

REPORTER'S EXPLANATION OF CHANGES ABA MODEL CODE OF JUDICIAL CONDUCT, 2007

The "Reporters' Explanations of Changes" were not been approved by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. They were drafted by the Commission's Reporters, based on the proceedings and record of the Commission, solely to inform the ABA House of Delegates about each of the proposed amendments to the Model Code that was presented at the ABA 2007 Midyear Meeting. They are not to be adopted as part of the Model Code.

PREAMBLE

EXPLANATION OF BLACK LETTER

1. The 1990 Preamble has been essentially dissected, with the objective of describing the general purpose and rationale of the Code in the Preamble, and moving to a new “Scope” section the specific explanation of how the Rules are intended to operate. This approach parallels that taken in the ABA Model Rules of Professional Conduct, whose general format the proposed Rules and Comments also follow.
2. The 1990 Code Preamble language discussing the “degree of discipline to be imposed” in the course of enforcing the Code’s provisions has been deleted completely.
3. New language has been added to emphasize that, at all times, judges should avoid both impropriety and the appearance of impropriety in their professional and personal lives and that they should aspire to conduct that ensures the greatest possible public confidence in their independence, integrity, impartiality, and competence.
4. Other changes in language are solely stylistic.

SCOPE

EXPLANATION OF BLACK LETTER

This new Scope section contains the concepts in the 1990 Preamble that explain how the various parts of the Rules are intended to operate. The Scope section indicates that judges may be disciplined only for violating a Rule. With regard to the Canons, or Rule headings, the Scope section explains that the Canons are overarching principles that provide important guidance in interpreting the rules.

TERMINOLOGY

EXPLANATION OF BLACK LETTER

1. The Commission proposes to change the use of asterisks to indicate defined terms, employing them in a Rule only where the defined term is used for the first time. Several commentators observed that the use of asterisks each time a frequently-appearing defined term occurred was more interruptive than useful to the reader.
2. Apart from the addition of "domestic partner" to the definitions of “Member of the candidate’s family” and “Member of the judge’s family,” the following terms are defined in a manner essentially identical to the way they are defined in the 1990 Code (any differences are intended to be purely stylistic):

Aggregate
Appropriate authority

Economic interest
Fiduciary
Knowingly, knowledge, known, or knows
Law
Member of the candidate's family
Member of the judge's family
Member of the judge's family residing in the judge's household
Nonpublic information
Public election
Third degree of relationship

3. The following terms are no longer contained in the Terminology Section:

“Continuing part-time judge,” on the theory that the provision applicable to continuing part-time judges in the Application Section provides a definition already.

“Court personnel,” which in the 1990 Code was not, in fact, a definition, but a statement that the term did not include lawyers in a proceeding before the judge. The Commission believed this was too evident to need statement, and otherwise believed that the term “court personnel” is clear enough that it does not need definition. The term “court personnel” has been replaced with “court staff, court officials, and others subject to the judge’s direction and control.”

“Periodic part-time judge” (on the same theory as applied to “continuing part-time judge”; see above)

“Pro tempore part-time judge” (same reason as above)

“Require,” which the Commission believed is easily understood.

The following definitions have been modified:

“De minimis” is defined specifically in the context of “interests pertaining to the disqualification of a judge,” because it is only in Rule 2.11 (“Disqualification”) that the Commission believes a precise definition of the term need be applied.

“Judicial candidate” is similar to the 1990 Code’s term “candidate.” The phrase “including a sitting judge” has been added for clarification. The language stating that the term “candidate” applies to a judge who is seeking a non-judicial office has been deleted, consistent with the reformulation of the term being defined.

“Political organization” has been expanded to include the qualifying language “sponsored by or affiliated with a political party or candidate,” the principal purpose of which is to further the election or appointment of candidates for political office. In addition, language has been added to clarify that the term is not meant to include a judicial candidate’s own campaign committee.

4. The following new defined terms have been added:

“Domestic partner,” on the theory that now commonplace “non-traditional” relationships that exist outside marriage are deserving of treatment equal to that afforded marital relationships in evaluating their potential conflict-of-interest implications under the Rules.

“Impartiality,” because it is a fundamental goal of the judicial system, and additionally because it has become a defined term in recent decisional law with respect to political activity of judges.

“Impending matter,” in order to set temporal limits on the phrase.

“Impropriety,” because of its fundamental importance as a concept underlying the importance of appearances created by judges.

“Independence,” as a fundamental concept underlying the justice system.

“Integrity,” for the same reason as above.

“Pending matter,” so as to set temporal limits on the phrase and create greater certainty in the application of the Code’s restrictions on judicial speech.

APPLICATION

EXPLANATION OF BLACK LETTER

1. The Commission is proposing a more user-friendly Application section as an alternative to the current version, which is complex and difficult with which to work. The most significant substantive change brings within the definition of “judges” justices of the peace, hearing officers, and “members of the administrative law judiciary.”
2. The title of Part I, "Applicability of This Code," is clearer and simpler than the title in the 1990 Code. No change in substance is intended.
3. Part I (A) has been revised to make clear which provisions of the Code apply to certain categories of judges or judicial candidates. This is a stylistic change and does not change the substance of the provision. The Commission placed in Part I (A) the sentence, “the four categories of judicial service in other than full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service,” which had been included in Commentary to Section A of the Application Section in the 1990 Code.
4. In Part I (B) of the revised Application, "justice of the peace" and “member of the administrative judiciary ” are included as judges "within the meaning of this Code." The application of the Rules to the administrative law judiciary is consistent with policy adopted by the ABA House of Delegates in Report 101B (2001), which provided that members of the administrative law judiciary should be accountable under appropriate ethical standards adapted from the Code in light of the unique characteristics of particular positions in the administrative law judiciary. The rationale for applying the Rules to justices of the peace and members of the administrative law judiciary

derives from the fact that they perform essentially the same function as a trial judge hearing a case without a jury.

5. To facilitate easier recognition of the subject matter of the many Rules cited throughout the Application section, parentheticals have been added with the names of each rule cited, eliminating the need to search through the entire Code. This approach is consistent with the format used when citing Rules throughout the rest of the Code.

6. A footnote reference has been revised to state that each jurisdiction "should consider the characteristics of particular members of the administrative law judiciary positions in adopting, adapting, applying and enforcing the Code for the administrative law judiciary. See, e.g., Model Code of Judicial Conduct for Federal Administrative Law Judges (1989) and the Model Code of Judicial Conduct for State Administrative Law Judges (1995). Both Model Codes are endorsed by the ABA National Conference of the Administrative Law Judiciary." The Commission deleted the language that alluded to the executive branch of government in order to avoid difficulties associated with separation of powers issues.

7. The phrase "for service" was added to Part II to explain more fully the meaning of a judge's being "subject to recall." No substantive change is intended.

8. In Parts III, IV and V, the definitions of the various types of part-time judges have been introduced into the text, and deleted from the "Terminology" section of the Code, consistent with the Commission's decision to place terminology within the body of a Rule when that is the only time that it appears.

9. Sections I(D)(2) and I(E)(2) of the 1990 Code were deleted in acknowledgement that this code is not meant to reach the conduct of lawyers, but that of judges. The situations described in both provisions arise under and are to be decided according to the Model Rules of Professional Conduct for lawyers.

10. Part VI, "Time for Compliance," has not changed in substance. Taken directly from Section F of the 1990 Code's Application section, it acknowledges the need to allow new judges to continue to serve as fiduciaries or in a business relationship for a period of up to one year in order to avoid hardship or serious adverse consequences to the beneficiaries of the fiduciary relationship.

EXPLANATION OF COMMENTS

PART I

[1] A new introductory Comment has been added to highlight the fact that it is desirable to have a uniform system of ethical principles that applies to all individuals serving a judicial function.

[2] This Comment clarifies that the category associated with a judicial officer depends on the judicial service.

[3] This new Comment confirms the propriety of using nontraditional methods in “problem solving” courts, such as drug and domestic violence courts, where they are permitted by law, including court rules.

CANON 1

1990 MODEL CODE COMPARISON

Canon 1 is a combination of Canons 1 and 2.

EXPLANATION OF BLACK LETTER

1. Canon 1 combines most of the subject matter of Canons 1 and 2 in the 1990 Code, addressing both the obligation of judges to uphold the independence, integrity, and impartiality of the judiciary and the obligation to avoid impropriety and its appearance. The admonishment that judges avoid not only impropriety but also its appearance is in the text of Canon 1 and in Rule 1.2.

The decision to combine Canons 1 and 2 in the 1990 Code into a single Canon was based on the premise that they are directed toward essentially the same end: to articulate a limited number of general, overarching principles that should govern a judge’s conduct. Former Canons 1 and 2 were inextricably linked: avoiding “impropriety and the appearance of impropriety” in former Canon 2 was instrumental to upholding “the independence and integrity of the judiciary” in former Canon 1. Moreover, the former Code blurred the distinction between its Canons 1 and 2 by including in Canon 2A a duty to act in a manner that “promotes public confidence in the integrity and impartiality of the judiciary,” which essentially paraphrased Canon 1’s directive to “uphold the integrity and independence of the judiciary.” Although one could argue that former Canon 1 was concerned with protecting independence and integrity in fact, while former Canon 2 concentrated upon protecting appearances and public perception, the overlap between them was so great that in the Commission’s view preserving the two as discrete Canons was unnecessarily confusing. Accordingly, the two Canons have been combined to underscore the instrumental relationship between them, and thereby reinforce the importance of both.

2. Addition of “promote” to Canon 1

As an overarching objective, the Commission deemed it desirable to speak in terms of an ethical duty to promote as well as uphold judicial independence, integrity and impartiality.

