

**AJS Comments on Preliminary Draft
of Revisions to ABA Model Code of Judicial Conduct**

Submitted to the ABA Joint Commission to
Evaluate the Model Code of Judicial Conduct
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Canon 3

**PERSONAL CONDUCT: A JUDGE SHALL CONDUCT THE JUDGE'S
PERSONAL AFFAIRS TO PRESERVE THE INTEGRITY, IMPARTIALITY
AND INDEPENDENCE OF THE JUDICIARY**

**RULE 3.01: INFLUENCE OF PERSONAL INTERESTS ON JUDICIAL
CONDUCT**

A judge shall not allow his or her financial, political or other personal interests or relationships to influence his or her judicial conduct or judgment.

RULE 3.02: MISUSING THE PRESTIGE OF JUDICIAL OFFICE

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

COMMENT

[1] Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. ~~The prestige of the office must be reserved to promote the administration of justice by the judicial branch. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions.~~ Judges should distinguish between proper and improper use of the prestige of office in all of their activities.

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

[The traffic stop example, included in the 1990 model code, should not be deleted; it is an excellent example of the proper use of commentary. Moreover, deleting it may be considered a signal that the conduct is now somehow appropriate.]

There is no possible motive for using judicial letterhead except to gain an advantage. Any use of judicial letterhead inevitably creates at least an appearance of an attempt to gain an advantage, and keeping the prohibition explicit and unconditional (as in the 1990 model code) gives very clear guidance

to judges and avoids the accusation of vagueness that has been leveled at the appearance of impropriety standard. The proposed change adds ambiguity to the code and, therefore, is not helpful to judges or the public. Courts have held that the use of judicial letterhead in personal matters inherently and inevitably creates the appearance of a misuse of the prestige of office. See, e.g., Inquiry Concerning a Judge, 822 P.2d 1333 (Alaska 1991) (supreme court justice's use of chambers stationery to write the counsel for a state agency regarding litigation in which the justice was involved as a private citizen would lead a reasonably objective person to believe that the justice was attempting "to influence opposing counsel and other viewers of the letters or that it had this effect"); In the Matter of Mosley, 102 P.3d 555 (Nevada 2004) (objective reasonable person could conclude that the judge used his judicial letterhead in an attempt to gain a personal advantage in letters to his son's school).]

[3] Special considerations arise when judges write or contribute to publications, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates these Canons, Rules or other applicable law. In contracts for publication of a judge's writings, the judge should retain sufficient control over the advertising to avoid exploitation of the judge's office. Prohibited conduct includes, but is not limited to, allowing the publisher to praise the judge's judicial accomplishments or, when the work is unrelated to the law, to emphasize the judge's position.

[4] ~~This rule does not apply to a judge's use of his or her name in connection with campaign activity as permitted in Canon 5.~~ Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to inquiries from such entities concerning the professional merit of a person being considered for a judgeship.

[Use of a judge's name in a campaign or indeed any context could not reasonably be seen as use of the prestige of office; it is use of the title or other official designation that raises a question under this provision of the code.]

[5] A judge may provide a reference or a recommendation for an individual based upon the judge's personal knowledge. ~~However, unless the recommendation is based upon information obtained through the judge's judicial position, the judge must not use the judge's judicial letterhead. When a judge is personally aware of facts or circumstances that would contribute to an accurate assessment of the individual under consideration, a judge may properly communicate that knowledge, and his or her opinions based thereon, to those responsible for making decisions concerning the applicant. The judge's awareness may be based, for example, on personal knowledge of the individual or special knowledge derived from some relationship, such as that with a law clerk or long-time family friend. In any case, in considering whether it is appropriate to write the recommendation on official or personal letterhead, the judge should carefully consider whether the recommendation or endorsement might reasonably be perceived as exerting~~

~~pressure by reason of his or her judicial office, and should avoid any action that could be so understood.~~

[The proposed comment is more confusing than helpful. A straightforward rule distinguishing between circumstances when letterhead is appropriate and when it is inappropriate is more valuable to judges. There is no reason for a judge to use judicial letterhead to write a letter of recommendation in support of the judge's paperboy's application to law school, for example, other than to misuse the prestige of office.]

[6] A judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.

RULE 3.035: TESTIFYING AS A CHARACTER WITNESS

A judge shall not testify as a character witness, except when properly summoned.

COMMENT

[1] When a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. In addition, a judge who testifies voluntarily as a character witness lends the prestige of judicial office to advance the interests of another. See Rule 3.01. 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.

[2] This prohibition applies to all adjudicative proceedings including disciplinary matters, and includes communication of character information through any method to a sentencing judge or a probation, parole, or corrections officer although a judge may provide to such persons other information for the record in response to a formal request.

RULE 3.043: USE OF NON-PUBLIC INFORMATION

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

COMMENT

[1] In the course of performing their judicial duties, judges may acquire information of commercial or other value that is otherwise unavailable to the public. Judges must not reveal or use such information for personal gain or for any purpose unrelated to their judicial duties.

RULE 3.054: AFFILIATION WITH DISCRIMINATORY ORGANIZATIONS

A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, gender, religion, national origin, ethnicity, or sexual orientation, and shall not use the benefits or facilities of such an organization to any significant extent.

COMMENT

[1] A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired. Whether an organization's practices are invidiously discriminatory is often a complex question. In general, an organization is said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, gender, national origin, ethnicity or sexual orientation those individuals who would otherwise be admitted, and the exclusion is not reasonably related to a legitimate purpose. Rule 3.04 does not prohibit a judge's membership in any organization ~~dedicated to the preservation of religious, ethnic or legitimate cultural values of common interest to its members~~ that does not stigmatize excluded persons as inferior or odious but, contrast, perpetuates or celebrates cultures, historical events, and ethnic or religious beliefs, identities, or traditions. Such organizations tend to be inclusive of an entire group, rather than exclusive of certain groups, and their membership limitations, rather than unfair or stigmatizing, are secondary to, if inseparable from, what is being legitimately preserved or celebrated.

[AJS's proposed language is taken from Indiana Advisory Opinion 1-94.]

[2] Public manifestation by a judge of the judge's approval of invidious discrimination on any basis gives the appearance of impropriety in violation of Rule 1.01 and diminishes public confidence in the integrity and impartiality of the judiciary. Rule 3.04 relates only to organizations invidiously discriminating on the basis of race, gender, religion, national origin, ethnicity, or sexual orientation. However, a judge's membership in or significant use of the benefits and facilities of organizations practicing invidious discrimination on any other basis prohibited by applicable law creates the appearance of impropriety in violation of Rule 1.01.

[3] Whether a judge's use of the benefits and facilities of a discriminatory organization is significant depends on whether the frequency or nature of that use is sufficient to create the impression that the judge approves of the organization and its practices. Accordingly, a judge must not arrange a meeting or regularly attend events at, or regularly use other benefits and facilities of, an organization that the judge knows practices invidious discrimination on the basis of race, gender, religion, national origin, ethnicity or sexual orientation in its membership or other policies.

[4] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.