary.
2. *Basis for Discipline*. Judge Finley was reprimanded, as a judge, "for voting as a Ramsey County Commissioner in 1995 and 1996 to approve property tax abatements for one of his legal clients and for a corporation in which he owned a 50% interest." Press Release, *In re Finley*. File No. 97-65, at 1. This conduct occurred before Judge Finley was elected as a judge. The conduct violated Rule 1.11(c), Minnesota Rules of Professional Conduct, a conflict of interest rule governing conduct by a public official. *Id.* Judge Finley was also fined \$1000. *Id.*
3. *Interim Suspension, Criminal Charge*. On August 26, 1997, the Supreme Court denied, as "premature," the Board's petition for interim suspension with pay. In December

1997, Judge Finley was indicted for three gross misdemeanors related to the above tax abatements. Also in December, Judge Finley wrote to the Supreme Court, requesting interim suspension with pay. The Court granted the request. 572 N.W.2d at 733. In February 1998, the criminal charges were dismissed, after Judge Finley agreed to pay \$1000 in costs. In March 1998, after the judicial discipline proceeding was terminated by stipulation and public reprimand, Judge Finley's interim suspension was terminated and he was reinstated as a judge.

- D. **Cynthia Gray, *Conduct Before and After the Bench Part I, Jud. Conduct Rep., Summer 2015*, at 1, 6, http://www.ncsc.org/~media/Files/PDF/Topics/Center%20for%20Judicial%20Ethics/JCR/JCR_Summer_2015.ashx.** (“The board’s jurisdiction shall include conduct that occurred prior to a judge assuming judicial office. The Office of Lawyers Professional Responsibility shall have jurisdiction to consider whether discipline as a lawyer is warranted in matters involving conduct of any judge occurring prior to the assumption of judicial office.”) (quoting R. Bd. Jud. Standards 2(c) (2009)).

LXIII. LAWYER DISCIPLINE FOR CONDUCT OCCURRING WHILE A JUDGE.

- A. **Rule 14(f).** This rule provides: “When the panel recommends the suspension or removal of a judge, the Court shall promptly notify the judge and the Office of Lawyers Professional Responsibility and give them an opportunity to be heard in the Court on the issue of lawyer discipline.” Before 2016, the rule provided for such notice and hearing on lawyer discipline only when the Board recommended removal.
- B. ***In re Bartholet*, 293 Minn. 495, 198 N.W.2d 152 (1972).** Judge Bartholet pled guilty to a crime, and resigned his judicial office. *Id.* at 496, 198 N.W.2d at 153. Judge Bartholet appointed appraisers of probate properties and caused them to be paid exorbitantly, with the understanding that the appraisers would contribute generously to Judge Bartholet’s campaign account. *Id.* at 498, 198 N.W.2d at 154. Unlike other judges who did somewhat similar things, Judge Bartholet used his campaign account for personal purposes. *Id.* at 499, 198 N.W.2d at 155. Proceedings were apparently lengthy, having been initiated in or before 1970 and concluded on May 19, 1972. *Id.* at 496, 198 N.W.2d at 152 n.1. Judge Bartholet was disbarred. *Id.* at 499, 198 N.W.2d at 155. A footnote in the opinion noted: “By order dated December 16, 1970, the functions of the Board of Law Examiners [petitioner in the matter] relating to discipline of attorneys were assumed by the State Board of Professional Responsibility.” *Id.* at 496, 198 N.W.2d at 152 n.1.
- C. ***In re Todd*, 361 N.W.2d 813 (Minn. 1985); Feb. 14, 1985 Report of Panel of Referees.**
1. Justice Todd, while a member of the Minnesota Supreme Court, took the multi-state bar examination. *Id.* at 30. He was found using reference sources. *Id.* He claimed he mistakenly understood the exam was open-book. *Id.* at 25.
 2. The Board commenced a proceeding. *Id.* at 25. Several members of the court of appeals were appointed as a special Supreme Court. *Id.* at 25-26.
 3. A panel of judges conducted an evidentiary hearing. *Id.* at 25. They found that Justice Todd used books in the exam “contrary to honest testing procedures known to [him];

such actions . . . constituting a dishonest submission by [Justice Todd] on a Multistate examination” *Id.* at 30. Justice Todd then resigned from the Supreme Court. William J. Wernz, *Minnesota Legal Ethics*, 25 (Minn. St. Bar Ass’n) (6th ed. 2016).

