

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

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Evaluate the Model Code of Judicial Conduct  
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## Canon 4

### **EXTRA-JUDICIAL CONDUCT: A JUDGE SHALL CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS**

#### **RULE 4.01: EXTRA-JUDICIAL ACTIVITIES IN GENERAL**

A judge shall conduct all of the judge's extra-judicial activities so that they:

(a) do not interfere with the proper performance of judicial duties;

(b) do not cast reasonable doubt on the judge's capacity to act with integrity, impartiality and independence; ~~and~~

(c) will not require frequent disqualification of the judge; and

(de) comply with the requirements of this Code.

#### **COMMENT**

[1] Judges are encouraged to engage in appropriate extra-judicial activities so as not to become isolated from their communities, and to further the public's understanding of how courts and the judicial system affect their lives.

[2] Expressions of bias or prejudice by a judge, at any time, may cast reasonable doubt on the judge's ability to act impartially as a judge. Such expressions include jokes and other remarks demeaning individuals on the basis of race, gender, religion, ethnicity, national origin, disability, age, sexual orientation or socioeconomic status. See Rule 3.04 and accompanying Comments.

[3] As a judicial officer specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of the justice system. Such contributions may take the form of speaking, writing, teaching or participating in other extrajudicial activities. ~~In many instances, these activities may contribute significantly to the promotion of the fair administration of justice and to ensuring the integrity, impartiality and independence of the judiciary.~~ To the extent that time permits, a judge is encouraged to undertake such activities, either independently or through a bar association, judicial conference or other organization. Judges may participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession, both within and outside their jurisdictions. For example, judges may ~~have occasion to~~ express opposition to the

persecution of lawyers and judges in other countries because of their professional activities.

[4] As a private individual, a judge may also ~~wish to engage in~~ writing, speaking, teaching, or ~~engage in other activities related being otherwise active in regard~~ to nonlegal subjects. ~~To the extent that such~~ if the activity does ~~is~~ not ~~in~~ conflict with Rule 4.01 ~~any of the judges' duties under this Code, it is permitted by this Rule.~~

**4.02 Use of court resources. A judge shall not use court staff, resources, stationery, equipment, or premises for extra-judicial activities except for incidental or de minimis use for non-political activities or insubstantial use for matters concerning the law, the legal system, or the administration of justice.**

*[Prohibiting judges from using court staff and other resources for personal activities does not impose an unreasonably high standard on judges but simply brings the code of judicial conduct in line with the standards for other government officials and most government and private employees. The prohibition proposed by AJS only reflects the rule enunciated in numerous court and judicial conduct commission decisions. See In the Matter of Robertson, Final Judgment (Alabama Court of the Judiciary August 14, 1997) (paid personal expenses with checks drawn from court fund, endorsed check made payable to fund and deposited it in personal checking account, and cashed 7 checks made payable to fund); Public Admonishment of Smith (California Commission on Judicial Performance November 25, 1996) (use of DMV records); Inquiry Concerning Hyde, Decision and Order of Public Censure (California Commission on Judicial Performance May 10, 1996) (misuse of DMV records, use of court staff for personal business); Inquiry Concerning Hyde, Decision and Order (California Commission on Judicial Performance September 23, 2003) (cjp.ca.gov/pubdisc.htm) (asking traffic clerk to obtain information from Department of Motor Vehicles records to identify driver); Public Admonishment of Robert Coates (California Commission on Judicial Performance April 12, 2000) (pattern of use of court resources for personal matters); In re Decuir, 654 So. 2d 549 (Louisiana 1995) (allowing former law partner to share court resources); In re Trudel, 638 N.W.2d 405 (Michigan 2002) (placed 142 calls on court cell phone to try to reach then-wife over 5-day period without reimbursing court; used court equipment, supplies, and personnel for purposes related solely to campaign without reimbursing court); In re Trudel, 663 N.W.2d 471 (Michigan 2003) (using computer equipment and Internet services to access Internet sites for his personal benefit including adult-only pornographic sites and frequently playing cards during work hours with certain employees and police officers and on the computer, at times delaying court proceedings; former judge); In the Matter of Cooley, 563 N.W.2d 645 (Michigan 1997) (using court resources for radio and television programs); Harris v. Smartt, 57 P.3d 58 (Montana 2002) (knowingly accessing sexually explicit images on a county computer and monitor); In the Matter of Davis, 946 P.2d 1033 (Nevada 1997) (conducting*

