

MEMORANDUM

To: ABA Joint Commission to Evaluate the ABA Model Code of
Judicial Conduct

From: Cynthia Gray, Director, Center for Judicial Ethics, American
Judicature Society

Re: Model Code of Judicial Conduct

Date: October 15, 2003

I appreciate the opportunity to identify issues that I believe the Joint Commission should consider as it evaluates the Model Code of Judicial Conduct. Most of the points I make in the following memo are merely suggestions for issues to consider based on examples of different provisions adopted by the states and current debates on appropriate judicial ethics standards. None of these represent the official position of the American Judicature Society. If you have any questions, please let me know. I look forward to working further with the Joint Commission.

Terminology

- Definitions of the following terms would be helpful:
 - Sexual harassment
 - Nepotism, favoritism
 - Practice of law
 - Endorse
 - Solicit
 - Ex parte communications
 - Close familial relationship
 - Ordinary social hospitality
- Members of the judge's family should be defined to include a person with whom the judge is living as a spouse but to whom the judge is not married (although this is already implied in the phrase "a person treated by a judge as a member of the judge's family, who resides in the judge's household"). The Alaska code of judicial conduct, for example, defines "Spouse" to include "not only a husband or wife but also any person with whom the judge maintains a shared household and conjugal relations."

Preamble

- It might be helpful to add something to the preamble about the difference between the judicial branch and the legislative and executive branches.
- The code's occasional use of "must" instead of "shall" is confusing as "must" is not defined in the preamble.

Canon 2

- The test for appearance of impropriety in the commentary should be revised. The "appearance of impropriety" standard is used either when the judge has engaged in conduct not specifically covered by the code but clearly improper (lying about having a Medal of Honor, for example) or when the judge has stopped just short of doing something obvious wrong (asking about a ticket, which is an implied request that it be dismissed as a favor). The first type of case might be better addressed by something in the text like the provision from the Oregon code of judicial conduct that "A judge shall not engage in conduct that reflects adversely on the judge's character, competence, temperament, or fitness to serve as a judge." State supreme courts have adopted different tests for the second type of case. For example, the New York Court of Appeals considers whether, notwithstanding the absence of proof of any actual or intended impropriety, a circumstantial appearance of impropriety was inescapably created (*In the Matter of Spector*, 392 N.E.2d 552 (New York 1979)), while the Louisiana Supreme Court has held that to avoid creating an appearance of impropriety, a judge has a duty to take reasonable precautions to prevent a reasonable person from suspecting that the judge violated the code (*In re Chaisson*, 549 So.2d 259 (Louisiana 1989)).
- Letters of recommendation still result in a lot of inquiries to advisory committees and communications to sentencing judges still result in a lot of judicial discipline, which suggests that some clarification of the restrictions is necessary.

Canon 3B: Adjudicative responsibilities

- Court staff and other judges should be added to list of the people judges are required to treat with patience, dignity, and courtesy either in Canon 3B or Canon 3C. That is implied in the phrase "other people with whom the judge deals in an official capacity," but the number of cases in which judges have failed to treat staff and other judges with courtesy suggests a need for express recognition of the duty.

- The Delaware code provides in commentary: “In court proceedings, judges or former judges participating as litigants or counsel should not be called by their current or former titles or treated with greater familiarity or deference than other participants.”
- The Ohio code has added a provision prohibiting disclosure of confidential information regarding the probable or actual decision in a case, including the vote of a justice, judge, or court in a case pending before the supreme court, a court of appeals, or a panel of judges of a trial court. The Joint Commission should consider whether there are ethical issues specifically for appellate judges that should be addressed in the code of judicial conduct.

Canon 3B(5): Bias

- A number of states have added other types of prohibited bias, including marital status, parenthood, social status, color, language, and ethnicity.
- Several states have taken different approaches to the anti-bias provisions. The Idaho provision, for example, states:

Judges shall perform judicial duties without bias or prejudice, to the end that justice shall be administered, in every respect, in a fair, equal, and nondiscriminatory manner. Judges shall not, by word or act, manifest any belief, attitude or position which has no substantial legitimate purpose, other than to embarrass, harass or discriminate against another person by reason of such person’s race, gender, religious preference, national origin, age, disability, sexual orientation, or socio-economic status, nor permit court staff, officers, counsel, or others subject to the judge’s direction or control to do so.

The Kansas code adds:

A judge shall refrain from speech, gestures or other conduct that could be perceived by a reasonable person as harassment based upon race, color, religion, gender, national origin, age, disability, or sexual orientation, and shall require the same standard of conduct of others subject to the judge’s direction and control.