4. By order dated April 8, 1985, the special court dismissed the Judicial Board complaint, finding that Todd’s resignation “rendered a hearing in connection the referees’ findings moot” *Id.* at 1. The court also found that, “Rule 12(g) of the Rules of the Board on Judicial Standards imposes a duty on this court to determine whether discipline as a lawyer is also warranted, and this court finds that discipline against John Todd as a lawyer is not warranted.” *Id.* Further, the court ordered, “The Board of Lawyers Professional Responsibility [sic] is hereby notified of our decision and no action shall be taken by it in connection with the complaint against former Associate Justice John J. Todd.” *Id.* at 2.
5. Further details regarding this matter can be found in William J. Wernz, *Minnesota Legal Ethics*, 25 (Minn. St. Bar Ass’n) (6th ed. 2016), in the chapter, “What Minnesota Legal Ethics is All About,” which is available at <http://www.mnbar.org/publications/ebooks/legal-ethics#.VeitbK3lvcs>.

D. *In re Winton*, 355 N.W.2d 411 (Minn. 1984).

1. The Office of Lawyers Professional Responsibility (OLPR) Director sought an opportunity to be heard on whether Winton, having been removed from office, should also be disciplined as a lawyer. 355 N.W.2d at 411-12. The Court held that OLPR lacked jurisdiction to proceed in this case. *Id.* at 412.
2. The Court explained: “We reject the Director’s position. In considering and deciding *Complaint Concerning Winton*, the court determined, notwithstanding it was ordering removal from judicial office, lawyer discipline was not warranted. We there emphasized that a judge ‘has the responsibility of conforming to a higher standard of conduct than is expected of lawyers *Complaint Concerning Winton*, 350 N.W.2d at 340.’ We concluded that ‘respondent’s prostitution activities, wholly apart from violations of other statutes,’ was sufficient to impose the judicial discipline of removal. *Complaint Concerning Winton*, 350 N.W.2d at 343. -In denying the Director’s motion and in dismissing the proceedings on grounds of lack of jurisdiction, we are only doing so with respect to the acts of misconduct which were before this court and passed on by this court in *Complaint Concerning Winton*, 350 N.W.2d 337 (Minn.1984).” *Id.*

E. ***In re Miera*, 426 N.W.2d 850 (Minn. 1988).** Judge Miera sexually harassed his court reporter. *Id.* at 854. Judge Miera was suspended as a judge for one year. *Id.* at 859. He was also publicly reprimanded as a lawyer. *Id.* at 859. This case is described in detail above.

F. ***In re Ginsberg*, 690 N.W.2d 539, 545 n.5 (Minn. 2004).** Judge Ginsberg committed various acts of misconduct on the bench. *Id.* at 545-48. He was also convicted of two misdemeanors for extra-judicial acts. *Id.* at 549-50. Judge Ginsberg’s judicial discipline

was removal. *Id.* His lawyer discipline was a suspension for one year, followed by transfer to disability inactive status. *Id.* at 556. This case is described in detail above.

- G. ***In re Blakely*, 772 N.W.2d 516 (Minn. 2009).** Lawyer discipline was not imposed on Judge Blakely, but the Court’s order for judicial discipline created a conditional, springing suspension as a lawyer. *Id.* at 528. The Court stated: “We conclude that Judge Blakely’s actions in negotiating and obtaining a substantial legal fee reduction from his personal attorney while contemporaneously appointing the attorney to provide mediation or related services violated Rule 8.4(d) and warrant a public reprimand. If, however, Judge Blakely ceases to be a judge before his term of judicial suspension ends, then Judge Blakely will be suspended from the practice of law for a term equivalent to the balance of his judicial suspension.” *Id.* A footnote stated: “Under Rule 3.10, Minnesota Code of Judicial Conduct (eff. July 1, 2009), a judge may not practice law.” *Id.* at 528 n.8.
- H. ***In re Pendleton*, 876 N.W.2d 296 (Minn. 2016); *In re Pendleton*, 870 N.W.2d 367 (Minn. 2015).** After his removal from judicial office, Pendleton made false statements in his blog about being retired, as opposed to removed. *Id.* at 296. Judge Pendleton had been removed from office for not residing in his judicial district and for filing a campaign affidavit that included a knowingly false statement about his residence. *Id.* Because the hearing panel recommended suspension, rather than removal, lawyer discipline was imposed in a proceeding subsequent to the judicial discipline proceeding. *See* Board Rule 14(f) (2009). This rule was amended effective July 1, 2016, to provide: “When the panel recommends suspension or removal of a judge, the Court shall promptly notify the judge and the Office of Lawyers Professional Responsibility and give them an opportunity to be heard in the Court on the issue of lawyer discipline.”
- I. **Rule 14(f) Amendment.** In 2016, Rule 14(f) was amended, by adding “suspension or” before the word “removal,” as the trigger for the Supreme Court to notify the Office of Lawyers Professional Responsibility and the judge of the opportunity to be heard on the issue of lawyer discipline as well as judicial discipline.

