

Canon 3B(7)
Ex Parte Communications
Professor Leslie W. Abramson
January 14, 2004

Professor Abramson suggests that the Commission consider the following modifications to the ex parte communications section of Canon 3B(7) that he proposed in Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 Houston L. Rev.1343 (2000) (examining, *inter alia*, ex parte communications permitted under the Model Code of Judicial Conduct (requests for help from disinterested experts, communications with other judges and with court personnel, contacts to resolve a case through mediation or settlement, judicial requests for findings of fact and conclusions of law, and ex parte contacts that are authorized by law) and proposing revisions of the Code of Judicial Conduct to assist judges, lawyers, and lay members of judicial conduct organizations in evaluating judicial disqualification or discipline). (Additions underlined; deletions struck through.)

“A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications are authorized for either scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) If a judge affords the parties reasonable opportunity to respond, a judge may seek and obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge by if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(i) Notifying the parties in writing both about the person who was consulted and the substance of the advice; or

(ii) Inviting the person to file a brief amicus curiae.

(c) A judge may consult with ~~court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.~~

(i) Law clerks and other court personnel on the judge's staff whose function is to aid the judge in carrying out the judge's adjudicative responsibilities, or

(ii) Other judges in the same jurisdiction and on the same court level. A copy of any written communication or the substance of any oral communication between judges in different jurisdictions or on different court levels must be provided to all parties to the proceedings that were the subject of the communication.

(d) A judge may, with the prior consent of all the parties and their lawyers, confer separately with the parties and/or their lawyers in an effort to mediate or settle matters pending before the judge ~~initiate or consider any ex parte communications when expressly authorized by law to do so.~~

(e) A judge may initiate, permit, or consider any ~~ex parte~~ communications ~~when expressly authorized by law to do so.~~

Canon 3D(1)
Judicial Misconduct
Professor Leslie W. Abramson
January 14, 2004

Professor Abramson suggests that the Commission consider the following modification of a judge's duty to report judicial misconduct under Canon 3D(1) that he proposed in Leslie W. Abramson, *The Judge's Ethical Duty To Report Misconduct By Other Judges And Lawyers And Its Effect On Judicial Independence*, 25 Hofstra L. Rev. 751 (1997) (correcting flaws inherent in the ABA's attempt to duplicate Model Rule 8.3 in the current version of Canons 3D(1) and 3D(2) by (1) stating an affirmative duty to report, thus eliminating the need for a judge to make a subjective judgment about the nature of the violation; (2) providing a "credible information" standard of knowledge to clarify a judge's ethical duty to notify the proper authority; and (3) streamlining the ethical standard to enable a judge both to execute the ethical duty to report and to retain the supervisory authority to deal with misconduct, without concern for a mistaken characterization of the particular violation).

"3D. Disciplinary Responsibilities

(1) A judge who receives credible information indicating a substantial likelihood that another judge either is no longer fit to continue in office or has committed a violation of this Code should take appropriate action. ~~A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority."~~

Canon 3D(2)

Lawyer Misconduct
Professor Leslie W. Abramson
January 14, 2004

Professor Abramson suggests that the Commission consider the following modification of a judge's duty to report lawyer misconduct under Canon 3D(2) that he proposed in Leslie W. Abramson, *The Judge's Ethical Duty To Report Misconduct By Other Judges And Lawyers And Its Effect On Judicial Independence*, 25 Hofstra L. Rev. 751 (1997) (correcting flaws inherent in the ABA's attempt to duplicate Model Rule 8.3 in the current version of Canons 3D(1) and 3D(2) by (1) stating an affirmative duty to report, thus eliminating the need for a judge to make a subjective judgment about the nature of the violation; (2) providing a "credible information" standard of knowledge to clarify a judge's ethical duty to notify the proper authority; and (3) streamlining the ethical standard to enable a judge both to execute the ethical duty to report and to retain the supervisory authority to deal with misconduct, without concern for a mistaken characterization of the particular violation).

"3D. Disciplinary Responsibilities

(2) A judge who receives credible information ~~indicating a substantial likelihood~~ that a lawyer either is no longer fit to practice law or has committed a violation of the applicable rRules of pProfessional cConduct ~~[substitute correct title if the applicable rules of lawyer conduct have a different title]~~ should take appropriate action. ~~A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority. The judge's obligation to inform does not preclude the judge from handling a lawyer's misconduct by taking additional disciplinary measures against the lawyer.~~

Canon 3E (1)
Disqualification
Professor Leslie W. Abramson
January 14, 2004

Professor Abramson suggests that the Commission consider the following amendment of Canon 3E (1) regarding a judge's duty to disqualify himself or herself, to incorporate proposals that Professor Abramson made for the federal disqualification statute in Leslie W. Abramson, *Specifying Grounds for Judicial Disqualification in Federal Courts*, 72 Nebraska L. Rev. 1046 (1993) (examining trial and appellate courts' interpretation and application of federal disqualification statute and suggesting periodic statutory modification ensure statute reflects legal developments). (Additions underlined; deletions struck through).