3. “Appearance of impropriety” standard

At the center of the Commission’s deliberations over Canon 1 was the “appearance of impropriety.” The discussions reflected two competing tensions. On the one hand, a primary purpose of the Code is to advise and inspire judges to adhere to the highest standards of ethical conduct. To preserve public confidence in the courts, it is not enough that judges avoid actual improprieties; they must avoid the appearance of impropriety as well. On the other hand, another purpose of the Rules is to serve as the basis for discipline. To discipline judges for appearing to act improperly—even if

they did not act improperly in fact—was considered by some commentators to raise due process issues because of the potential vagueness of the term “impropriety.”

To address the concern that a duty to avoid the appearance of impropriety was too vague to be independently enforceable, the Commission’s preliminary draft included a comment to the effect that ordinarily, when judges are disciplined for violating their duty to avoid the appearance of impropriety, it is in combination with other, more specific rule violations that give rise to the appearance problem. When the preliminary draft was circulated for public comment in June 2005, that comment was criticized widely for, among other things, diluting the “appearance of impropriety” standard unnecessarily.

Of additional concern was the preliminary draft’s deletion of former Canon 2A’s directive that “a judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary” (the “act at all times” clause), which had been a rule through which the appearance of impropriety was commonly enforced.

The Commission deleted the offending draft Comment, and restored the “act at all times clause.” The Commission had in the interim considered retaining the appearance of impropriety language only in the Canon, and, as a precaution against it being used as a disciplinary standard, included a statement in the Scope Section that the Canons could themselves be enforced only when some Rule was violated. Urgings from legal organizations and the judiciary led the Commission to accept an amendment, during debate in the House of Delegates, that reinstated the obligation of a judge to avoid impropriety and the appearance of impropriety as black letter Rule 1.2. With an enforceable rule thus “on the books,” any objections to the non-enforceability of the Canons were withdrawn, and the Scope provision was retained.

4. Use of “independence, integrity, and impartiality”

In the prior Code, “impartiality” did not appear in the titles of Canons 1 or 2, even though it did appear in underlying sections, such as Canon 2A. In the Commission’s view, independence, integrity, and impartiality are overarching, fundamental values that the Rules promote, which warrant mention in the title of Canon 1. The term “impartiality” has been added to integrity and independence throughout the Rules, and the Rules have been revised throughout to preserve consistency.

The importance of judicial independence, integrity, and impartiality is underscored by the recurrence of the phrase throughout the Rules. Although it was used in earlier Codes as well, the Commission took pains to ensure that the three terms appear together wherever appropriate, and in the same sequence whenever they are employed.

RULE 1.1

1990 MODEL CODE COMPARISON

The Rule is the first clause of Canon 2A, combined with a statement from the Commentary to Canon 1A.

EXPLANATION OF BLACK LETTER

1. Creation of a new rule

This Rule reproduces the first clause of former Canon 2A. The former Canon linked the duty to respect and comply with the law to the duty to act at all times in a manner that promoted public confidence in the independence, integrity, and impartiality of the judiciary, which the Commission regarded as distinct and discrete concepts. To be sure, the judge who does not comply with the law diminishes public confidence in judges, but the “act at all times” clause encompasses a far broader range of conduct that deserved to be singled out and articulated at the front of the Canon. The reference to a judge’s duty to “respect” the law was deleted because it was believed to be both impossible to define and unnecessary.

2. Addition of “including the Code of Judicial Conduct”

The Commission wanted to leave no room for doubt that the scope of “law” within the meaning of this rule, applies to the Rules themselves.

3. Canon 1A’s pronouncement that a judge “should participate in establishing, maintaining and enforcing high standards of conduct” has been revised and moved to the Preamble. The Commission concluded that such hortatory language should not be confused with enforceable standards and that to avoid such confusion, it should not appear in black letter Rules.

EXPLANATION OF COMMENTS

The Commentary to Canon 1A was deleted as unnecessary. Integrity and independence, which were discussed in the deleted comment, are defined terms in the revised Terminology Section.

RULE 1.2

1990 MODEL CODE COMPARISON

The Rule is Canon 2A.

Comment [1] is based upon the first two sentences of Commentary to Canon 2A, with the first sentence of the second paragraph of Commentary to Canon 2A inserted as a second sentence.

Comment [2] is taken from the first paragraph of Commentary to Canon 2A.

Comment [3] is taken from the first two paragraphs of Commentary to Canon 2A.

The third paragraph of Commentary to Canon 2A was deleted.

Comment [4] is new.

Comment [5] is a reformulation of the second paragraph of Commentary to Canon 2A.

Comment [6] is new.

EXPLANATION OF BLACK LETTER

Creation of a new rule

The first clause of Rule 1.2 is taken from Canon 2. This language was formerly included in the text of Canon 2A and is now a free-standing rule, for reasons explained above in the general discussion of Canon 1.

The second clause, directing judges to avoid impropriety and the appearance of impropriety was added at the urging of the judiciary and others, to make creating an “appearance of impropriety” an independent basis for discipline.

EXPLANATION OF COMMENTS

[1], [2], [3] The substance of Comments [1], [2], and [3] is derived from Commentary to former Canon 2A. Language from the former Commentary that was deemed self-evident, redundant, or otherwise unnecessary was deleted.

[4] Comment [4] is new. The Commission heard from a number of witnesses who underscored the importance of encouraging judges to promote professionalism among lawyers and judges—to make it clear that doing so was a part of their jobs. Although it was never suggested that judges be subject to discipline for failing to undertake such activities, the Commission agreed that judges should strive to promote professionalism and access to justice and that the aspirational objectives of the Code were well served by including this Comment.

[5] Comment [5] is derived from commentary accompanying Canon 2A of the 1990 Code. It modifies the former commentary’s “test” for the appearance of impropriety by stating that an appearance problem arises from the perception that the judge either violated the Code or engaged in other conduct that reflects adversely on the judge’s honesty, impartiality, temperament or fitness.

[6] Comment [6] is new, and is designed to encourage judges to participate in community outreach activity. Existing ABA policy encourages judges to engage in such activity as a means to promote public confidence in the courts.

RULE 1.3

1990 MODEL CODE COMPARISON:

The Rule and its Comment come from Canon 2B and its Commentary.

EXPLANATION OF BLACK LETTER

1. Creation of separate Rule on abusing prestige of office

This Rule was segregated from former Canon 2B for treatment as a stand-alone Rule because it relates directly to a judge's personal conduct. Former Canon 2B's prohibition on a judge allowing family, social, and political relationships to influence judicial conduct and its prohibition on a judge conveying or allowing others to convey the impression that other persons are in a position to influence the judge related directly to a judge's judicial decision-making responsibilities. For that reason, these provisions belonged more logically in proposed Canon 2. Former Canon 2B's limitation on a judge serving as a character witness, on the other hand, related to a judge's personal conduct and has been moved to Rule 3.3.

2. Substitution of "abuse" for "lend"

The term "abuse" has been substituted for "lend." In the Commission's view, the term "lend" created unnecessary confusion. For example, a judge who wrote a letter of recommendation for a law clerk "lent" the prestige of the judge's office to the recommendation, and some judges told the Commission that they declined to write letters on their clerks' behalf as a consequence. In the Commission's view, however, the problem that Rule 1.3 seeks to address is more accurately characterized as "abuse" of the office.

3. Addition of "economic" interests

Although a judge's "personal" interests might commonly be thought to include "economic" interests, the Commission wanted to avoid any possibility of confusion, and thus made it clear that a judge may not abuse the prestige of office to advance either.

4. Addition of prohibition on others' abuse

The Rule has been revised to prohibit judges from allowing others to abuse the prestige of the judge's office to advance the judge's or others' personal or economic interests. In the Commission's view, judges should not be permitted to look the other way if friends or relatives seek to trade on the judge's position to benefit themselves or others. "Personal" replaced "private" for stylistic reasons not intended to change substantive meaning.

EXPLANATION OF COMMENTS

[1] This Comment elaborates on the core objective underlying the Rule by making plain that a judge should not use his or her position as a judge to gain personal advantage in business or daily life. The last sentence was changed to limit the admonition that a judge should not use his or her judicial letterhead for personal business to situations in which the use of letterhead could "gain advantage." There are times when a judge might draft a personal note on stationery that includes the judge's title that could not conceivably enable the judge to "gain advantage," as, for example, when the judge corresponds with a long-time acquaintance who is well aware of the judge's position. Material from the 1990 comment regarded as too general to be helpful was deleted.

[2] The Commission was in accord that judges should be permitted to use their titles and office letterheads when writing references for people with respect to whom the judge's experience as a judge was relevant. The prohibition on abusing the prestige of judicial office to advance the interests of another is intended to prevent inappropriate exploitation of judges' positions, and there is nothing

inappropriate about judges identifying themselves as such when judicial experience is germane to the recommendation. The Comment thus clarifies that a judge may write letters on the basis of a judge's experience on the job (e.g., law clerks) or general expertise in the law (e.g., a neighbor applying for admission to law school). This Comment does not admonish judges to avoid writing letters of reference on behalf of someone with respect to whom the judge's status as a judge is irrelevant, rather, it merely advises judges to consider whether their position as a judge might be perceived as exerting pressure by reason of their office and to refrain if it would.

[3] Changes were stylistic and not intended to change substantive meaning.

[4] Deleted material was redundant of the text and otherwise not illuminating.

CANON 2

1990 MODEL CODE COMPARISON

The Canon is former Canon 3.

Canon 2 addresses solely the judge's professional duties as a judge, which constitute part of Canon 3 in the 1990 Code.