LXIV. JUDICIAL REMOVAL / DISCIPLINE BEFORE 1971 LEGISLATIVE CREATION OF THE BOARD ON JUDICIAL STANDARDS.

- A. **Removal – Exclusive Remedy.** It appears that before the Board on Judicial Standards was created in 1971, and began operations in 1972, there was no means of disciplining a Minnesota judge, other than removing the judge from office. The removal procedures were varied and generally ineffective. In the first 115 years of Minnesota statehood, only one judge was disciplined, by removal after a trial extending for two months. *See* S. Journal, Sitting as a High Court of Eugene St. Julien Cox, at 14 (Dec. 13, 1881).
- B. **Presidential Removal.** In 1851, Millard Fillmore, the President of the United States, removed the Chief Justice of the territorial Minnesota Supreme Court, Aaron Goodrich, apparently for political reasons, rather than misconduct. *United States ex rel. Goodrich v. Guthrie*, 58 U.S. (17 How.) 284, 301 (1854). Goodrich had been presidentially appointed in 1849. *Id.* Goodrich claimed his appointment was for four years and brought a mandamus action, to compel payment of his remaining compensation. *Id.* The U.S.

Supreme Court held it lacked authority to issue the writ. *Id.* at 305. Dissenting justices argued that Fillmore had lacked authority to remove Goodrich and that the writ should issue. *Id.* at 311-14.

- C. **First Impeachment (Acquittal).** In 1878, after impeachment by the Minnesota House of Representatives, and a trial of over 25 days in the Minnesota Senate, Judge Sherman Page was acquitted. Note, *Judicial Disciplinary Proceedings in Minnesota*, 7 Wm. Mitchell L. Rev. 459, 466-67 n.51 (1981). Shortly thereafter, a lawyer, DeWitt Clinton Cooley, published a satirical play, mocking the proceedings. *Id.* The play was titled: “The High Old Court of Impeachment,” and featured a cover, “showing an owl with large ears, one marked ‘law’ and the other marked ‘order,’ perched on a file box around which are a half dozen barking dogs and scattered bank notes.” Douglas A. Hedin, *Forward to The High Old Court of Impeachment 1, 2* (Minn. Legal Hist. Project) (2008).
- D. **Second Impeachment (Conviction).** In 1882, after House impeachment and Senate trial, from January to March 1882, Judge E. St. Julien Cox, was convicted and removed, for intoxication on the bench, and related misconduct, in seven instances. S. Journal, Sitting as a High Court of Eugene St. Julien Cox, at 14 (Dec. 13, 1881). Examples of related misconduct apparently included Judge Cox stating to a slow-moving lawyer, during a sidebar, “Sam Miller, if Pontius Pilate had been as slow in the prosecution of Jesus Christ as you have been in the conduct of this case, the world would not have had the benefit of the Christian religion today.” Fred W. Johnson, *County of Brown – District Court History*, 27-28, *New Ulm Journal* (Oct. 18, 1935), [http://www.minnesotalegalhistoryproject.org/assets/Brown%20Cty%20\(1935\).pdf](http://www.minnesotalegalhistoryproject.org/assets/Brown%20Cty%20(1935).pdf).
- E. **Electoral Removal – Rejected.** In 1913, Minnesota voters rejected a proposed state constitutional amendment that would have provided for recall of public officers by the voters of the state or of the officer’s electoral district. 1913 Minn. Laws 902, 902.
- F. **Gubernatorial Removal.** Governor J. A. A. Burnquist removed Dodge County Probate Judge James F. Martin from office after receiving a removal petition, alleging that Martin made statements opposing United States involvement in World War I. *State ex rel. Martin v. Burnquist*, 141 Minn. 308, 320, 170 N.W. 201, 202 (1918). The removal was reversed by the Minnesota Supreme Court because, although the statements were “at variance with good citizenship,” there was no proof of misfeasance or malfeasance as a judge. *Id.* at 321-22, 170 N.W. at 203. The court explained, “But we are clear that scolding the President of the United States, particularly at long range, condemning in a strong voice the war policy of the federal authorities, expressing sympathy with Germany, justifying the sinking of the Lusitania, by remarks made by a public officer of the jurisdiction and limited authority possessed by the judge of probate under the Constitution and laws of this state, do not constitute malfeasance in the discharge of official duties and therefore furnish no legal ground for removal.” *Id.* at 322, 170 N.W. at 203.
- G. **Resignation / Disbarment.** The Minnesota Supreme Court disbarred a lawyer who committed misconduct while on the bench, pled guilty to a crime, and resigned his judicial office. *In re Bartholet*, 293 Minn. 495, 496, 198 N.W.2d 152, 153 (1972). Judge Bartholet appointed appraisers of probate properties and caused them to be paid exorbitantly, with