*personal business from chambers; borrowing money from court employees; use of court employees for personal business during court hours); In re Vigil (New Mexico Supreme Court June 13, 2000) (used court facilities and equipment of court for private business activities; failed to timely pay county for approximately \$1,155.95 of private business copying charges incurred at county clerk's office); In the Matter of Ramich, Determination (New York State Commission on Judicial Conduct December 27, 2002) (www.scjc.state.ny.us) (using court facilities and personnel to perform legal services for a former client); In the Matter of Faso, Determination (New York State Commission on Judicial Conduct February 5, 1998) (retained double reimbursement); Disciplinary Counsel v. O'Neill, 815 N.E.2d 286 (Ohio 2004) (improperly used county resources and personnel to promote her unsuccessful campaign for a seat on the county court of appeals); Inquiry Concerning Gallagher, 951 P.2d 705 (Oregon 1998) (use of judicial assistant for personal business; use of judicial stationery to gain advantage); In re Berkheimer, Opinion (Pennsylvania Court of Judicial Discipline April 1, 2005), Order (June 28, 2005) (having employees send congratulatory notes to constituents mentioned in local newspaper); In the Matter of Abraham, 583 S.E.2d 435 (South Carolina 2003) (using internet facilities while on duty); Inquiry Concerning Jenevein, Commission's Findings, Conclusions, and Order of Public Censure (Texas State Commission on Judicial Conduct January 17, 2003) (using county computer system to send unsolicited e-mail about case), appeal dismissed, Opinion (Special Court of Appeals Appointed by the Texas Supreme Court June 12, 2003) (jurisdiction to review by trial de novo censure issued by State Commission on Judicial Conduct); Public Reprimand of Duke (Texas State Commission on Judicial Conduct June 27, 2003) (used county funds to pay for lawn mowing services at private residence and discussed pending judicial matters in public); Public Admonition of Katz (Texas State Commission on Judicial Conduct December 19, 2000) (used county computer to forward e-mail containing political message from Bush campaign); In re Furman, Stipulation, Agreement, and Order of Censure (Washington Commission on Judicial Conduct June 2, 2000) (using court computer equipment, state-provided computer, and state-provided Internet services to access Internet sites for personal benefit); In re Meadows, Stipulation, Agreement, Order of Admonishment (Washington State Commission on Judicial Conduct December 7, 2001) (used court resources to obtain motorist's traffic infraction record); In re Lukevich, Stipulation, Agreement, and Order of Admonishment (Washington State Commission on Judicial Conduct April 4, 2003) (www.cjc.state.wa.us) (using court facility to assist personal interests of former client and friend).]*

*AJS proposes an exception for de minimis use or insubstantial use based on Inquiry Concerning Gallagher, 951 P.2d 705, 713 (Oregon 1998) and Canons 4D and 5G of the Code of Conduct for U.S. Judges. Canon 4D provides that "a judge should not use to any substantial degree judicial chambers, resources, or staff to engage in activities permitted by this Canon" (that is extra-judicial activities to improve the law, the legal system, and the administration of justice). Canon 5G provides that "a judge should not use judicial chambers, resources, or*

*staff to engage in activities permitted by this Canon, except for uses that are de minimis” (that is other extra-judicial activities).*

## **RULE 4.032: APPEARANCES BEFORE GOVERNMENTAL BODIES**

**A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except:**

- (a) on matters concerning the law, the legal system or the administration of justice;**
- (b) on other matters that might reasonably merit the attention and comment of the judge because of knowledge or expertise acquired in the course of the judge’s judicial duties; or**
- (c) when acting pro se in a matter involving the judge or the judge’s interests.**

### **COMMENT**

[1] Judges possess special expertise on matters of law, the legal system and the administration of justice, and may properly share that expertise with governmental bodies. In addition, judges may acquire information on issues before them that are not law-related but upon which they may be well qualified to comment from their unique vantage point as jurists who have presided over such matters in court. ~~For example, a juvenile court judge may be uniquely situated to comment to a public body on the potential benefits of proposed improvements in the community, such as the creation of new athletic or other recreational opportunities that could lead to a decrease in delinquency among juveniles.~~ For example, a judge may comment on the need to create more options for judges in sentencing in criminal cases, such as ordering treatment in cases involving substance abuse or mental illness or providing for services for children and juveniles involved in the system although a judge should not promote any particular option or program to avoid lending the prestige of office to advance private interest and should avoid involvement in debates within the service-provider community and among executive agencies and between the legislative and the executive branches. Judges must be mindful, however, that their appearance before governmental bodies remains subject to other provisions of this Code, such as Rule 2.11, governing public comment on pending and impending matters, and Rule 4.01(b), prohibiting judges from engaging in extra-judicial activities that cast reasonable doubt on the judge’s impartiality, integrity and independence.

*[While a judge, like many members of a community, may feel that recreational activities would be beneficial, a judge is not uniquely situated or qualified to comment on whether there is a cause and effect relationship between recreational opportunities for youth and delinquency. Moreover, such comment would inevitably embroil a judge in a debate on the best use of a community’s limited resources (which is better, a raise for police officers or more athletic activities for teenagers?). The example proposed by AJS is more appropriate.]*

[2] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies on matters that are likely to have special effect upon them as private citizens, for example, zoning proposals that will affect their real property or proposals having to do with the availability of local health services. The judge must exercise care, however, not to refer to his or her judicial position or otherwise lend the prestige of judicial office to advance general causes with respect to which the judge possesses no special judicial competence.

