

**AMERICAN BAR ASSOCIATION  
CPR POLICY IMPLEMENTATION COMMITTEE**

**COMPARISON OF ABA MODEL JUDICIAL CODE AND STATE VARIATIONS**

<b>RULE 3.9 Service as Arbitrator or Mediator</b>	
	<p><b>A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge’s official duties unless expressly authorized by law.*</b></p> <p><b>COMMENT</b></p> <p>[1] This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties. Rendering dispute resolution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.</p> <p>Ten (10) states have identical language (AR, CO, IN, MO, MS, NV, OH, OK, UT, WY)                      Nine (9) states have similar language (AZ, DE, HI, IA, KS, MD, MT, NY, TN)                      Three (3) states have different language (MN, NH, WA)</p>
<b>AL</b>	
<b>AK</b>	
<b>AZ</b> Effective 9/1/09	Adds [2]: Retired, part-time or pro tempore judges may be exempt from this section. See Application, Parts B, C(2) and D(2).
<b>AR</b> Effective 7/1/09	Identical
<b>CA</b>	
<b>CO</b> Effective 7/1/10	Identical
<b>CT</b> Effective 1/1/11	Identical
<b>DE</b> Effective 11/1/08	Rule: replaces “shall” with “should” Deletes [1]
<b>DC</b> (as pro- posed)	Adds at the end: “This rule does not prohibit a judge from performing judicial functions pursuant to military service.” Adds Comment: <i>[2] Advisory Opinion No. 3 (June 25, 1992) of the Advisory Committee on Judicial Conduct addresses the circumstances under which Senior Judges may act as arbitrators.”</i>
<b>FL</b>	
<b>HI</b> Effective 1/1/09	Rule: replaces “judge’s official duties” with “duties of judicial office” [1]: replaces “assigned judicial duties” with “duties of judicial office”

<b>ID</b>	
<b>IL</b>	
<b>IN</b> Effective 1/1/09	Identical
<b>IA</b> Effective 5/3/10	Adds: <i>Comment [2] Senior judges can act as an arbitrator or a mediator as allowed by Iowa Court Rule 22.12.</i>
<b>KS</b> Effective 3/1/09	Rule: same as 1990 Model Code Canon 4F [1]: same as 1990 Model Code Canon 4F Commentary
<b>KY</b>	
<b>MD</b> Effective 7/1/10	(a) is the same as Model Code body; Adds: <i>(b) A retired judge who is approved for recall for temporary service under Maryland Constitution, Article IV, §3A may conduct alternative dispute resolution (ADR) proceedings in a private capacity only if the judge:</i> <i>(1) conducts no ADR proceedings in a private capacity relating to a case in which the judge currently is presiding;</i> <i>(2) is not affiliated with a law firm, regardless of whether the law firm also offers ADR services;</i> <i>(3) discloses to the parties in each judicial proceeding over which the judge presides:</i> <i>(A) the judge’s professional association with any entity that is engaged in offering ADR services;</i> <i>(B) whether the judge is conducting, or has conducted within the previous 12 months, an ADR proceeding involving any party, attorney, or law firm involved in the judicial proceeding pending before the judge; and</i> <i>(C) any negotiations or agreements for future ADR services involving the judge and any of the parties or counsel to the case; and</i> <i>(4) except if there is no disqualification by agreement as permitted by Rule 2.11 (c), does not preside over a judicial proceeding in which the judge’s <b>impartiality</b> might reasonably be questioned because of ADR services engaged in or offered by the judge.</i> [1] is similar to Model Code but adds clause to beginning: “Except as provided in paragraph (b)”
<b>MA</b>	
<b>MI</b>	
<b>MN</b> Effective 7/1/09	Rule: same as 1990 Model Code Canon 4F. Adds: <i>A retired judge may act as mediator or arbitrator if:</i> <i>(A) The judge does not act as an arbitrator or mediator during the period of any judicial assignment;</i> <i>(B) The judge is disqualified from mediation and arbitration in matters in which the judge served as judge, and is disqualified as judge from matters in which the judge acted as mediator or arbitrator, unless all parties to the proceeding consent after consultation with their attorneys;</i> <i>and</i> <i>(C) Acting as arbitrator or mediator does not reflect adversely on the judge’s impartiality</i>