EXPLANATION OF BLACK LETTER

Discussion of Canon

This Canon is at the heart of the Rules, in that it governs core judicial functions. It bears emphasis, however, that the judicial function has changed over time and logically reaches such matters as administration, discipline, and some forms of outreach. Judicial activities or conduct, therefore, are not limited to the adjudication of cases, but are intended to reach the broader duties of judicial office. Thus, this Canon on the duties of judicial office includes rules governing judicial discipline, administration, and reporting.

The element of "competence" was added to the Canon in recognition of the importance that competence plays in a judge's discharge of his or her duties.

RULE 2.1

1990 MODEL CODE COMPARISON

The Canon is Canon 3A.

The Comment is new.

EXPLANATION OF BLACK LETTER

1. Deletion of heading
2. Change "judicial duties" to "duties of judicial office"

The wording was changed to emphasize that its application goes beyond adjudicative functions to reach the broader scope of responsibilities that accompany the judicial office.

3. Addition of "shall"

The Commission wanted to make clear that this rule was doing more than making the descriptive point that judicial functions do take precedence; by inserting the term "shall," the Code clearly imposes an ethical duty on judges to give priority to the duties of judicial office.

4. Replace “all the judge’s other activities” with “all of a judge’s personal and extrajudicial activities”

This change was made to avoid confusion. Judges should give priority to their judicial duties, broadly defined to reach not only adjudication but also the other duties of judicial office (such as administration and discipline), and the Commission wanted to be clear that the matters of secondary importance were limited to personal and extrajudicial activities.

5. Deletion of third sentence

This sentence was deleted as unnecessary.

EXPLANATION OF COMMENTS

[1] New Comment

This Comment has been added to highlight the relationship between Canon 2 and Canon 3: because judges must disqualify themselves from cases in which they have a conflict of interest, they must conduct their extrajudicial activities in ways that minimize their need to disqualify themselves.

[2] New Comment

This comment has been added, along with Comment 6 to Rule 1.2, to underscore the value of judicial outreach. Although undertaking activities that encourage public understanding of and confidence in the justice system is not a duty of judicial office per se, such activities promote public confidence in the courts and to that extent facilitate the courts’ mission.

RULE 2.2

1990 MODEL CODE COMPARISON

The Rule is the first half of the first sentence of Canon 3B(2).

Comments [1] – [4] are new.

EXPLANATION OF BLACK LETTER

New Rule on upholding the law

This Rule is taken from the first half of the first sentence of Canon 3B(2), which spoke in terms of judges being “faithful” to the law. In its stead, the Commission substituted the phrase “uphold and apply the law.” In the Commission’s view, “fidelity” lacked clear meaning; the essential point was and remains that judges should interpret and apply the law as they understand it to be written, and the Rule has been revised to make that point more clearly.

Although there is some similarity between this Rule and Rule 1.1, their purposes are fundamentally different. Whereas Rule 1.1 addresses the judge's duty to comply with the law, this Rule directs the judge to follow the rule of law when deciding cases. The duty to follow the law is inextricably linked to a corresponding duty to be fair and impartial. Although the duty to decide cases with impartiality was implicit in numerous provisions in the former Code, it was not stated explicitly. This Rule corrects that oversight and does so by linking the judge's obligation to decide cases with impartiality to a corresponding duty to apply the law.

EXPLANATION OF COMMENTS

[1] This new Comment defines impartiality with reference to the two definitions of impartiality accepted by the Supreme Court in *Republican Party of Minnesota v. White*, lack of bias toward a participant in the judicial process, and open-mindedness.

[2] Comments [2] and [3] were inserted to underscore the distinction between the judge whose honest understanding of the law is influenced by upbringing, education, and life experience, which is neither avoidable nor improper, and the judge who disregards the law.

[3] Comment [3] underscores the point that judges sometime commit good faith errors of fact or law, which does not violate this rule. Rather, the rule is directed at judges who deliberately or repeatedly disregard court orders or other clear requirements of law.

[4] Throughout the life of the Commission, some witnesses urged the Commission to create special rules enabling judges to assist pro se litigants, while others urged the Commission to disregard calls for such rules. This Comment makes clear that judges do not compromise their impartiality when they make reasonable accommodations to pro se litigants who may be completely unfamiliar with the legal system and the litigation process. To the contrary, by leveling the playing field, such judges ensure that pro se litigants receive the fair hearing to which they are entitled. On the other hand, judges should resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage.

RULE 2.3

1990 MODEL CODE COMPARISON

Paragraph (A) is taken from the first sentence of Canon 3B(5).

Paragraph (B) is taken from the second sentence of Canon 3B(5).

Paragraph (C) is taken from Canon 3B(6).

Paragraph (D) is taken from Canon 3B(6).

Comment (1) is the second sentence of the second paragraph of Commentary to Canon 3B(5).

Comment [2] is the third and fourth sentences of the second paragraph of Commentary to

Canon 3B(5).

Comments [3] and [4] are new.

The first paragraph of Commentary to Canon 3B(5) was deleted.

EXPLANATION OF BLACK LETTER

1. Paragraphs (B) and (C): Addition of “harassment”

Canon 3B(5) required judges to avoid bias and prejudice, but included nothing in the black letter about harassment, which it relegated to a discussion in the Commentary, limited to sexual harassment. The Commission agreed that harassment was a form of bias or prejudice that the Rules proscribed but wanted to expand it beyond sexual harassment to reach other forms of harassment as well, for which reason it deleted the term “sexual” from the Commentary in an early draft. Witnesses, however, argued that the proposed change could be construed to have an unintended consequence. By deleting the reference to “sexual” harassment per se, the change could be construed as deleting sexual harassment from the range of behaviors barred by the Rules, or at least diminishing its significance. The Commission remained of the view that harassment—including but not limited to sexual harassment—should be proscribed by the Rules. It was, however, persuaded both that sexual harassment deserved special mention, given the significance of the problem, and that harassment per se was sufficiently distinct from bias and prejudice to deserve separate mention in the black letter of the Rule.

2. Paragraphs (B) and (C): Additions to list of factors upon which bias, prejudice, or harassment can be based

Although the Rule prohibits bias, prejudice, or harassment on any basis, it includes an illustrative list, to which four new items were added: gender (“sex” is a term of art employed in sex discrimination statutes, but may not capture bias, prejudice, or harassment against trans-gendered individuals); ethnicity (which the Commission regarded as distinct from national origin; for example, in the case of an Arab-Canadian, discrimination on the basis of Arab ancestry would relate to ethnicity, while discrimination based on Canadian derivation would relate to national origin); marital status (the Commission was made aware of instances in which judges had berated a party for cohabiting or having a child outside of wedlock); and political affiliation (as, for example, when a judge displays animus toward plaintiffs affiliated with a particular political party).

3. Paragraph (D): Legitimate reference to listed factors

When a case before the judge raises issues of bias or prejudice, the judge must be in a position to discuss such issues without fear of violating this rule, for which reason an exception has been created in the text. The substance of this provision formerly was in Canon 3B(6).

EXPLANATION OF COMMENTS

The first paragraph of Commentary to Canon 3B(5) was deleted given the new black letter provision prohibiting harassment and new Comments [2] – [4].

[1] Comment [1] is the second sentence of the second paragraph of Commentary to Canon 3B(5), but with the phrase “on any basis” deleted. The phrase “or prejudice” was added to reach not only favoritism or opposition by a judge to an idea, which is the more common understanding of “bias,” but also specially favoring or opposing individuals, which is generally contemplated by the term “prejudice.”

[2] The new language was added after several witnesses urged the Commission to provide some illustrations of bias and to better inform judges of what bias entails and what some of the most common bias-related problems are. The list is explicitly non-exclusive and self-explanatory. The last two sentences are taken from the second paragraph of the comment to Canon 3B(5). The terms “in addition to oral communication” and “judicial” were deleted as excess language.

The term “behavior” was replaced with “conduct” in the last sentence for consistency with the rest of the Rules. The last sentence now instructs judges to avoid conduct that may be perceived as “prejudiced or biased” in order to be more comprehensive and consistent with the thrust of the Rule. The addition of the term “reasonably” in the last sentence is consistent with Title VII jurisprudence, which separates the merely vulgar from the deeply offensive.

[3] This new Comment defines harassment and underscores that the prohibition in the black letter includes, but is not limited to, sexual harassment.

[4] This new Comment separately elaborates on the meaning of “sexual harassment.” Although the Rule forbids all forms of harassment, witnesses before the Commission were emphatic about the need to single out sexual harassment for special mention, given the nature, extent, and history of the problem.

RULE 2.4

1990 MODEL CODE COMPARISON

Paragraph (A) is the second sentence of Canon 3B(2).

Paragraph (B) is the first sentence of Canon 2B.

Paragraph (C) is the second half of the second sentence of Canon 2B.

Comment [1] is new.

EXPLANATION OF BLACK LETTER

1. Paragraph (B): Addition of “financial”

Paragraph (B) is the first sentence of Canon 2B.

“Financial” relationships were added to the list on influences that judges should avoid. Although the pre-existing rule referred to “other” relationships, the Commission regarded financial relationships as important enough to warrant separate mention.

2. Paragraph (C): Expansion of scope of Rule

The scope of the Rule was expanded slightly. As previously drafted, the Rule forbade a judge from permitting others to convey the impression that “they,” meaning the “others,” were in a position to influence the judge. As a technical matter, that prohibition did not reach the situation in which “others” conveyed the impression that a third person was in a position to influence the judge, and the change has been made to cover that scenario.

The Commission felt that the term “special,” modifying position, was at best a redundancy and at worst added confusion by creating the impression that there might be persons who are in a position to influence the court.

EXPLANATION OF COMMENTS

[1] Comment [1] is new.