[3] See Rules 2.07 and 3.01 and Comments regarding the obligation to avoid improper influence.

### **RULE 4.0~~4~~3: APPOINTMENTS TO GOVERNMENTAL BODIES**

**A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice.**

#### **COMMENT**

[1] A judge must assess the appropriateness of accepting extra-judicial assignments both in terms of judicial availability and in terms of the requirements of impartiality of the judiciary. Thus, a judge should not serve on a governmental commission that requires an excessive time commitment or is embroiled in controversial subject matter, or whose members are limited to advocating for one side in a policy debate.

[2] A judge may, ~~however~~, represent a country, state or locality on ceremonial occasions in connection with historical, educational or cultural activities.

[3] Rule 4.01 and 4.03 read in conjunction require a judge to gather sufficient information to determine whether the work of a particular government commission concerns the improvement of the law, the legal system, or administration of justice and whether the judge's participation on the commission would cast reasonable doubt on a judge's capacity to act with impartiality, integrity, and independence. To come within the exception for improvement of the law, the legal system, or the administration of justice, the government commission must have a direct connection with how the court system meets its statutory and constitutional responsibilities, in other words, how the courts go about their business, and the commission should relate to matters a judge, by virtue of judicial experience, is uniquely qualified to address. Commissions designed to improve the operation of another branch of government, for example, law enforcement or prison reform, do not fall within the exception. Moreover, membership by a judge on a commission may create the appearance that the judge could not be impartial if the commission does not have a diverse membership that represents more than one point of view or the commission advocates the rights of specific types of participants in the justice system. Even if a judge may not be a member of a commission, a judge may educate and

assist the commission by offering the judge’s expertise on the law, the legal system, or administration of justice.

[4] A provision in a statute or executive announcement specifying that one of the members of a governmental commission should be a judge does not preempt Rule 4.03. Principles of separation of powers and judicial independence require that whether judicial participation is appropriate be independently evaluated under the standards in Rule 4.03 without automatic deference to the mandate of the legislative or executive branches.

#### **RULE 4.054: PARTICIPATION IN CIVIC OR CHARITABLE ACTIVITIES**

**A judge may participate in civic or charitable activities that do not reflect adversely upon a judge’s integrity, impartiality and independence, or interfere with the performance of judicial duties, subject to the following limitations and the other requirements of this Code.**

**A. With respect to any activities in which a judge participates on behalf of a civic or charitable organization:**

**(1) A judge shall not:**

**(a) use or permit the use of the prestige of judicial office for fundraising or membership solicitation;**

**(b) personally solicit funds or in-kind donations for the organization ~~on an other than de minimis basis~~;**

**(c) be a speaker, guest of honor, or other featured participant at an organization’s fund-raising event, except for an organization devoted to the improvement of law, the legal system, or the administration of justice.**

**(d) personally participate in membership solicitation if the solicitation is primarily a fundraising mechanism, or if it might reasonably be perceived as coercive.**

**(e) personally solicit attorneys to participate in specific pro bono programs or to accept particular cases; and**

**(f) order a contribution to a charity as part of a sentence.**

*[AJS’s proposal regarding solicitation to participate in pro bono programs is based on judicial ethics opinions. “Adopting the adage that ‘time is money,’ at least with respect to professional services by attorneys,” there is “no meaningful distinction between judicial solicitation of funds and of time from lawyers.” Arizona Advisory Opinion 00-6. The prohibition includes direct solicitation (Michigan Advisory Opinion J-7 (1998); Alaska Advisory Opinion 04-1); signing a letter (Florida Advisory Opinion 00-6; Nebraska Advisory Opinion 02-3; West Virginia Advisory Opinion (March 10, 2000)); and participating in a telephone bank (Arizona Advisory Opinion 00-6). The prohibition also applies to asking lawyers to contribute money in lieu of performing pro bono work. Alaska Advisory Opinion 04-1; Florida Advisory Opinion 00-6; Nebraska Advisory Opinion 02-3. But see Maryland Advisory Opinion 124 (1996) (judge may personally ask attorney to volunteer for pro bono activity). However, a judge*

*may “write, speak, lecture, and otherwise participate in a wide range of activities designed to promote and encourage attorneys to engage in such pro bono representation.” Michigan Advisory Opinion J-7 (1998). Similarly, although a judge may not solicit attorneys to participate in pro bono programs on behalf of specific organizations or to accept particular cases, a judge may encourage attorneys to fulfill their obligation to perform pro bono work as long as the judge does not promote a particular program or refer to a specific case. Alaska Advisory Opinion 04-1. Thus, a judge may make monetary contributions to further pro bono activities, make general appeals, including referring to a list of available pro bono programs, participate in a workshop or CLE seminar that is made available at no (or reduced) cost for attorneys who agree to undertake pro bono cases, write articles for publication in bar or general-circulation media encouraging members of the bar to participate in pro bono work, and acknowledge the pro bono activity of particular attorneys publicly, such as in a newspaper advertisement or displaying a plaque in a court. However, a judge may not send letters of congratulation directly to an attorney or host a social event for lawyers who have participated in pro bono activity. Alaska Advisory Opinion 04-1. See also Massachusetts Advisory Opinion 03-7 (judge may not appear in video to be shown at dinner to raise funds to retire debt arising from costs of action seeking better quarters for court or send letter to be read aloud thanking attorney for pro bono work on that litigation but may contribute toward retiring that debt); Missouri Advisory Opinion 157 (1991) (judges in juvenile division may publicly express appreciation to local bar for pro bono representation of juveniles by mounting plaque on wall of the juvenile justice center and giving annual award to individual attorney).]*