"E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to instances where:

(a) ***

~~(b) (i) Where in private practice of law, the judge's connection with a served as a lawyer in the matter in controversy was as (1) an attorney; or (2) an associate of the attorney serving, or a lawyer with whom the judge previously practiced law served during the such association as counsel a lawyer concerning the matter; or (3) the judge has been a material witness concerning it; A "matter in controversy" is the same transaction or course of events.~~

(ii) Where as a government employee, the judge: (1) as an attorney or a material witness participated personally and substantially in a proceeding; or (2) expressed an opinion about the merits of a matter in controversy.

~~(c) the judge knows* that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household*, has an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis* interest that could be substantially affected by the proceeding;~~

~~(d) Where the judge, or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person:~~

(i) is a party to the proceeding, (or an officer, director or trustee of a party) to the proceeding, unless the evidence shows either that such person has been named as a party merely to compel recusal or that such person has an interest in the case which is no different than any other person;

(ii) is personally and substantially acting as an attorney lawyer in the proceeding; or

(iii) is known* by the judge to be a have a more than de minimis* interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge* likely to be a material witness in the proceeding;

(de) Where the judge knows about an interest which is more than de minimis which is

(i) a personal or fiduciary financial interest in the subject of or a party to the proceeding, or

(ii) any other interest which could be substantially affected by the outcome of the proceeding, either of which type of interest is held by the judge, the judge's spouse, the judge's parent, or the judge's child, or the spouse of any of them."

In the same article, Professor Abramson proposed a new section for Canon 3E, requiring recusal when:

"The judge's law clerk: (i) continues to work on a case where the clerk has accepted or has received an offer of a position of future employment and the clerk's future employer or the offeror is a party or attorney for a party in a case assigned to the judge; or
(ii) is the attorney of record or appears as a practicing attorney in a case assigned to the judge within _____ years(s) after terminating employment with the judge."

Canon 3E(2)
Disqualification
Professor Leslie W. Abramson
January 14, 2004

Professor Abramson suggests that the Commission consider amendment of the black letter of Canon 3E (2) to incorporate the following modifications he proposed in Leslie W. Abramson, *Appearance of Impropriety: Deciding When A Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Georgetown J.Legal Ethics 55 (2000) (lack of guidance in Code of Judicial Conduct about meaning and application of catch-all appearance of impropriety rule invites uncertainty or unwillingness in application to judicial disqualification and discipline). (Additions underlined; deletions struck through).

"E. Disqualification.

(2) A judge ~~should~~shall keep informed about any circumstance which could lead to disqualification, particularly the circumstances described in Canon 3E(1) (a)–(e) [or Canon 3C(1)(a)–(e)]~~the judge's personal and fiduciary economic interest, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household."~~

Canon 3E(1) Comment
Disqualification
Professor Leslie W. Abramson
January 14, 2004

Professor Abramson suggests that the Commission consider significant expansion of the comment to Canon 3E(1) to incorporate the modifications he proposed in Leslie W. Abramson, *Appearance of Impropriety: Deciding When A Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Georgetown J.Legal Ethics 55 (2000) (lack of guidance in Code of Judicial

Conduct about meaning and application of catch-all appearance of impropriety rule invites uncertainty or unwillingness in application to judicial disqualification and discipline). Professor Abramson observes that the current black letter does not encompass many fact situations encountered by the judiciary, thus, the suggested comment expansion will assist judges in application of Canon 3E(1).

**Canon 3E(1) and Comment
Disqualification
Professor Leslie W. Abramson
January 14, 2004**

Professor Abramson suggests that the Commission consider amendment of the black letter and commentary of Canon 3E (1) to incorporate the following modifications he proposed in Leslie W. Abramson, *The Judge's Relative Is Affiliated with Counsel of Record: The Ethical Dilemma*, 32 Hofstra L. Rev. 1181 (2004) The suggested black-letter modification requires recusal when a judge's relative is not counsel of record, but is affiliated with the law firm of record. (Additions underlined; deletions struck through).

“E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to instances where:

(f) the judge knows that a lawyer in a proceeding is affiliated with a law firm in which a relative of the judge is a partner or has an ownership interest in the law firm.

Professor Abramson's suggested comment to this addition specifies relevant factors for making a decision about recusal in these circumstances, including:

- the size of the lawyer-relative's firm,
- the nature and notoriety of the proceeding,
- the fee arrangement between the firm and client,
- whether the lawyer-relative is working for a private law firm or a government agency,
- whether the lawyer-relative's reputation or goodwill will be significantly enhanced by a successful result in the proceeding,
- the nature and degree of the relationship between the judge and the lawyer-relative,
- the prospect of an imminent decision regarding promotion or retention for the lawyer-relative, and
- whether the law firm's compensation plan includes a bonus or other reward system.