“Harassment” is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, disability, or sexual orientation, or that of his/her relatives, friends, or associates.

“Harassing conduct” includes, but is not limited to, the following: (i) Epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts that relate to race, color, religion, gender, national origin, age, disability, or sexual orientation, and (ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of gender and that is placed on walls, bulletin boards, or elsewhere on the premises, or circulated in the

- workplace, and (iii) sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that are unwelcome, regardless of gender.
- The prohibition on sexual harassment should use “shall” and be moved from commentary to the text for emphasis. The California Supreme Court has asked for public comment on a proposal to do so in its code.

Canon 3B(7): Ex parte communications

- The Massachusetts Supreme Judicial Court has adopted a new code of judicial conduct, effective October 1, 2003, that includes a prohibition on ex parte communications that adds some clarifying language particularly with respect to the exceptions. The new Massachusetts provision is worth considering. For example, the new Massachusetts code:
 - requires a judge to “take all reasonable steps to avoid receiving from court personnel or other judges factual information concerning a case that is not part of the case record.”
 - addresses communications with probation officers.
 - clarifies that no judge “shall consult with another judge about a case pending before one of them when the judge initiating the consultation knows the other judge has a financial, personal or other interest which would preclude the other judge from hearing the case, and no judge shall engage in such a consultation when the judge knows he or she has such an interest.” Similarly, the Alaska code provides that the exception for consulting with other judges and court personnel “assumes that the other judge or member of the judge’s adjudicative staff is not disqualified from participating in the decision of the case.”
- The definition of pending and impending adopted by the ABA in 2003 for Canon 3B(9) should be made to apply to Canon 3B(7).

Canon 3B(9): Public comments

- Concerned that the prohibition in the 1972 model code on a judge’s publicly commenting about a pending or impending proceeding in any court was too broad, in 1990, the ABA revised the provision to state “A judge shall not, while a proceeding is pending or impending in any court, make any public comment *that might reasonably be expected to affect its outcome or impair its fairness.*” That change, however, may have made the prohibition vague because it is difficult to assess the impact of public comment on an unknown audience. Several states have attempted to narrow the prohibition while giving judges a clear standard to follow, for example, by creating

exceptions for discussions in legal education materials, explaining what may be learned from the public record in a case, and correcting factual misrepresentation in the reporting of a case, or limiting the prohibition to cases pending in the state.

- Text or commentary should be added to emphasize that the canon prohibits a judge from discussing the rationale for a decision unless the judge is repeating what was already made part of the public record.

Canon 3C: Administrative responsibilities

- A great many judicial discipline cases involve a judge's failure to discharge administrative responsibilities. This may be more of a training problem than a code problem, but it does suggest at least that additional commentary is needed for Canon 3C(1) to explain what "professional competence in judicial administration" means.
- Rather than "a judge shall avoid nepotism and favoritism" (Canon 3C(4)), it would be stronger to provide that a judge "shall not engage in nepotism and favoritism."
- A provision should be added prohibiting a judge from using court resources and staff for personal or campaign purposes.
- A provision should be added requiring a judge to cooperate with the judicial disciplinary authority.

Canon 3D: Disciplinary responsibilities

- There is still a lot of confusion about when a judge needs to report an attorney or another judge, suggesting this canon needs to be revisited.

Canon 3E: Disqualification

- Professor Leslie Abramson has suggested standards and criteria that should be added to the model code and commentary to address disqualification issues that frequently arise for judges but that are not specifically addressed in the model code. *See* "Appearance of Impropriety: Deciding When a Judge's Impartiality 'Might Reasonably Be Questioned,'" *Georgetown Journal of Legal Ethics* (Fall 2000).
- Some states have added specific grounds for disqualification not expressly included in the model code, for example, if the judge or a relative has acted as a judge in the proceeding; if the judge conferred ex parte with the parties in an unsuccessful effort to mediate or settle the matter; if a judge or the judge's spouse or relative is in the

employ of or associated in the practice of law with, a lawyer in the proceeding; if the judge was associated in the practice of law with one of the attorneys; and if the judge as a government attorney participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

- There have been suggestions that the so-called duty to sit in Canon 3B(1) may take precedence in circumstances not specifically covered by Canon 3E and that inconvenience to the court system is an appropriate consideration in considering whether the rule of necessity applies. Commentary could address those considerations.
- Several states and the federal judiciary have not adopted the “de minimis” standard for disqualification for an economic interest, preferring the bright line “however small” standard. If the ABA does not wish to re-visit the “de minimis” standard, commentary should be added to caution judges that even if a judge has only a de minimis interest, disqualification may be required under the general standard. *See Huffman v. Judicial Discipline and Disability Commission*, 2 S.W.2d 386 (Arkansas 2001).
- The New Hampshire Supreme Court has adopted a policy to require that a justice disqualified from a case to leave the room when other members of the court are discussing the case. It would be appropriate for the model code to specify that a disqualified judge should have no other involvement in a case.