**(2) Notwithstanding paragraph (1) above, a judge may:**

- i. personally solicit funds from members of the judge’s family, or judges over whom the judge does not exercise supervisory or appellate authority;**
- ii. assist the organization in planning fundraising and participate in the management and investment of the organization’s funds;**
- iii. sign a general membership solicitation mailing;**
- iv. be involved in member recruitment for an organization devoted to the improvement of law, the legal system, or the administration of justice even though the membership dues or fees may be used to support the objectives of the organization;**
- ~~v.iii.~~ appear at, participate in, and permit the judge’s title to be used in connection with an event of an organization devoted to the improvement of law, the legal system, or the administration of justice, even though the event may serve a fundraising purpose;**
- ~~vi.iv.~~ make recommendations to public and private fundgranting organizations on programs and activities concerning the law, the legal system or the administration of justice;**
- vii. encourage attorneys to participate generally in pro bono efforts, including referring to a list of pro bono programs;**

**viii. donate to an organization's fund-raising activity; and**  
**ix. participate in de minimis fund-raising activities.**

*[Having some "may" provisions in the text and some in comments is confusing.]*

**b. A judge may serve as an officer, director, trustee, or nonlegal advisor of an organization or governmental entity devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, unless it is likely that the organization or governmental entity:**

**(1) will be engaged in proceedings that would ordinarily come before the judge, or**  
**(2) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.**

**COMMENT**

~~[1] A judge should be permitted to participate in civic, fraternal or charitable activities for the benefit of the community of which the judge is a part, provided that such participation does not take inappropriate advantage of the judge's judicial position, or otherwise interfere with the performance of the judge's judicial duties.—See Rule 5.01(a).~~

*[Goes without saying.]*

~~[2] Judges may solicit lawyers to participate in pro bono programs so long as in doing so the judge does not misuse the prestige of the office and does not solicit lawyers to accept particular cases that could come before the judge or the court on which the judge sits.~~

*[Moved to text.]*

~~[12] A judge's solicitation of funds for an organization creates involves the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control or will donate funds in order to curry favor with the judge. For that reason, there are limited restrictions on a judge's participation in fund-raising. a judge is not permitted to solicit funds in person in writing or by telephone, on an other than de minimis basis, unless the person being solicited is or another judge over whom the judge exercises no appellate or supervisory control. Similarly, a judge is not permitted to personally solicit memberships in an organization if the solicitation is primarily a fundraising mechanism. A judge may, however, participate in fundraising activities by performing tasks other than soliciting or accepting donations at fundraising events, without the attendant risk of coercion that makes personal solicitation of funds problematic.~~

*[Much of this comment just repeats the rule and is unnecessary.]*

[23] De minimis fund-raising activities solicitation includes insignificant, incidental, or behind-the-scenes activities that do not use the judge's name or title and situations where the judge's role is no more active or visible than that of other participants.

*[These activities are more accurately considered fund-raising activities than solicitation.]*

~~[34] Solicitation of membership poses potential problems similar to those associated with the solicitation of funds. For that reason, a judge must not personally solicit membership or endorse or encourage membership efforts for civic or charitable organizations if the. For example, A membership solicitation could reasonably be perceived as coercive if a judge must not solicit memberships from other judges over whom the judge exercises supervisory or appellate authority, or from persons or those affiliated with persons who are likely to appear before the court on which the judge serves.~~

*[Much of this comment just repeats the rule and is unnecessary.]*

~~[45] Notwithstanding the foregoing limitations, no comparable risk of coercion arises when a judge who is an officer of such an organization sends a general membership solicitation mailing over the judge's signature. In addition, lawyer and judicial organizations with diverse memberships, whose membership is balanced in representing all parties in litigation often include judges in their leadership. Judges may be involved in member recruitment for judicial organizations and lawyer organization whose membership represents all sides in litigation even though the membership dues or fees associated with membership may be used, in part, as fundraising to support the objectives of those organizations.~~

*[Much of this comment just repeats the rule and is unnecessary.]*

~~[6] Judges are an integral part of the legal community and may participate as judges in the activities of organizations within the legal community without inappropriately lending the prestige of office to those activities, even when they serve a fundraising purpose. Therefore, a judge may, for example, accept an invitation to speak at or be recognized or honored at an event hosted by a legal organization, law school, or other entity devoted to improving the law, the legal system or the administration of justice, even if such an event raises funds for the benefit of the sponsoring organization.~~

*[Repetitive and unnecessary.]*

[57] Identification of a judge's position in an organization in Use of an organization's letterhead used for fundraising or membership solicitation does not violate Rule 4.04 provided that the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

[8] This Rule does not prohibit a judge from serving in a governmental position associated with the improvement of the law, the legal system or the administration of justice; see Rule 4.03.