This new Comment is intended to underscore the general purpose underlying paragraphs (A) and (B) by linking the duty not to be swayed by the public, friends, or family to the judge’s primary obligation to follow the law and facts impartially.

RULE 2.5

1990 MODEL CODE COMPARISON

Part A is taken from Canons 3B(2) and 3C(1). Part B is the second half of Canon 3C(1).

Comments [1] and [2] are new.

Comment [3] is the second paragraph of Commentary to Canon 3B(8).

Comment [4] is the first three sentences of Commentary to 3B(8).

EXPLANATION OF BLACK LETTER

1. New Rule combining duties of competence and diligence

This Rule governs competence, formerly governed by Canon 3B(2), and diligence, formerly governed by Canon 3C and makes the requirements applicable to both adjudicative and

administrative duties of a judge. The duty of competence is analogous to a lawyer's professional duty of competence, while the duty to apply the law is discussed elsewhere (the term "fidelity" is no longer used). Corresponding Commentary was moved accordingly. The phrasing was changed from passive to active voice for stylistic reasons.

2. Expansion of Rule

The black letter Rule was clarified to make plain that the duty at issue was one of diligence, and expanded slightly to extend the duty of diligence to all judicial duties and not just "judicial matters," which is generally understood to be limited to case adjudication.

3. Change Rule standard

The obligation to cooperate with others in judicial administration was upgraded from hortatory to mandatory. Efficient and effective administration is a duty of the judicial office, the proper execution of which necessitates cooperation among the judges of the court.

EXPLANATION OF COMMENTS

[1] Comment [1] was added simply to define competence and underscore its fundamental importance in relation to core judicial functions.

[2] New Comment [2] was added to emphasize that the duty to perform judicial and administrative duties competently and diligently requires judges to devote time to proper time management and use of court resources and personnel.

RULE 2.6

1990 MODEL CODE COMPARISON

Paragraph A of the Rule is 3B(7)

Paragraph B of the Rule is 3B(8) commentary.

Comments [1], [2], and [3] are new.

EXPLANATION OF BLACK LETTER

1. Paragraph (B): New paragraph on settlements

This new paragraph was added in recognition of the fact that out-of-court settlement is a commonly used method of case resolution. It is important for judges to remember that a litigant's right to be heard can inadvertently be impaired by a judge who is overzealous in encouraging an out-of-court resolution. Accordingly, the Rule draws a line between encouraging settlement, which is permitted, and coercing settlement, which is not. The Commission heard testimony from some witnesses who went further, urging the adoption of rules that would prohibit judges from presiding at

trial over cases with respect to which they had previously conducted settlement negotiations that ultimately were unsuccessful. Although several members of the Commission agreed that, as a general matter, it was the better practice for judges not to try cases they had attempted to settle given the risk that statements the judge made during settlement negotiations might later be construed as lack of impartiality, the Commission declined to adopt such a rule. The Commission ultimately concluded that such an issue was better left for rules of practice and procedure than ethics.

EXPLANATION OF COMMENTS

[1] New Comment [1] emphasizes what is implicit in the Rule, that judges' duties include ensuring that those entitled have their day in court. In so doing, the Comment underscores the relationship between substantive and procedural justice, i.e. that protection of substantive rights depends in part on respecting procedural rights to be heard.

[2] New Comment [2] provides judges with guidance in conducting settlement talks. It undertakes to sensitize judges to concerns that can arise when they lead settlement discussions and to advise judges on what factors to take into account when deciding how to oversee settlement.

[3] New Comment [3] underscores the point that sometimes events transpiring during settlement talks may bias judges toward a party or create an appearance of bias that necessitates disqualification.

RULE 2.7

1990 MODEL CODE COMPARISON

The Rule is Canon 3B(1).

Comment [1] is new.

EXPLANATION OF BLACK LETTER

Clarification of instances requiring disqualification

1. The Rule is Canon 3B(1), with a slight modification to cross-reference the disqualification rule explicitly and to acknowledge that in some instances disqualification may be required by other law.

EXPLANATION OF COMMENTS

[1] New Comment [1] was added to emphasize that although disqualification remains an important and at times essential option for a judge, it should not be misused as a tool to avoid deciding cases that the judge may regard as unpleasant or unpopular. The effective administration of justice depends on judges remaining available to hear the cases that parties file, and this Comment is intended to remind judges of that concern when they approach issues of disqualification.

RULE 2.8

1990 MODEL CODE COMPARISON

Paragraph (A) is Canon 3B(3).

Paragraph (B) is Canon 3B(4).

Paragraph (C) is the first sentence of Canon 3B(11).

Comment [1] is the Commentary to Canon 3B(4).

Comment [2] is the Commentary to Canon 3B(11).

Comment [3] is new.

EXPLANATION OF BLACK LETTER

1. Paragraph (B): Extension of duty of courtesy

Paragraph (B) is Canon 3B(4), modified to extend the duty of courtesy to court staff, where episodes of abusive behavior occasionally have arisen. “Court officials” was added to be consistent with the list used later in the same paragraph.

2. Paragraph (C): Expressing appreciation to jurors

The Commission moved discussion permitting judges to express appreciation to jurors from the black letter Rule to the Comment on the grounds that it was advice not needed in the black letter.

EXPLANATION OF COMMENTS

[3] New Comment [3] was added in light of the growing recognition that judicial outreach is a valued part of the judicial role and includes outreach to jurors. The Comment makes clear that judges can commend jurors for their service and that the prohibition on judges commending or criticizing the jury for their verdict does not foreclose other communications between judges and jurors. To the contrary, the Commission saw value in creating an opportunity for the judge to learn more about the jury’s experience, as long as the merits of the case were not discussed.

RULE 2.9

1990 MODEL CODE COMPARISON

Paragraph (A) is the second sentence of Canon 3B(7).

Paragraph (A)(1) is Canon 3B(7)(a).

Paragraph (A)(1)(a) is Canon 3B(7)(a)(i).

Paragraph (A)(1)(b) is Canon 3B(7)(a)(ii).

Paragraph (A)(2) is a modified version of Canon 3B(7)(b).

Paragraph (A)(3) is Canon 3B(7)(c).

Paragraph (A)(4) is Canon 3B(7)(d).

Paragraph (A)(5) is Canon 3B(7)(e).

Paragraph (B) is new.

Paragraph (C) is paragraph 6 of the Commentary to Canon 3B(7).

Paragraph (D) is from the eighth paragraph of Commentary to Canon 3B(7).

Comment [1] is the second paragraph of Commentary to Canon 3B(7).

Comment [2] is the third paragraph of Commentary to Canon 3B(7).

Comment [3] is the first paragraph of Commentary to Canon 3B(7).

Comments [4] – [7] are new.

The fourth, fifth, seventh and ninth paragraphs of Commentary to Canon 3B(7) were deleted.

EXPLANATION OF BLACK LETTER

1. “Issues on the merits” was deleted as duplicative; the Rule’s exclusion of “substantive matters” from the scope of permissible ex parte communications would necessarily subsume all “issues on the merits.” Replacing “authorized” with “permitted” is stylistic and does not change the substance of the provision.

2. Paragraph (A)(1)(a): Addition of “substantive”

“Substantive” was added in recognition of the fact that a scheduling, administrative, or emergency ex parte communication that is unrelated to substantive matters per se could nonetheless, in some instances, enable a party to gain an inappropriate advantage related to the substance or merits of the case.

3. Paragraph (A)(1)(b): Addition of delegation

Paragraph (A)(1)(b) is Canon 3B(7)(a)(ii), but revised to add the notion that a judge may delegate the notification obligation to others.

4. Paragraph (A)(2): Addition of requirement of advance notice

Paragraph (A)(2) is Canon 3B(7)(b), but modified to add the requirement of advance notice. Under the 1990 Code, a judge could consult with an outside legal expert ex parte before notifying the parties. If such a consultation was problematic for reasons that had not occurred to the judge, post-consultation notification to the parties would come too late to prevent the problem from arising. As revised, the Rule requires the judge to notify the parties before the ex parte contact is made.

5. Paragraph (A)(3): Addition of limitation on consultation

Paragraph (A)(3) is a modified version of Canon 3B(7)(c). The permissibility of a judge's consultation on a case with other court personnel was qualified to include the common sense limitations that the judge must not relinquish ultimate responsibility for deciding the case and, in the course of such consultation, should be careful not to acquire improper factual information.

6. Paragraph (B): Creation of new paragraph on inadvertent communications

New Paragraph (B) addresses an issue not covered by the 1990 Code. In situations where a judge inadvertently receives an unauthorized ex parte communication, the new Rule directs the judge to notify all the other parties of the substance of the communication and give them an opportunity to respond. In an age when misdirected faxes and email are common, the need for some provision to deal with inadvertent disclosures of ex parte information impressed the Commission as necessary.

7. Paragraph (C): Creation of new paragraph prohibiting investigation

In the Commission's view, former Commentary prohibiting a judge from undertaking independent factual investigations was largely unsupported by the Rule itself and warranted inclusion as part of the Rule. Moreover, the judge's duty to consider only the evidence presented is a defining feature of the judge's role in an adversarial system and warrants explicit mention in the black letter. The term "must" was replaced with "shall," both for consistency and to make clear that compliance with the proscription is absolute. Specific acknowledgement of the category of evidence or facts that are judicially noticed was considered a beneficial clarification, and was therefore added to this paragraph.

8. Paragraph (D): Creation of new paragraph on avoiding communication through staff

Paragraph (D) was moved to the black letter from the eighth paragraph of Commentary to Canon 3B(7). In the Commission's view, a judge's duty to take steps to avoid violating the Rule against ex parte communications through staff could not be inferred from the black letter of the former Rule.