the understanding that the appraisers would contribute generously to Judge Bartholet's campaign account. *Id.* at 498, 198 N.W.2d at 154. Unlike other judges who did somewhat similar things, Judge Bartholet used his campaign account for personal purposes. *Id.* at 499, 198 N.W.2d at 155. Proceedings were apparently lengthy, having apparently been initiated in or before 1970 and concluded on May 19, 1972. *Id.* at 496, 198 N.W.2d at 152 n.1. A footnote in the opinion noted, "By order dated December 16, 1970, the functions of the Board of Law Examiners [petitioner in the matter] relating to discipline of attorneys were assumed by the State Board of Professional Responsibility." *Id.*

LXV. PROCEDURES.

- A. **Supreme Court's Power to Suspend and Other Implied Powers.** By statute, the Supreme Court is authorized to "censure or remove a judge," for misconduct. Minn. Stat. § 490A.02, subd. 3 (2016) (formerly Minn. Stat. § 490.16, subd. 3). Judge Anderson, who was found to have violated the Code, took the position that the Court could not suspend him, but could only remove or censure him. *In re Anderson*, 252 N.W.2d 592, 594-95 (1977). The Court concluded, however: "A literal reading of the statute supports Judge Anderson's position. However, keeping in mind the broad language of the constitutional authorization for this legislation, and considering the objective sought by the Legislature of providing a plenary system of judicial discipline which is capable of dealing appropriately with all cases that might arise in any varied factual context, we feel that the grant of absolute power to remove from office implicitly gives us the power to impose lesser sanctions short of removal, in the absence of specific indication to the contrary by the Legislature." *Id.*
- B. **Board Public Reprimands.** Effective January 1, 1996, the Board was authorized to issue public reprimands. Board Rule 6(f)(7) (2009). Before 1996, there were reprimands issued by the Supreme Court, pursuant to stipulations between the Board and judges. *See* Board Rule 11(d) (1990). After the rule amendment, there were fewer Supreme Court disciplines issued pursuant to stipulation, because the Board could issue public reprimands.
- C. **Hearing Panel Dismissal.** Effective July 1, 2009, a hearing panel was authorized to dismiss a Board formal complaint, if the panel did not find clear and convincing evidence of misconduct. Board Rule 11(a). The Board could appeal the dismissal. Board Rule 11(d). An example of a dismissal, appeal, and affirmance of the dismissal is *In re Galler*, 805 N.W.2d 240 (Minn. 2011). Before July 1, 2009, hearing panels made recommendations to the Board, but the Board could adopt its own disposition or recommendation for discipline, subject to a judge's right to appeal to the Supreme Court. Board Rule 11(a), (d) (1996).
- D. **Hearing Panel Disciplines and Discipline Recommendations.** Effective July 1, 2009, a hearing panel could issue a public reprimand, or recommend a variety of disciplines to the Supreme Court. Board Rule 11(b) (2009). If the panel issued a reprimand, and neither the Board nor the judge appealed, the reprimand became final. Board Rule 11(d) (2009). An example of such a disposition is *In re Armstrong*, No. A11-121, File Nos. 09-37, 10-48 (Oct. 31, 2011). <http://www.bjs.state.mn.us/file/news/armstrong-findings-and-recommendations.pdf>.