[69] In this and other Rules in Canon 4, the phrase “subject to the requirements of this Code” is used to remind judges that the use of permissive language in various Rules of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct. For example, a judge permitted by this Rule to serve on the board of a fraternal institution may be prohibited from such service by Rules 3.03 or 4.01 if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge’s capacity to act impartially as a judge.

[10] Service by a judge on behalf of a civic, fraternal or charitable organization may be governed by other provisions of Canon 4 in addition to Rules 4.02, 4.03 and 4.04. For example, a judge is prohibited by Rule 4.07 from serving as a legal advisor to a civic, fraternal or charitable organization.

[74] The changing nature of some organizations makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is associated to determine if it is proper for the judge to continue such association

[812] This Rule, not Rule 4.03 governs a judge’s service in a nongovernmental position. ~~This Rule permits service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit.~~ Service on the board of a public educational institution, other than a law school, would be prohibited under Rule 4.03, whereas service on the board of a public law school or any private legal institution would generally be permitted.

*[Much of this comment just repeats the rule and is unnecessary.]*

[9] To prevent the prestige of the judge’s office from being used in fund-raising, a judge must inform all organizations in which the judge is involved of the limitations on the judge’s participation in fund-raising and the use of the judge’s name, require those organizations to comply with the provisions of this rule, and review and approve the content of materials used in fund-raising that include the judge’s name.

[117] To prevent the prestige of office judge’s office from being used in fund-raising, a judge should not serve as an honorary member of a committee where the sole purpose is to allow committee members’ names to be used on an invitation to solicit attendance at a fund-raising event and should not allow his or her title to be used in an image campaign for a charitable organization.

[10] A judge must not require a defendant to contribute to a charity as part of a sentence even if no specific charity is identified and even if the defendant has agreed to the requirement as part of a plea bargain.

[12] Even for law-related organizations, a judge must consider whether the membership and purpose of the organization or the nature of event would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's impartiality, integrity, and independence. For example, it may be inappropriate for a judge to speak at a fund-raising event for a bar association comprised of lawyers that primarily represent a particular class of clients or an organization that has taken a public stand on issues to be litigated in a case before the court on which the judge sits or to accept an award that honors the judge for decisions the judge has made in a particular case or cases.

#### **RULE 4.065: APPOINTMENTS TO FIDUCIARY POSITIONS**

**(a) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.**

**(b) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.**

**(c) The same restrictions on financial activities that apply to a judge personally apply to the judge while acting in a fiduciary capacity.**

#### **COMMENT**

[1] The Time for Compliance provision of this Code (Application, Section F) postpones the time for compliance with certain provisions of this Rule in some cases.

[2] Other restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Rule 4.11, or require frequent disqualification.

#### **RULE 4.076: SERVICE AS ARBITRATOR OR MEDIATOR**

**A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.**

#### **COMMENT**

[1] ~~Judges regularly participate in arbitration, mediation or settlement conferences, either as part of their regular duties or as specially authorized by court rule or other law.~~ The integrity of the judiciary is undermined, ~~however~~, when judges take financial advantage of their offices by rendering private dispute resolution services for pecuniary gain as an

extra-judicial activity. ~~In such circumstances, the prestige of the judicial office would be used to advance the personal financial gain of the judge.~~ Even when performed without charge, dispute resolution services provided by a judge in an extrajudicial capacity may interfere with the proper performance of the judicial office, and is therefore permitted only when authorized by law.

~~[2] Rule 4.06 does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties. See Rule 2.09, Comment [2] and Rule 2.10(a)(4).~~

*[Unnecessary.]*

#### **RULE 4.087: PRACTICE OF LAW**

**A judge shall not practice law. Notwithstanding this prohibition, 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.**

#### **COMMENT**

[1] ~~This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity.~~ A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Rule 3.01.

[2] The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

#### **RULE 4.098: FINANCIAL ACTIVITIES**

**A judge shall not engage in financial and business dealings that:**

- (a) may reasonably be perceived to exploit the judge's judicial position, or**
- (b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.**

#### **COMMENT**

[1] When in a judicial capacity a judge acquires information that is not yet generally known, such as material contained in filings with the court, the judge must not use the information for private gain. See Rule 3.01; see also Rule 3.02.