EXPLANATION OF COMMENTS

[3] Comment [3] is the first paragraph of Commentary to Canon 3B(7), with the addition of "by this Rule," a revision made for stylistic reasons and not intended to change substantive meaning.

[4] New comment dealing with problem-solving and therapeutic courts

The Commission heard a great deal of testimony about therapeutic or problem-solving courts. In these non-traditional courts that hear matters on an increasingly broad array of issues ranging from drugs to juvenile justice, domestic relations, and crime, judges communicate with parties, service providers (such as social workers), and others in ways that can be in tension with traditional rules governing ex parte communications. Several witnesses thus urged the Commission to create special rules for such courts. The Commission was reluctant to do so because therapeutic courts were too many and varied for the Commission to devise rules of general applicability. Instead, the Commission drafted this new Comment, which calls special attention to the exception for ex parte communications authorized by law and notes that this exception enables individual jurisdictions to devise special rules for their therapeutic courts.

[5] New comment regarding judge-to-judge consultations

New Comment [5] was added to clarify that while a judge may consult with other judges about a case, the judge should not consult with judges who have been disqualified from hearing the case. If, for whatever reason, a judge is disqualified from hearing a given matter, it would defeat the purpose of the disqualification rules to permit another judge to confer with the disqualified colleague. In addition, the Comment clarifies that a judge should not consult on a matter with any judge having appellate jurisdiction over the matter.

[6] New Comment containing prohibition against independently investigating facts.

Given the ease with which factual investigation can now be accomplished via electronic databases and the Internet, the risk that a judge or the judge's staff could inadvertently violate Rules 2.9(B) and (C) has heightened considerably. The need for vigilance on the part of judges has increased accordingly.

[7] New Comment regarding judges seeking ex parte guidance regarding compliance with Rules

The Commission wanted to make clear that judges may seek ex parte guidance concerning their compliance with the Code without violating this Rule. Judges routinely consult ethics advisory committees, counsel and outside experts concerning their obligations under the Code in a given context. Because such consultations are not problematic, New Comment [7] was added accordingly.

Deletion of the fourth, fifth, seventh and ninth paragraphs of Commentary to Canon 3B(7)

The Commission deleted the reference to requests for amicus briefs in the fourth paragraph of Canon 3B(7) Commentary as being "often desirable procedures," because it is not an ethical concern.

The fifth paragraph of Canon 3(B)(7) Commentary concerning clearly acceptable purposes for ex parte communications was deleted because it is redundant of the black letter Rule.

The Commission decided to delete Commentary language in the seventh paragraph of Canon 3B(7) authorizing a judge to request that a party submit proposed findings of fact and conclusions of law as long as the other party was given an opportunity to respond to the submission. In the Commission's view, the permissibility of the practice was so free from doubt as to render the Comment unnecessary.

The Commission deleted the ninth paragraph of Canon 3B(7) Commentary. The subject matter, keeping records of communications, is an administrative, rather than an ethical matter.

RULE 2.10

1990 MODEL CODE COMPARISON

Paragraph (A) is the first sentence of Canon 3B(9).

Paragraph (B) is Canon 3B(10).

Paragraph (C) is the second sentence of Canon 3B(9).

Paragraph (D) is the third and fourth sentences of Canon 3B(9).

Paragraph (E) is new.

Comment [1] is the first sentence of the Commentary to Canon 3B(10).

Comment [2] is new.

Comment [3] is the fifth through seventh sentences of the Commentary to Canon 3B(10).

EXPLANATION OF BLACK LETTER

1. Paragraphs (A) and (C): Separation of former Canon

Former Canon 3B(9) was subdivided into two separate subsections (addressing the judge's statements and the statements of staff, court officers, and others). Paragraph (A) is the first sentence of Canon 3B(9), but was reworded to improve clarity.

In Paragraph (C), the phrase "court personnel" was replaced with "court staff, court officials and others" to broaden the judge's duty to prohibit others from making inappropriate comment on pending and impending cases to include all persons within the judge's control regardless of whether such persons technically qualified as court personnel.

2. In Paragraph (B), "judicial" was inserted before "office" for clarity.

3. Paragraph (E): Adding language concerning responding to media

Judges are justifiably reluctant to speak about pending cases. However, the Commission wanted to make clear that when a judge’s conduct is called into question, the judge may respond as long as the response will not affect the fairness of the proceeding.

EXPLANATION OF COMMENTS

Deletion of reference to Model Rules of Professional Conduct

In the Commentary to Canon 3B(10), the cross-reference to the Model Rules of Professional Conduct was deleted as unnecessary.

Substance of Canon 3B(11) and its Commentary moved

The Commission moved Canon 3B(11) and its Commentary, relating to judges commending or criticizing jurors, to Rule 2.8, the Rule devoted to judicial decorum, demeanor, and communication with jurors.

The definitions of “pending” and “impending” in Commentary to Canon 3B(10) were moved to Terminology.

Comment [2] suggests that it may be appropriate in some instances for statements that explain or defend the role or action of a judge in a particular matter to be made by a third person, rather than by the judge. This suggestion reflects a preference for keeping to a minimum the extent to which judges discuss cases directly with the media.

RULE 2.11

1990 MODEL CODE COMPARISON

Paragraph (A) is Canon 3E(1).

Paragraph (A)(1) is Canon 3E(1)(a).

Paragraph (A)(2) is Canon 3E(1)(d).

Paragraph (A)(2)(a) is Canon 3E(1)(d)(i).

Paragraph (A)(2)(b) is Canon 3E(1)(d)(ii).

Paragraph (A)(2)(c) is Canon 3E(1)(d)(iii).

Paragraph (A)(2)(d) is Canon 3E(1)(d)(iv).

Paragraph (A)(3) is Canon 3E(1)(c).

Paragraph (A)(4) is Canon 3E(1)(e).

Paragraph (A)(5) combines Canons 3E(1)(f), 3E(1)(f)(i), and 3E(1)(f)(ii).

Paragraph (A)(6) is the first two words of Canon 3E(1)(b).

Paragraph (A)(6)(a) is the remainder of the first half of Canon 3E(1)(b).

Paragraph (A)(6)(b) is the Commentary to Canon 3E(1)(b).

Paragraph (A)(6)(c) is the second half of Canon 3E(1)(b).

Paragraph (A)(6)(d) is new.

Paragraph (B) is Canon 3E(2).

Paragraph (C) is Canon 3F.

Comment [1] is the first paragraph of Commentary to Canon 3E(1).

Comment [2] is new.

Comment [3] is the third paragraph of Commentary to Canon 3E(1).

Comment [4] is the Commentary to Canon 3E(1)(f).

Comment [5] is the second paragraph of Commentary to Canon 3E(1).

Comment [6] is new.

The Commentary to Canon 3F was deleted, as being largely redundant of the black letter and otherwise administrative, rather than ethical, in its recommendations.

EXPLANATION OF BLACK LETTER

Most changes to this Rule and its accompanying Comment are stylistic and structural rather than substantive. Only substantive changes are addressed below.

1. Paragraphs (A)(2), (A)(3), and (B): Addition of “domestic partner”
“Domestic partner” was added to treat domestic partners comparably to spouses for purposes of evaluating economic conflicts.
2. Paragraph (A)(2)(a): Addition of “general partner, managing member”

These additions were made to ensure completeness of the list.

3. In Paragraph (A)(2)(d), “to the judge’s knowledge”, which is included in former Canon 3E (1) (d) (iv), was deleted as unnecessary.

4. Paragraph (A)(6)(b): New paragraph on government lawyers

Paragraph (A)(6)(b) makes explicit in the black letter what former Canon 3E(1)(b) stated only in Commentary. Judges must not sit on cases concerning matters with which they were involved as government lawyers, for the same reason that they must not sit on cases concerning matters in which they were involved as lawyers, and the Rule has been revised to so state.

5. Paragraph A(6)(d): New paragraph on judges sitting on cases they previously heard:

Trial judges sometimes sit by designation on courts of appeal, and vice versa. Such judges should not hear cases over which they presided in a different court, and this Rule makes that clear. This Rule, however, leaves unaffected the propriety of a judge who decided a case on a panel of an appellate court participating in the rehearing of the case en banc with that same court.

EXPLANATION OF COMMENTS

[2] New Comment [2] was added to clarify that the disqualification rules apply regardless of whether a motion to disqualify has been filed. The terms “recusal” and “disqualification” have been defined in different and sometimes inconsistent ways to apply where judges act on their own initiative or pursuant to a motion by a party. This Comment is intended to render such distinctions irrelevant here.

[6] New Comment [6] was added to elaborate on the meaning of “economic interest.” Although the term is separately defined in the Terminology section, it is important enough to bear recapitulation here.

RULE 2.12

1990 MODEL CODE COMPARISON

The Rule is Canon 3C(2) and (3).

Comments [1] and [2] are new.

EXPLANATION OF BLACK LETTER

1. Canons 3C(2) and (3) combined

Canons 3C(2) and (3) were combined under a general rubric, “Supervisory Duties.”

2. Revision to Court staff standards

Rule 2.12(A) was reworded to reflect a more comprehensive understanding of the standards of conduct required of court personnel. Judges must insist that court staff and officials act in a manner consistent with all of a judge’s obligations under the Code and not simply those previously enumerated in Canon 3C(2) relating to diligence, fidelity, and lack of bias or prejudice.

3. Proper discharge of judicial responsibilities of subordinate judges

The Commission reordered the provision to emphasize the importance of the obligation of the supervisory judge to ensure the prompt discharge of judicial responsibilities over all matters.

EXPLANATION OF COMMENTS

[1] New Comment [1] was added to emphasize the critical position judicial staff occupy in the justice system—not only in terms of their relevance to the administration of justice but also in terms of their role in preserving public confidence in the system as a whole. The Comment explains the black letter to underscore that a judge must never direct staff within his or her control to engage in conduct that would violate the Code if undertaken by the judge.