Canon 4A: Extra-judicial activities

- There has been much discussion of the question of judges’ participating on domestic violence task forces and similar groups. My research indicates that the current code allows greater participation than many judges think (at least under certain circumstances) while prohibiting more participation than others would like. Although the motivation for becoming more involved is laudable, there is a serious potential threat to judicial impartiality and independence that cannot be overlooked. The question requires a very fact-specific inquiry so that changes in the black letter text of the code may be less appropriate than commentary that identifies factors a judge should consider when asked to participate in such a group.

Canon 4C: Charitable activities

- The Massachusetts judicial ethics committee has issued an advisory opinion (*Massachusetts Advisory Opinion 00-4*) that allows judges to solicit family members on behalf of charitable organizations, which is a possible exception to add to the model code.

- The Arizona judicial ethics committee has issued an advisory opinion (*Arizona Advisory Opinion 97-1*) that explains that a judge may write a letter of endorsement to government agencies or private foundations in support of a non-profit organization seeking grant funds for a proposal that will affect the administration of justice if the judge or court administrator is knowledgeable about the organization, its purposes, and the use for which the funding is sought, which would be helpful additional commentary to Canon 4C(3)(ii).
- Some states, either in their codes or in advisory opinions, have adopted a de minimis exception to the prohibition on personal participation in fund-raising. For example, commentary to the Alaska code explains that although direct solicitation of funds (including being the speaker or guest of honor at an organization’s fund-raising event) is prohibited, “judges may participate as workers at fundraising events such as car washes and carnivals, purchase admission to fundraising social events, and purchase goods and services (e.g., candy bars, commemorative buttons, or car wash) that are being sold as a fundraising effort.”
- Judicial ethics committees have consistently advised that a judge may not ask attorneys to perform pro bono legal services for low income clients, require a contribution to a charitable organization as part of a sentence, or be a featured participant in a fund-raising event even if not as a speaker or guest of honor.
- Some of the current issues being addressed by judicial ethics committees include: may a judge participate in an image campaign for a not-for-profit organization? May a judge be on a fund-raising committee and be identified as a member of the committee? May a judge be a honorary member of a committee to plan a fund-raising event? May a judge be honored at a fund-raiser if the judge’s participation is not announced before the event?
- The phrases “reasonably be perceived as coercive” and “essentially a fund-raising mechanism” should be explained.

Canon 5: Political activities

- A provision making candidates responsible for the acts of their campaign committees should be added.
- A provision establishing appropriate and inappropriate uses of unexpended campaign funds should be added.
- There is a division of authority on the question whether a judicial candidate’s attendance at a campaign fund-raising event for his or her campaign constitutes inappropriate solicitation.

- Additional commentary could be added to the reference to political activity by family members to emphasize that family members may run for office and campaign for other candidates but the judge should not be involved and should require family members to refrain from suggesting the judge's endorsement of the political activity.
- Provisions designed for states with non-partisan elections should be added.
- The Alaska Judicial Council has adopted guidelines for applicants for appointive judicial office (www.ajc.state.ak.us/reports/appguideframe.htm) that might contain some provisions that should be added to Canon 5B.
- Judges have asked whether they can vote in party primaries where they must declare their party affiliation in order to receive a ballot.

Application

- The various levels, jurisdictions, types of court, and geographic areas into which courts are divided -- limited jurisdiction courts; general jurisdiction courts; special jurisdiction courts, or divisions such as family court, traffic court, and probate court; county courts; district courts; or circuit courts -- raise questions about how to define "the court on which the judge serves" for purposes of determining in which courts a part-time judge may not practice. For example, if a county or circuit court is divided into different geographic areas with separate jurisdiction, does the "court on which the judge serves" include any court of the same class or level as the court on which the judge serves within the same county or circuit? If a county or circuit is divided into different divisions that handle different types of cases, does the "court on which the judge serves" include any division or type of court within the same county or circuit as the court on which the judge serves?
- An additional question that arises frequently for part-time judges are may a part-time judge who hears criminal cases act as a prosecutor or defense attorney?