~~[2] A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come before the~~

~~judge personally or before other judges on the judge's court. In addition,~~ A judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. ~~With respect to affiliation of relatives of a judge with law firms appearing before the judge, see Comments to Rule 2.12 relating to disqualification.~~

*[Much of this comment just repeats the rule and is unnecessary.]*

[3] Participation by a judge in financial and business dealings is subject to the general prohibitions in Rule 4.01 against activities that tend to reflect adversely on impartiality, demean the judicial office, require frequent disqualification, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 1 against activities involving impropriety or the appearance of impropriety, and the prohibition in Rule 3.01 against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1.

#### **RULE 4.0109: REMUNERATIVE ACTIVITIES**

**A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family including real estate investments, and engage in other remunerative activity.**

#### **COMMENT**

~~[1] This Rule provides that, subject to the requirements of this Code, a judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge's family, and investments owned jointly by the judge and members of the judge's family. The term "investments" includes real estate. See Comments for Rule 4.04 regarding use of the phrase "subject to the requirements of this CODE.~~

*[Unnecessary, just repeats the rule.]*

#### **RULE 4.1110: MANAGEMENT AND DIVESTITURE OF INVESTMENTS**

**A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.**

#### **COMMENT**

~~[1] Judges must not allow their financial activities to interfere with their duty to preside over cases that come before them. Although some disqualifications will be unavoidable, judges must reduce unnecessary conflicts of interest that arise when they retain financial interests in organizations and other entities that appear regularly in their courts, by divesting themselves of such interests.~~

*[Unnecessary, just repeats the rule.]*

[2] Financial interests, within the meaning of this rule, include the interests of others whom the judge serves as a fiduciary under Rule 4.05.

#### **RULE 4.1211: FOR PROFIT ACTIVITIES**

**A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any for-profit entity except that a judge may, subject to the requirements of this Code, manage and participate in:**

- (a) a for-profit entity closely held by the judge or members of the judge’s family, or**
- (b) a for-profit entity primarily engaged in investment of the financial resources of the judge or members of the judge’s family.**

#### **COMMENT**

[1] Although participation by a judge in a closely held family for profit business might otherwise be permitted by Rule 4.11, a judge may be prohibited from participation by other provisions of this Code. Examples of such situations include when the business entity regularly appears before the judge’s court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely held for-profit family business if the judge’s participation would involve misuse of the prestige of judicial office.

#### **RULE 4.1312: SOLICITATION AND ACCEPTANCE OF GIFTS**

**(a) A judge shall not solicit or accept ~~and shall urge members of the judge’s family residing in the judge’s household not to solicit or accept~~ gifts from anyone or loans (other than one from a financial institution) except that a judge may accept unless otherwise provided by law:**

*[Catch-all language such as “unless other provided by law” should be added in several places to remind judges that their acceptance of gifts, reimbursement, and honorarium may be governed by state or federal law that may be more restrictive than the code. Because a loan is not generally considered a gift, the definition of “gift” in the terminology section or even a comment may not be sufficient to notify all readers that loans from individuals are restricted. Therefore, either the text or commentary of Canon 4.12(a) should indicate that a loan from an individual is governed by the same restrictions as a gift. AJS proposes moving*

*the reference to gifts to family members to a separate subsection (see below) to avoid some very awkward sentence construction.]*

- (1) a gift incident to a public testimonial;**
- (2) books, magazines, journals, audio-visual materials and other resource materials supplied by publishers or organizations on a complimentary basis for official use; or**
- (3) an invitation to the judge and the judge's spouse or guest to attend without charge;**

**~~(i) a widely attended event;~~**

*[AJS strongly disagrees with the creation of an exception that would allow judges to accept an invitation to attend without charge a "widely attended event." The apparent justification for the exception – that judges will not be able to afford to attend many community events and become isolated from the public they serve – is unconvincing. If judges cannot afford to attend the events, then the vast majority of the public they serve will also be unable to attend as well. The exception threatens to undermine the dignity of the office by appearing to reflect a sense of judicial entitlement and giving judges privileges not shared by the public that they serve simply by virtue of their office. There are innumerable free or reasonably-priced community events in which judges may participate to ensure that they do not become isolated. The proposed exception may actually tend to isolate judges from the general public by linking them with the much smaller group of people in a position to give out free invitations to widely attended events.]*

**~~(ii) a bar-related function; or~~**

**~~(iii) any activity devoted to the improvement of the law, the legal system or the administration of justice;~~**

**(5) a gift from a relative or friend, for a special occasion, such as a wedding anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;**

**(6) a gift or loan, from a relative or personal friend whose appearance or interest in a case would in any event require disqualification under Rule 2.12; or**

**(7) reduced membership dues for a bar association or other organization devoted to the improvement of the law, the legal system, or the administration of justice (excluding any organization whose members comprise or frequently represent the same side in litigation.)**

**~~(8)~~ any other individual gift, from any other source, valued at [\$50] or less, or series of gifts from the same source whose value in the aggregate does not exceed [\$150], if the donor is not:**

- (i) a lawyer, party, or third person who has come before the judge, or a person or entity whose interests have come before the judge, within the preceding five years, or
- (ii) a lawyer, party, or third person who is likely to come before the judge, or a person or entity whose interests are likely to come before the judge, in the foreseeable future.

