

August 16, 2007

**SOME SIGNIFICANT NEW AND CARRYOVER PROVISIONS
IN THE
2007 ABA MODEL CODE OF JUDICIAL CONDUCT**

- The "appearance of impropriety" standard as an independent basis for discipline appears in Rule 1.2. The Commission's final draft deleted this standard as an independent basis for discipline but the Conference of Chief Justices objected and the Commission agreed to reinstate it.
- In Rule 1.3, the new Code forbids judges to "abuse the prestige of judicial office to advance the personal or economic interests of the judge or others," whereas the 1990 Code said a judge "shall not lend the prestige of office" to such interests.
- Rule 2.2 cmt. [4], which is new, allows judges "to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." Rule 2.2 itself requires that judges perform all duties "fairly and impartially."
- Rule 2.3(B) adds "or engage in harassment" to the prohibition against a judge manifesting bias based on a list of categories and adds "gender, ethnicity, marital status, and political affiliation" to that list. Rule 2.3(C), which states that judges "shall require lawyers . . . to refrain from manifesting bias or prejudice," also adds "harassment" and adds the same categories to the list.
- Rule 2.6(B) continues to permit judges to "encourage parties...and their lawyers to settle" but directs that the judge "not act in a manner that coerces any party into settlement." New commentary identifies six factors a judge may consider in deciding the judge's "settlement practice" and raises the possibility that in some instances participation in settlement talks may lead to disqualification.
- Rule 2.8 cmt. [3], which is new, permits a judge, if not legally prohibited, to "meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case."
- Rule 2.9(A)(2) continues to permit a judge to consult with an independent expert but the rule now requires "advance notice to the parties" and "a reasonable opportunity to object and respond to the notice and to the advice received."
- Rule 2.9(B) is new and requires notification to the parties if a judge "inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter." The Reporter explains that this rule responds to the risk of such things as a misdirected fax.
- For some specialized courts, Rule 2.9 cmt. [4] contains a new exception to the

prohibition against ex parte contacts as follows:

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

- Rule 2.9 cmt. [6], which is new, makes it clear that the prohibition against independently investigating the facts extends to doing so by electronic research.
- Rule 2.9 cmt. [7] is new and allows a judge to "consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code."
- Rule 2.10(E) is new. It permits a judge "to respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter." This new authority is subject to Rule 2.10(A), which is present in the 1990 Code and which forbids public comment "that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court...."
- Disqualification based on the interests of family members in Rule 2.11 now extends to a "domestic partner," which the Terminology now defines as "a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married."
- Comment [2] to Rule 2.11, on disqualification, is new. It provides that "a judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed."
- Rule 2.14 newly provides that a judge who has "a reasonable belief" that a judge's or lawyer's performance "is impaired" by mental or physical illness or alcohol or substance abuse must "take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program."
- Rule 3.2(B), which is new, allows a judge to make a voluntary appearance at a public hearing convened by an executive or legislative body "in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties."
- The prior Code prohibited a judge from belonging to an organization that discriminated based on race, sex, religion, and national origin. Rule 3.6 adds gender, ethnicity, and sexual orientation to the list. Comment [3] now requires a judge to "resign immediately" from any such organization, whereas previously judges were allowed to remain members for a year during which time they could

work to change the rules of the organization. As before, there are exceptions for organizations identified in cmts. [2], [4], and [5] of the rule, including religious organizations, and for "national or state military service."

- A new set of rules (Rules 3.7(A)(3-5)) permits judges to solicit members for an organization even though membership dues help support the organization; to appear, speak and be honored at fund-raising events of an organization; and to make recommendations to a grant making organization *but in each case* only if the particular organization is "concerned with the law, the legal system, or the administration of justice." Also, Rule 3.7(A)(4) allows a judge to be featured and receive an award at events sponsored by educational, charitable, and like organizations that are not "concerned with" the law, but only if the event is not a fundraiser. (The Rule 3.7 authority is subordinate to Rule 3.1, which, among other things, forbids conduct "that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.")
- Rule 3.7 cmt. [4] continues to allow a judge's name to appear on fund raising and membership solicitation letters of organizations identified in Rule 3.7. The judge's title or office may also be listed "if comparable designations" are used for others.
- Rule 3.14, which is new, addresses expenses to and at seminars. It permits a judge to "accept reimbursement of necessary and reasonable expenses for travel, food, lodging, and other incidental expenses" associated with participation in "extrajudicial activities permitted by this Code." The rule also permits reimbursement of these expenses "when appropriate to the occasion, by the judge's spouse, domestic partner, or guest." The fact of reimbursement for expenses at these events must be made known "within 30 days following the conclusion of the event or program." Posting on the court's web site is required "when technically feasible." Comment [3] to Rule 3.14 lists eight separate factors a judge should consider "when deciding whether to accept reimbursement or a fee waiver for attendance at a particular activity." These factors bear on whether or not reimbursement would "appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."
- Rule 4.1, whose subject is political activity of judges and judicial candidates (via election or appointment), is mostly unchanged except for three additional prohibitions in paragraphs (A)(6, 7, 10). Most notable, though, are new cmts. [11-15], which describe what judges and non-judge candidates may ethically say and not say consistent with the ABA's reading of *Republican Party of Minnesota v. White*.

- Stephen Gillers