[2] New Comment [2] was added to underscore that public confidence in the courts depends on judges with supervisory authority taking the steps needed to ensure that judges under their supervision administer their workloads both properly and expeditiously.

RULE 2.13

1990 MODEL CODE COMPARISON

Paragraph (A) is taken from Canon 3C(4).

Paragraph (B) is taken from Canon 3C(5).

Paragraph (B)(1) is Canon 3C(5)(a).

Paragraph (B)(2) is Canon 3C(5)(b).

Paragraph (B)(3) is Canon 3C(5)(c).

Paragraph (C) is Canon 3C(4).

Comment [1] is the Commentary to Canon 3C.

Comments [2] and [3] are new.

EXPLANATION OF BLACK LETTER

1. Paragraph (A): Movement of “unnecessary appointments”

The first sentence of former Canon 3C(4) was folded into the Rule for largely stylistic reasons not intended to change substantive meaning.

2 Paragraph (B): Addition of “spouse or domestic partner”

The proscription against the appointment of a lawyer who has contributed a defined amount to the judge’s election campaign is extended to the spouse or domestic partner of the lawyer.

EXPLANATION OF COMMENTS

[2] The black letter directs judges to avoid nepotism, and new Comment [2] was added simply to add clarity to the meaning of nepotism with a conventional definition.

[3] The black letter prohibits a judge from awarding appointments to contributors who have given more than a specified amount to the judge’s election campaign but creates an exception for “substantially uncompensated” positions. This new Comment clarifies the meaning of “substantially uncompensated” to reach positions in which the appointee is merely reimbursed for out-of-pocket expenses.

RULE 2.14

1990 MODEL CODE COMPARISON

The Rule and Comment are new.

EXPLANATION OF BLACK LETTER

Creation of new Rule on impairment

This is a new Rule, governing a difficult and extremely important issue. Impairment can undermine judicial competence, diligence, and demeanor specifically, and public confidence in the courts generally. The Rule imposes a mandatory obligation to take appropriate action when a judge learns of a colleague’s impairment. The objective of this provision is to guide and encourage judges to address impairment problems when they arise.

EXPLANATION OF COMMENTS

[1] This Comment was added to define “appropriate action.” There was some concern that disagreement could arise over whether a particular action taken in response to knowledge of impairment was sufficient. This Comment takes a functional approach, by asking whether the action taken would be reasonably likely to rectify the problem.

[2] The Commission was alert to the need for sensitivity when dealing with impairment problems and was careful not to prescribe specific action in response to specific evidence of impairment. Often, referral to a lawyer or judicial assistance referral program may be the most

appropriate course, but the Commission recognized that different circumstances may warrant different responses.

RULE 2.15

1990 MODEL CODE COMPARISON

Paragraph (A) is the second sentence of Canon 3D(1).

Paragraph (B) is the second sentence of Canon 3D(2).

Paragraph (C) is the first sentence of Canon 3D(1).

Paragraph (D) is the first sentence of Canon 3D(2).

Comment [1] is new.

Most of Comment [2] is new. The second sentence of the Comment is the Commentary to Canon 3D.

Canon 3D(3) was deleted.

EXPLANATION OF BLACK LETTER

Rules regulating the response to lawyer and judicial misconduct were consolidated to reflect closely related concepts.

1. Paragraph (A): Change to parallel Rule 8.3

The Rule was reworded to parallel the lawyer reporting obligations in Rule 8.3 of the Model Rules of Professional Conduct to require reporting to the “appropriate authority” whenever the judge has knowledge of another judge’s violation of the Code that raises a substantial question as to the judge’s “honesty, trustworthiness, or fitness as a judge in other respects.”

2. Paragraphs (B) and (D): Language changes

Changes were made to parallel the obligations by judges to address the misconduct of lawyers.

3. Paragraph (C): Change in duty

Former Canon 3(D)(1) was revised to state that when a judge receives information indicating a substantial likelihood that another judge has violated the Rules, the judge receiving such information shall—no longer should—take “appropriate action.” In the Commission’s view, in situations where the judge does not “know” but receives information making it substantially likely that another judge has violated the Rules, the judge receiving such information shall take action. The

appropriate action would vary with the circumstances. In some instances, it could involve talking to the judge in question or in other instances, taking steps to verify the information received and report it to the appropriate authorities.

4. Deletion of Canon 3D(3)

Former Canon 3D(3) declared that the acts of a judge in the discharge of disciplinary responsibilities were absolutely privileged. Although there was no opposition to the concept that judges should be immune from suit in such situations, the Commission concluded that such a provision was inappropriate for the Model Code of Judicial Conduct. Neither the ABA nor an adopting court is in a position to grant or deny judicial immunity in the context of judicial conduct standards. Accordingly, Canon 3D(3) was viewed as a generalized statement of support for judicial immunity, which, in the Commission's view, was not appropriate for the Code.

EXPLANATION OF COMMENTS

[1] Language was added to underscore the relationship between reporting serious misconduct of judges and lawyers and the judge's responsibility to preserve public confidence in the courts.

[2] Commentary concerning "appropriate action" in response to judicial and lawyer misconduct is consistent with the Commentary in former Canon 3D.

RULE 2.16

1990 MODEL CODE COMPARISON

The Rule and its Comments are new.

EXPLANATION OF BLACK LETTER

Creation of new Rule

Several witnesses noted that disciplinary authorities often struggle to gain the cooperation of targeted judges in disciplinary matters and the cooperation of judges in lawyer disciplinary proceedings. In the Commission's view, the need for a judge's cooperation in the disciplinary process is paramount. Moreover, for a judge to retaliate against a person for cooperating in disciplinary proceedings against him or her would be patently unethical. This Rule thus serves to address an important omission in the former Code.

CANON 3

1990 MODEL CODE COMPARISON

This renumbered Canon 3 is drawn almost exclusively from Canon 4 of the 1990 Code. However, some material involving the “personal” activities of a judge has been repositioned to this Canon from Canon 2 of the 1990 Code.

EXPLANATION OF BLACK LETTER

1. Expanded the reach of this Canon to include “personal” as well as “extrajudicial” activities.

Some activities governed by this Canon, such as accepting gifts or participating in private clubs, are “extrajudicial” in the sense that they are not part of a judge’s official duties, yet they are less formal and less public than participating in a seminar or accepting an award. Accordingly, the Commission added the word “personal” to the Canon title to make it more accurate and more complete.

2. Replaced “conflict with judicial obligations” with “conflict with the obligations of judicial office.”

No significant substantive change is intended. The substituted phrase is used as a reminder that judges have a variety of duties—including administrative duties—that go with the judicial *office*.

RULE 3.1

1990 MODEL CODE COMPARISON

To the extent that Rule 3.1 serves as a general list of restrictions upon a judge’s participation in extrajudicial activities, it is chiefly derived from Canon 4A. However, the new set of restrictions is somewhat different, as it focuses attention more sharply upon interference with the independence, integrity, and impartiality of judges.

Rule 3.1(A) is essentially the same as Canon 4A(3).

Rule 3.1(B) is new, but is derived from Canon 4A(3), but contains more specific content. See Rule 3.1(A).

Rule 3.1(C) is based upon Canon 4A(1), but with expanded coverage and revised language.

Rule 3.1(D) is new.

Rule 3.1(E) is new, but has some overlap with aspects of Canon 2B (“lend the prestige of judicial office to advance the private interests of the judge or others”).

Comment [1] is derived from the first paragraph of the Commentary following Canon 4B, although the subject matter of Canon 4B, Avocational Activities, is not addressed separately.

Comment [2] is based upon the first paragraph of the Commentary following Canon 4A.

Comment [3] is the second paragraph of the Commentary to 4A.

Comment [4] is new.

EXPLANATION OF BLACK LETTER

1. Rule 3.1, lead-in is restructured to permit extrajudicial activities generally, but subject to the listed prohibitions.

The restrictions set forth in Rule 3.1 are generally applicable to all of Canon 3, and are frequently cross-referenced in other Rules within Canon 3.

2. Rule 3.1(A) added the italicized words in “interfere with the proper performance of *the judge’s* judicial duties.”

3. Rule 3.1(B) is newly added as a specific instance of the prohibition contained in Rule 3.1(A).

One way to interfere with the proper performance of judicial duties is to become involved in extrajudicial activities that will lead to frequent disqualification.

No substantive change is intended.

4. Rule 3.1(C) substituted the phrase “would appear to a reasonable person to undermine” for “cast reasonable doubt on,” and broadened coverage from “act impartially” to “the judge’s independence, integrity, or impartiality.”

The Commission decided that the words “cast reasonable doubt on” are too closely associated with the criminal law, and did not accurately express the proper level of certainty required. The substitute wording makes the standard turn upon the thought processes of a “reasonable person,” which is a familiar standard in the law generally and also suggestive of the “might reasonably be questioned” language of 28 U.S.C. § 455. Concern with impairment of a judge’s independence, integrity, and impartiality, rather than impartiality alone, is a theme that is prevalent in the Rules.

5. Rule 3.1(D) added a new provision to guard against overt or subtle efforts by a judge to coerce others into participating in extrajudicial activities favored by the judge.

The Commission heard testimony suggesting that coercion of this kind can be a significant problem in small communities with only one judge or a small number of judges, and a small number of lawyers who need to maintain good relations with the judiciary.

6. Rule 3.1(E) added a new prohibition against using court facilities and other resources for a judge’s extrajudicial activities, but with an exception for incidental use in connection with a law-related event.