- E. **Private Disciplines.** Before 1996, the Board issued private reprimands. Board Rule 6(g)(1) (1990). From 1996 to July 1, 2009, the Board issued private warnings. Board Rule 6(f)(1) (1996). The warnings typically alleged that a judge’s conduct “may have violated” specific Code provisions. Appeal of warnings involved public proceedings in the Supreme Court. Board Rules 6(g), 10(a). Since July 1, 2009, the Board has issued admonitions, for “isolated and non-serious” misconduct. Board Rule 6(f)(5)(ii) (2009), Board Rule 6(f)(5)(ii) (2016). Appeal of admonitions is to a private hearing panel appointed by the Supreme Court. Board Rules 6(f)(6), 7.

LXVI. STATUTE OF LIMITATIONS.

- A. **No Statute of Limitations.** Minnesota Statutes section 490A.02, subdivision 4, in effect provides there is no statute of limitations on the Board taking action on a complaint of judicial misconduct.
- B. **1971 Statute Superseded.** Section 490A.02, subdivision 4 superseded a 1971 statute, which had provided a four year statute of limitations, as follows: “On recommendation of the commission on judicial standards, the supreme court may retire a judge for disability that seriously interferes with the performance of his duties and is or is likely to become permanent, and censure or remove a judge for action or inaction occurring not more than four years prior to such action being reported to the commission on judicial standards that may constitute persistent failure to perform his duties, habitual intemperance or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.” Minn. Stat. § 490.16, subd. 3 (1971).

LXVII. RESOURCES.

A. Issues in Using Resources.

1. *Compilation / Critical Collection.* In some cases, commentaries on judicial ethics may collect opinions from various courts and boards without making judgments or comments on the merits of the opinions.
2. *Codes.* Adoption by various jurisdictions of ABA Model Code amendments is very uneven. The 2007 amendments were adopted in Minnesota in 2009, but the great majority of states lagged behind Minnesota, and some did not adopt the amendments. In addition, there are variations from the Model Code even in those states whose codes are largely based on the Model Code. Readers should take note of the code provisions on which any particular opinion is based. For example, the *Annotated Model Code of Judicial Conduct* acknowledges that it cites “little authority citing to the rules in their current structure” Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* vii (2d ed. 2011).
3. *Uneven Updating.* The updating of commentaries is often very uneven. For example, in 1990, Model Code Rule 2.10(A) was amended to qualify a prohibition on judicial comment, so that comment was permitted unless it “might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court” See Model Code Canon 3(B)(9) (1990). The *Annotated Model Code of*

Judicial Conduct took account of this amendment by adding a section on Rule 2.10 constitutional issues. Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* 211 (2d ed. 2011). However, the following commentary was not changed, even though it does not comport with the amendment, “Rule 2.10(A) clearly prohibits judges from commenting on the merits of a case pending in their court or in another court. . . . Judges are not only prohibited from commenting on the merits of cases pending before them, they are likewise prohibited from commenting on the merits of cases in other courts, as well as other judges’ decisions or court practices.” *Id.* at 206.

B. Arthur Garwin et al., *Annotated Model Code of Judicial Conduct* (2d ed. 2011).

1. This resource is available for purchase from the ABA.

C. National Center for State Courts, Center for Judicial Ethics.

1. Topic Index: <http://www.ncsc.org/Topics/Judicial-Officers/Ethics/Center-for-Judicial-Ethics/Judicial-Conduct-Reporter/JCR-Topic-Index.aspx>.
2. Cynthia Gray, Director, cgray@ncsc.org.
3. The Judicial Conduct Reporter is available at the NCSC website <http://www.ncsc.org/cje>.

D. Charles Gardner Geyh, et al., *Judicial Conduct and Ethics* (5th ed. 2013). New editions of this work are published frequently.

E. Minnesota Case Law.

1. *Lawyer Discipline Cases*. These cases are frequently cited in judicial discipline cases, usually for procedural points. It must be remembered that judges are subject to higher standards than lawyers.
2. *Criminal Cases*. “A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct.” Minn. R. Crim. P. 26.03, subd. 14(3). Minnesota appellate courts have ruled on several cases in which a defendant has invoked this rule to seek reversal. These cases include: *State v. Pratt*, 813 N.W.2d 868 (Minn. 2012); *State v. Jacobs*, 802 N.W.2d 748 (Minn. 2011); *State v. Schlienz*, 774 N.W.2d 361 (Minn. 2009); *State v. Burrell*, 743 N.W.2d 596 (Minn. 2008).

F. Note, *Judicial Disciplinary Proceedings in Minnesota*, 7 Wm. Mitchell L. Rev. 459 (1981).