(b) A judge shall encourage members of the judge’s family residing in the judge’s household not to solicit or accept the same gifts and loans a judge is prohibited from soliciting or accepting. Members of the judge’s family residing in the judge’s household may accept a gift, award or benefit incident to the business, profession or other separate activity of that individual including those for the use of the judge (as spouse, domestic partner or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties.

(be) For any gift, other than a gift from a member of the judge’s family or loan, other than from a member of the judge’s family or financial institution, that alone or in the aggregate with other gifts received from the same source in the same calendar year exceeds [\$250.00] in value, the judge must publicly report receipt of the gift in the same manner as the judge reports compensation, reimbursement or waiver of charges pursuant to Rule 4.16.

#### COMMENT

[1] ~~This Rule imposes restrictions on the solicitation and acceptance of gifts.~~ The Terminology section defines a “gift” as any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, bequest, or anything of monetary value, but does not include:

(a) Ordinary social hospitality that is common among people in the judge’s community, extended for a non-business purpose by an individual, not a corporation, and limited to the provision of modest items, such as food and refreshments. Relevant considerations include the cost of the event or gift, whether the benefits conferred are greater in value than that traditionally furnished at similar events sponsored by bar associations or similar groups, whether the benefits are greater in value than that which the judge customarily provides the judge’s own guests, whether the benefits conferred are usually exchanged only between friends or relatives, whether there is a history or expectation of reciprocal social hospitality between the judge and the donor, whether the event is a traditional occasion for social hospitality, and whether the benefits received must be reported to any governmental entity.

(b) items with little intrinsic value intended solely for presentation, such as plaques, certificates, trophies and greeting cards;

(c) loans from banks and other financial institutions on the same terms available to persons who are not judges ~~terms that are available based on factors other than judicial status;~~

- (d) opportunities and benefits, including favorable rates and commercial discounts, that are available based on factors other than judicial status to persons who are not judges based on factors other than judicial status;
- (e) rewards and prizes given to competitors in random drawings, contests or other events, that are open to the public and that are awarded to persons who are not judges based on factors other than judicial status; or

*[Allowing judges to accept loan terms, opportunities, and benefits based “on factors other than judicial status” would be a difficult if not impossible standard to enforce. Bank officers or car dealers are not going to acknowledge that a special deal was based on the person being a judge. The 1990 model code language that allows judges to accept loans on the same terms available to persons who are not judges is preferable.]*

- (f) scholarships and fellowships awarded on the same terms and based on the same criteria applied to non-judge applicants
- (g) reimbursement or waiver of charges for travel-related expenses governed by Rule 4.14;
- (h) compensation for extra-judicial activities that is governed by Rule 4.14.

[2] A judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this Code. See Rules 4.01 and 2.09.

[3] Because a gift to a member of the judge’s family residing in the judge’s household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge’s household.

[4] A gift to a judge, or to a member of the judge’s family living in the judge’s household, that is excessive in value raises questions about the judge’s impartiality and the integrity of the judicial office and might require disqualification of the judge.

[5] Rule 4.12 prohibits judges from accepting gifts or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts or loans from clients of lawyers or their firms when the clients’ interests have come or are likely to come before the judge. Rule 4.12(a)(5) prohibits a judge from accepting gifts or loans, even of a nominal value, from people or entities who are likely to appear before the judge. The rule requires a judge to consider whether a donor, or the donor’s interest, might come before the judge in the foreseeable future.

[6] Rule 4.12 does not apply to contributions to a judge’s campaign for judicial office. Such contributions are governed by Canon 5 and other Rules of this Code. Rule 4.12

likewise does not apply to the reimbursement or waiver of charges for travel-related expenses, which is governed by Rule 4.13.

[7] Acceptance of an invitation to a law-related function is governed by Rule 4.12(a)(1) and includes acceptance of an invitation paid for by an individual lawyer or group of lawyers.<sup>69</sup> The judge's acceptance of such an invitation is subject to the provisions of Rule 4.12(a)(7)(a) and (b).

[8] Regardless of whether Rule 4.12 would permit receipt of a particular gift by a judge or a member of the judge's family residing in the judge's household, other Rules may prohibit the gift. For example, Rule 4.01(b) would apply if the gift would cast reasonable doubt on the judge's capacity to act with integrity, impartiality and independence.

[9] For purposes of this canon, gifts are considered to be from the same source if the donors are members or employees or the same law firm, corporation, or government entity.

~~“Widely attended event” means a convention, conference, symposium, forum, panel discussion, dinner, viewing, reception or similar event at which more than 25 persons are expected to attend.~~

#### **RULE 4.1413: REIMBURSEMENT OR WAIVER OF CHARGES FOR TRAVEL RELATED EXPENSES OF THE JUDGE OR THE JUDGE'S SPOUSE OR GUEST**

(a) Unless otherwise provided by law, a judge may accept reimbursement of or a waiver of charges from sources other than the judge's employing entity for necessary travel, food and lodging expenses associated with the judge's participation in extra-judicial activities permitted by this Code, only if such acceptance does not cast reasonable doubt on the judge's capacity to act with impartiality, integrity, or independence.