	<i>Adds [2]: A retired judge may act as a mediator or arbitrator under the conditions set forth in the rule.</i>
<b>MO Effective 1/1/2012</b>	[1] Adds “Rule 2-3.9” to “this Rule”
<b>MS (as pro- posed)</b>	Identical
<b>MT Effective 1/1/09</b>	[1] A “judge’s official duties” may include acting as a mediator in a case pending before another judge.
<b>NE Effective 1/1/2011</b>	Identical
<b>NV Effective 1/19/10</b>	Identical
<b>NH Effective 4/1/2011</b>	<p>NH Rule:</p> <p><i>(A) Except as provided in subsection B below, a judge shall not provide services as a private arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.</i></p> <p><i>(B) A judge who is in senior active service pursuant to RSA 493-A:1 or who has reached age 70 but continues to sit as a judicial referee pursuant to RSA 493-A:1-a may serve as a private mediator or arbitrator, and may be privately compensated for such services in accordance with this subsection. To the extent the senior judge or judicial referee provides mediation services pursuant to Superior Court Rule 170 or 170-B, he or she shall comply with the certification requirements of those rules.</i></p> <p><i>(1) A senior judge or judicial referee may be associated with entities that are solely engaged in offering mediation or other alternative dispute resolution services but that are not otherwise engaged in the practice of law. However, such senior judge or judicial referee shall not associate with a law firm, or advertise or solicit business in a manner that identifies his or her position as a senior active judge or judicial referee or prior service as a judge, but he or she may include the fact of prior service as a judge, along with other background and experience, in a resume or curriculum vitae.</i></p> <p><i>(2) A senior judge or judicial referee who serves as a mediator or arbitrator shall disclose to the parties to the mediation or arbitration whether he or she has presided over a case involving any party to the mediation or arbitration within the past three years. A senior judge or judicial referee shall not solicit service as a mediator or arbitrator in any case in which he or she is or has been presided or in which he or she has ruled upon any issues other than routine scheduling matters, but he or she may serve as a mediator or arbitrator in such a case if requested to do so by all parties to the case; provided, however, that once a senior judge or judicial referee serves as a mediator or arbitrator in such a case, he or she shall not thereafter preside over any aspect of the case or rule upon any issue in the case in a judicial capacity.</i></p> <p><i>(3) A senior judge or judicial referee shall disclose if he or she is being utilized or has been utilized as a mediator or arbitrator by any party, attorney or law firm involved in the</i></p>

	<p><i>case pending before the senior judge or judicial referee. Absent express consent from all parties, a senior judge or judicial referee is prohibited from presiding over any case involving any party, attorney or law firm that is utilizing or has utilized the senior judge or judicial referee as a mediator within the previous three years. A senior judge or judicial referee also shall disclose any negotiations or agreements for the provision of mediation or arbitration services between the senior judge or judicial referee and any of the parties or counsel to the case.</i></p> <p><i>(C) The provisions of subsections (B)(2) and (B)(3) above do not apply when a judge, senior judge or judicial referee is performing mediation services for the judicial branch and without private compensation pursuant to Superior Court Rules 170 or 170-B.</i></p> <p>[1] Deletes the last sentence.</p>
<b>NJ</b>	
<b>NM (as proposed)</b>	Identical
<b>NY (as proposed)</b>	Adds “full time” before “judge.”
<b>NC</b>	
<b>ND (as proposed)</b>	<p>Replaces “the judge’s official duties” with “the duties of judicial office”</p> <p>[1] Replaces “assigned judicial duties” with “the duties of judicial office;” In the second sentence replaces “those duties” with “the duties of judicial office”</p> <p>Adds [2]:</p> <p><i>This Rule does not prohibit a district judge from serving as a tribal judge with the approval of the Supreme Court.</i></p>
<b>OH Effective 3/1/09</b>	Identical
<b>OK Effective 4/15/2011</b>	Identical
<b>OR</b>	
<b>PA</b>	
<b>SD</b>	
<b>TN (as proposed)</b>	[1]: Adds “ <i>See Tenn. S. Ct. R. 31, § 17 (permitting various part-time judges to serve as mediators) and Tenn. S. Ct. R. 31 § 20 (authorizing trial judges to participate in judicial settlement conferences). See also Rule 2.6 and Comments [2] and [3] thereto regarding the role of a judge in judicial settlement conferences.</i> ”
<b>TX</b>	
<b>UT Effective 4/1/10</b>	Identical
<b>VT</b>	
<b>VA</b>	
<b>WA</b>	State Code deletes “apart from the judge’s official duties,” inserts in its place, “in a private

As of September 6, 2011

<b>Effective 1/1/11</b>	capacity.”
<b>WV</b>	
<b>WI</b>	
<b>WY Effective 7/1/09</b>	Identical

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