The rationale for the general restriction is that favoring a particular charity or other extrajudicial event by providing access to facilities that are closed to others is an abuse of the prestige of judicial office; see Rule 1.3. The rationale for the exception, however, is that certain activities, such as opening a real courtroom for use in a moot court competition or using a court's conference room for a meeting of a bar association task force that includes the judge, are not abuses of judicial office.

EXPLANATION OF COMMENTS

[1] This Comment was reworded to confirm the special role that judges can play in engaging in extrajudicial activities that involve the law, the legal system, and the administration of justice, but also to approve participation in activities that are *not* law-related, as long as they are undertaken in connection with not-for-profit organizations.

In both instances, the sense of the Comment is to be somewhat more encouraging than was the 1990 Code, so that judges will reach out to the communities of which they are a part, and avoid isolating themselves.

Specific examples in the 1990 Code, both in black letter (avocational activities such as speaking and writing) and in the Commentary (improving criminal and juvenile justice and expressing opposition to the persecution of lawyers and judges in other countries), were removed as unnecessarily restrictive or of insufficiently general application.

[2] This Comment focuses on the positive value of judges being integrated into the activity of the community. The first paragraph of Comment to Canon 4A had addressed that notion implicitly, but spoke in terms of judges not becoming isolated from the communities in which they live.

No substantive change is intended.

[3] This Comment is modified from the second paragraph of the Commentary following Canon 4A.

The cross-reference to Section 2C in the 1990 Code was to the provision on discriminatory organizations, although the Commentary did not make that sufficiently clear. The provision regarding discriminatory organizations has been repositioned to Canon 3; accordingly, the cross-reference is to Rule 3.6.

[4] New Comment [4] fleshes out the intention of Rule 3.1(D), which is also new.

RULE 3.2

1990 MODEL CODE COMPARISON

Rule 3.2 is derived from Canon 4C(1). Minor revisions and additions have been made.

Rule 3.2(A) is essentially the same as the middle clause of Canon 4C(1).

Rule 3.2(B) is new.

Rule 3.2(C) is essentially the same as the last clause of Canon 4C(1), but with some minor modifications.

All the Comments are new; Canon 4C(1) had no substantive Commentary.

EXPLANATION OF BLACK LETTER

1. Rule 3.2 lead-in: added the word “voluntarily.”

This was a minor but necessary addition, to make clear that judges who are formally summoned to appear before various governmental bodies may not refuse to appear on the ground that it would be “unethical” to do so.

2. Rule 3.2(A): no substantive change is intended.

3. Rule 3.2(B): a new paragraph.

This provision was added to reflect the growing recognition that in the course of carrying out their judicial duties, judges often gain expertise and special insight into legal and social problems and matters of public policy. The point of this provision is to establish that judges are permitted to share this information with other governmental bodies and officials.

4. Rule 3.2(C): modified existing language.

Rule 3.2(C) substituted “the judge’s legal or economic interests” for “the judge’s interests,” and extended the exception to situations in which a judge is “acting in a fiduciary capacity.”

EXPLANATION OF COMMENTS

[1] New Comment [1] simply explains the rationale of Rule 3.2(A) and, implicitly, of Rule 3.2(B).

[2] New Comment [2] serves as a reminder that even when it is permissible under Rules 3.2(A) or 3.2(B) for a judge voluntarily to consult with other governmental branch personnel, the judge remains subject to other restrictions of this Code, some of which are given as examples.

[3] New Comment [3] more narrowly describes the types of interests judges may address in their appearances before or consultations with government bodies. Under the original language, the Commission believed a judge might act pro se in connection with any political or social matter that “interested” the judge, which would allow the exception to swallow the rule. Without resorting to legalistic definitions of legally protected interests sufficient to justify formal intervention, the Comment distinguishes between matters that affect judges directly as private citizens and more general causes.

RULE 3.3

1990 MODEL CODE COMPARISON

Rule 3.3 is derived from the last sentence of Canon 2B.

Comment [1] is based upon the last paragraph of the Commentary to Canon 2B.

EXPLANATION OF BLACK LETTER

1. Rule 3.3: substituted the phrase “except when duly summoned” for “testify voluntarily,” and added the phrase “otherwise vouch for the character of a person in a legal proceeding.” New language, specifying that the Rule applies in all forms of “adjudicatory proceedings,” was also added.

Regarding the first revision, similar language (“properly summoned”) appeared in the Commentary in the 1990 Code; thus, no substantive change was intended. The Commission added the language about “vouching” because testimony under oath is not the only mode in which judges might abuse the prestige of judicial office when the character of a person is in issue in a legal proceeding.

The remaining addition, “in a judicial, administrative, or other adjudicatory proceeding,” is simply a reminder that Rule 3.3 is not limited to civil or criminal trials in courts, but applies whenever testimony is taken on a formal record.

EXPLANATION OF COMMENTS

[1] This Comment is the last sentence of the Commentary to Canon 2B.

Although the Rule permits testifying as a character witness upon receipt of a subpoena or other process, it has always been understood that judges should not encourage a party to issue a sham subpoena for what is in fact voluntary testimony. The Comment goes a step further and suggests that judges should actively discourage parties from compelling their testimony as character witnesses.

RULE 3.4

1990 MODEL CODE COMPARISON

Rule 3.4 is derived from the first sentence of Canon 4C(2). It has been recast and simplified.

Comment [1] is based upon the first paragraph of the Commentary to Canon 4C(2), but again reworded and simplified. The second paragraph of the Commentary to Canon 4C(2) was deleted as unnecessary and somewhat confusing.

Comment [2] has been moved into the Comments from the last sentence of the black letter of Canon 4C(2).

EXPLANATION OF BLACK LETTER

1. Rule 3.4: add the word “board” to the list of governmental entities for completeness.

As has been done throughout the revised Code, “improvement in the law,” has been changed to “concerns the law,” because what constitutes an “improvement” is almost always debatable.

EXPLANATION OF COMMENTS

[1] The Commentary to Canon 4C(2) was modified by removing language that was merely repetitive of the black letter text, and by deleting as infelicitous the reference to the need to “protect” the courts from controversy.

Comment [1] as revised more clearly reflects the point that service on governmental bodies should not be allowed to distract judges from their judicial duties or otherwise compromise their independence, impartiality, or integrity.

[2] New Comment [2] was moved from the black letter text of Canon 4C(2) of the 1990 Code.

In the Commission’s view, the provision was of insufficiently general applicability to warrant treatment in the text.

RULE 3.5

1990 MODEL CODE COMPARISON

Rule 3.5 is based upon Canon 3B(12), with minor revisions, including addition of the word “intentionally” in the first line of the black letter text.

Comments [1] and [2] are new.

EXPLANATION OF BLACK LETTER

1. Rule 3.5 includes element of “intentional” conduct:

In the 1990 Code, this provision, Canon 3B(12) was found in the Canon on the performance of *judicial* duties. It was repositioned to Canon 3 on personal and extrajudicial activity, because it is a form of misuse of judicial office for personal gain or advantage. The word “intentionally” was added so as not to impose discipline for mere carelessness.

EXPLANATION OF COMMENTS

[1] New Comment [1] provides a link between using nonpublic information for personal advantage and abuse of judicial office.

[2] New Comment [2] recognizes the unfortunate reality that physical violence has become more common than formerly in and around the courts. If a judge learns of nonpublic information that constitutes a credible threat of violence against court personnel or family members, this Comment contemplates that the judge may take protective measures on the basis of that information.

RULE 3.6

1990 MODEL CODE COMPARISON

Rule 3.6 is based upon Canon 2C of the 1990 Code and its extensive Commentary. The Commentary was revised substantially, including some substantive changes. Some aspects of the Commentary in the 1990 Code were reworked and moved to the black letter text of Rule 3.6(B).

EXPLANATION OF BLACK LETTER

1. Rule 3.6(A) text is similar to Canon 2C of the 1990 Code.

It does expand the list of prohibited bases of invidious discrimination by adding gender, ethnicity, and sexual orientation.

2. Rule 3.6(B) derives chiefly from the last paragraph of the Commentary to Canon 2C of the 1990 Code, revised to change its focus, and then moved to the black letter text because of its practical importance.

The former Commentary permitted a judge who was already a member of an organization that engaged in invidious discrimination to remain a member for up to one year, if during that year the judge took steps to change the organization's policy. Rule 3.6(B) instead focuses upon the extent to which the judge actually *uses* the benefits or facilities provided by the organization. Building upon ideas found earlier in the Commentary to Canon 2C, the new Rule effectively provides that a judge cannot be the *initiating party* in scheduling an event or taking advantage of the facilities, but is permitted to attend an isolated event that has been scheduled or arranged by someone else, as long as it is clear that merely attending cannot reasonably be seen as an endorsement of the organization and its policies. A hypothetical that informed the Commission's deliberations concerned a wedding reception held at a discriminatory club that the judge could not join according to Rule 3.6(A): the judge could not schedule his or her *own* child's reception at the club, but could attend the reception of a friend or relative's child.

Because Rule 3.6(B) does not allow any active engagement with an organization that practices invidious discrimination, the one-year "grace period" to try to effect change has been eliminated. The Commission concluded that any active involvement would constitute too much of an

endorsement of the organization; even good-faith behind-the-scene activities would not sufficiently negate the public's perception of bias.

See Comment [3], which confirms that the lack of any black letter exception regarding membership means that a judge must resign immediately upon learning of the organization's practices.

EXPLANATION OF COMMENTS

[1] This Comment blends the first sentence of the Commentary to Canon 2C of the 1990 Code with language found in the long second paragraph of that Commentary. Revised in part for style and in part for more completeness, the new Comment stresses that support for invidious discrimination generally, and especially through participation in organizations engaging in it, calls into question a judge's integrity and impartiality, and creates an appearance of impropriety.