(b) Expense reimbursement and waiver of charges shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse, domestic partner or guest. Any reimbursement or waiver of charges that alone or in the aggregate with other expenses reimbursed from the same source in the preceding [twelve months] exceeds [\$250] shall be reported and made accessible to the public in the same manner as required by Rule 4.15.

#### **COMMENT**

[1] Judicial education in law-related and academic disciplines is in keeping with a judge's duty to remain competent in the law and is encouraged under the provisions of Canon 4. Attendance at educational activities where the expenses are paid for by persons or entities other than the judge, or the judicial system, or a government entity must nevertheless be evaluated by the judge to determine whether attendance is consistent with the

requirements of this Code. For example, Rule 4.01(b) requires that a judge's extrajudicial activities be conducted so that they do not cast reasonable doubt on the judge's capacity to act with impartiality, integrity, and independence.

*[If it is inappropriate for a judge to attend a seminar sponsored by a private entity under certain circumstances, given the frequency with which government entities are litigants, it would also be inappropriate for a judge to attend a seminar sponsored by government entity (except of course for the judicial branch) under comparable circumstances.]*

[2] A judge's decision whether to attend such an expense-paid educational activity should be based on an assessment of all of the circumstances, and the judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment. The judge should, for example, consider whether the sponsor or the funding source of the educational activity is currently appearing, or likely to appear, before the judge in a matter, thus requiring disqualification of the judge in the matter. See Rule 2.12. A judge also should not attend educational activities sponsored by organizations with which the judge may not properly be associated, such as organizations referred to in Rule 3.03; to do so would violate Rule 1.01 if the judge's attendance manifests approval of the organization's policies. See Rule 3.03, comment [2]. Other factors that may affect whether the judge should or should not attend an educational activity include: (a) Whether the sponsor is an accredited educational institution or bar association rather than a for-profit entity or trade association; (b) Whether the source of the funding is largely from numerous contributors rather than from a single entity and earmarked for programs with specific content; (c) Whether the content is unrelated to the subject matter of litigation before the judge or is related to matters that are, or are likely to come before the judge; (d) Whether the activity is purely educational rather than recreational, and whether expenses of attending are a reasonable amount and comparable to those traditionally furnished at similar events sponsored by the judiciary, bar associations, or similar groups the length of the program; those; the amount of the program devoted to educational activities compared to the amount of time allowed for recreational activities; (e) Whether information concerning the activity and its funding sources are available upon inquiry; (f) Whether the sponsor and/or source of funding are generally associated with particular interests likely to appear in the judge's court; (g) whether the sponsor and/or source of funding are generally associated with particular interests likely to appear in the judge's court; (h) whether competing viewpoints are presented; (h) the number of participants; whether a broad range of judicial and non-judicial participants are invited; and whether the program is designed specifically for judges; In addition, the judge should determine whether attendance may create a conflict of interest, may result in disqualification or recusal in matters coming before the judge, may give rise to a judge's independence being questioned, or may interfere with the judge's performance of his or her judicial duties.

[3] Consistent with Rules 4.12(b) and 4.15, a judge must take reasonable steps to ensure that information concerning the judge's participation in educational activities and other events, as well as reasonable information regarding the nature and circumstances of such

events, are available to the public. A judge should therefore promptly and publicly disclose participation in extra-judicial events at which the expenses are paid for by entities other than the judge or the judicial system ~~a government entity~~.

**Rule 4.1514: COMPENSATION FOR EXTRAJUDICIAL ACTIVITIES**

**(a) A judge may accept compensation for extra-judicial activities permitted by this Code, if such acceptance does not cast reasonable doubt on the judge’s capacity to act with impartiality, integrity, or independence.**

**(b) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.**

**COMMENT**

[1] The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not exploit or appear to exploit the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. The source of the payment of any such compensation must not raise any question of undue influence or the judge’s ability or willingness to be impartial. See Rule 4.01.

**Rule 4.1415: REPORTING OF COMPENSATION, REIMBURSEMENT OF EXPENSES AND WAIVER OF CHARGES.**

**A judge shall report the date, place and nature of any activity for which the judge received compensation, reimbursement of expenses or waiver of charges, the name of the payor or waivor and the amount of compensation, reimbursement of expenses, or waiver of charges so received. The judge’s report shall be made at least annually, except with respect to reimbursements and waivers, which shall be reported at least quarterly, and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law, and when technically feasible, posted on the website of that court or office.**

**COMMENT**

[1] By reporting and publicly disclosing their compensation, reimbursement of expenses or waiver of charges for extrajudicial activities, judges promote transparency and public confidence in the integrity, independence and impartiality of the judiciary.