[2] Based closely upon the first paragraph of the Commentary to Canon 2C, this Comment provides guidelines—but no hard-and-fast rules—to help determine when an organization engages in invidious discrimination, thus falling under the ban of Rule 3.6(A). The key test is a functional one: whether an excluded applicant (not possessing one of the listed characteristics) *would otherwise be eligible for admission to membership*. In addition, the Comment explains that certain organizations practicing some forms of discrimination cannot be said to be practicing *invidious* or *improper* discrimination, either because the discrimination is based upon rationales that are not socially harmful, or because the members of the organization have a constitutional right to associate without governmental interference.

Although the Commission received a large number of submissions arguing that a particular organization either did or did not practice invidious discrimination, it determined not to cast any judgments in stone. Policies of an organization might change over time, as might the constitutional standard for judging whether an organization is sufficiently “private” to be immune from governmental regulation of its membership policies.

[3] New Comment [3] replaces Commentary in the 1990 Code suggesting that as an alternative to resigning, a judge might instead remain with the organization for up to one year, while attempting to effect change from within. The Commission chose not to add such language to the text of Rule 3.6. Thus, Comment [3] requires immediate resignation to comply with Rule 3.6(A).

[4] The tenor of new Comment [4] was implicit in the Commentary to Canon 2C of the 1990 Code. Comment [4] makes clear that while many religious organizations engage in some forms of discrimination, and some religious organizations may engage in some invidious discrimination, participation by a judge in any bona fide religious organization cannot be prohibited or punished by governmental authorities because of the constitutional guarantee of the free exercise of religion.

[5] New Comment [5] was adopted by the Commission after receiving considerable commentary and after considerable debate. Like religious organizations, military organizations often engage in discrimination and sometimes engage in discrimination that would be found to be invidious in other contexts. The Commission concluded, however, that the practical difficulties involved in enforcing a ban on holding membership in military organizations, and the necessity for uniform rules across the

military services, justified an interpretation that service in state and national military organizations does not violate this Rule.

RULE 3.7

1990 MODEL CODE COMPARISON

Rule 3.7(A) and its Comments are based upon Canon 4C(3) and its subparagraphs and their Commentary. The 1990 Code has been thoroughly reorganized in the proposed Code, making line-by-line comparison difficult. Virtually all the concepts in Canon 4C(3) have been retained, although some have been made more expansive or more restrictive.

The specific reference in Rule 3.7(B) to pro bono publico legal services is new.

EXPLANATION OF BLACK LETTER

1. Rule 3.7(A) was expanded.

The lead-in to Paragraph (A) added “[s]ubject to the requirements of Rule 3.1,” and included law-related public and private organizations and entities, as well as most nonprofit organizations, even if not law-related, within the reach of this paragraph; eliminated specific reference to service as an officer, director, or nonlegal advisor, and placed discussion of those specific situations in the subparagraphs.

This provision is integral to the reorganization of the material on participation in extrajudicial activities, and of Canon 3 generally. Canon 4C(3) of the 1990 Code referred at the outset to service as an officer or a director of various not-for-profit organizations, and then used several subparagraphs to deal with activities in which such officers or directors engaged. The lead-in to Rule 3.7(A) establishes its coverage of essentially the same organizations—public and private, law related and not law related—but then deals in the following subparagraphs with *all* activities related to those organizations, *including* service as an officer or a director.

The opening phrase, “[s]ubject to the requirements of Rule 3.1,” is not greatly different in meaning from “subject to the other requirements of this Code,” which appeared at the end of Canon 4C(3). Organizationally, however, the specific cross-reference in the proposed Code focuses attention upon particular problems closely associated with extrajudicial and personal activities—such as coercion, undue influence, or interference with the primacy of judicial duties—which is why they were gathered together in a single Rule at the beginning of Canon 3.

2. Rule 3.7(A)(1): repositioned, but substantially the same as the first clause of Canon 4C(3)(b)(i) of the 1990 Code.

The difference, however, as explained above in connection with the lead-in to Rule 3.7(A), is that the 1990 Code allowed these activities (assistance in planning fund-raising and management and investment of an organization’s funds) *only* in connection with service as an officer, director, trustee, or nonlegal advisor, or the somewhat nebulous “as a member or otherwise.” In the proposed Code,

these activities are permissible without more, if participation in the activities of the organization or entity itself is permissible.

3. Rule 3.7(A)(2): substantially the same as the second clause of Canon 4C(3)(b)(i), except added soliciting funds from family members as permissible activity.

The repositioning of this provision into one of the subparagraphs of Rule 3.7(A) has the same significance as described above: it will apply to all judges who engage in this form of extrajudicial activity, not just those who serve as officers, directors, and the like. Judges were already permitted by the 1990 Code to solicit contributions for charities from judges over whom they did not exercise supervisory or appellate authority, because the element of coercion is largely missing, and there is little likelihood that the judge making the contribution would be perceived as attempting to influence the judge making the solicitation. The same rationales support extending permission to judges to solicit this kind of contribution from their own family members.

4. Rule 3.7(A)(3): based upon some aspects of Canon 4C(3)(b)(iii), but with other elements added or deleted or repositioned elsewhere in Canon 3.

The basic idea of prohibiting a judge from soliciting membership in an organization where charging membership dues is essentially a fund-raising device is retained. The rationale is essentially the same as that in the 1990 Code: the risk that persons contacted will feel coerced into joining, or will attempt to curry favor with a sitting judge by joining.

In the proposed Code, however, it is not necessary to advert specifically to the element of coercion—that is covered by the cross-reference to Rule 3.1. Beyond this, the Commission decided to limit the permission granted to solicit membership to membership in law-related organizations—one of several places in Canon 3 where this line is drawn. It was felt that solicitation of membership in a law-related organization, such as a bar association or moot court society, would be perceived as more natural or more appropriate than soliciting membership in a fine arts society or the American Red Cross. This perception is related, at least indirectly, to the thematic requirement of avoiding abuse of the prestige of judicial office. A person who loves opera or is a dedicated member of an environmental protection organization, and who also happens to be a judge, should not use that position as an added reason for someone else to join the cause. On the other hand, it is not inappropriate for judges to use their positions as leaders in the legal community to increase membership in law-related organizations.

5. Rule 3.7(A)(4): a new provision for the Model Code of Judicial Conduct, based upon Commentary to Canons 5B(2) and 5B(3) of the Code of Conduct for United States Judges, and reversing the thrust of Commentary to Canon 4C(3)(b).

The Code of Conduct for United States Judges provides that as a general matter, judges may *not* participate in the fund-raising activities of charitable and other civic organizations other than by attending, which is similar to Commentary in the 1990 Code. In context, however, the federal provision appears to be limited to non-law-related organizations and activities. The Commission adopted the same general stance in Rule 3.7(A)(4), but made the implicit exception explicit: a judge *is* permitted to be a featured speaker or participant at an event that has a fund-raising purpose, *but*

only if the organization or entity is a law-related one. The rationale for making this distinction is the same as that for Rule 3.7(A)(3).

5. Rule 3.7(A)(5): essentially the same as Canon 4C(3)(b)(ii) of the 1990 Code.

The one exception is that the authority to make recommendations to fund-granting organizations and entities is not limited to officers, directors, and others directly associated with the organization or entity. This is consistent with the revised organization of Canon 3 generally, and Rule 3.7 specifically, as noted above in connection with the lead-in to Rule 3.7(A) and Rule 3.7(A)(1).

7. Rule 3.7(A)(6): essentially identical to Canon 4C(3)(a) of the 1990 Code.

In the 1990 Code, there was some redundancy between this provision and Canon 4C(3) itself. The main paragraph already dealt generally with service as officer, director, and the like, while subparagraph (a) dealt with restrictions on such service. Rule 3.7(A)(6) makes no substantive change in the combined effect of those two provisions, but makes explicit that service is allowed in both private organizations and public entities, *whether or not they are law related*, as long as the two caveats are satisfied.

Unlike situations in which a judge is soliciting funds or members, participating as an officer or a director does not present the dangers of coercion or abuse of the prestige of judicial office; accordingly, neither the 1990 Code nor the proposed Code differentiate in this area along that axis.

8. Rule 3.7(B): a new provision, encouraging judges to provide leadership in increasing *pro bono publico* lawyering in their respective jurisdictions.

This provision is consistent with the thrust of Rule 3.7(A). It was placed in a separate paragraph because paragraph (A) deals with a large variety of organizations and entities, with varied goals and programs, whereas paragraph (B) refers to specific activities, whether or not conducted in connection with a particular organization or entity.

EXPLANATION OF COMMENTS

[1] New Comment [1] clarifies that the restructuring of Rule 3.7(A) was intended to make it applicable to all public and private not-for-profit organizations and entities. Previously, there was some confusion about the status of public and private universities, including their law schools (which are obviously law-related). Thus, it is permissible, for example, for a judge to serve as a trustee of a private university (rather than merely its law school), as long as it is not conducted for profit.

[2] This Comment is derived from Commentary to Canon 4C(3) of the 1990 Code, but it has been thoroughly revised to provide more clarity. The revised Comment serves as a reminder that participation in law-related activities is permitted more often than is participation in non-law-related activities, *but that even in connection with the former*, other requirements of the proposed Code may counsel caution or even abstention from the activity. Obvious examples include participating in activities sponsored by organizations that practice invidious discrimination, or serving as the

president of a major university (the time commitment associated with the latter making it impossible for a judge to attend to judicial duties).

[3] New Comment [3] is designed to provide a safe harbor for certain minor and noncoercive activities undertaken in connection with an organization's or entity's fund-raising efforts. When a judge donates time to serve food or serve as an usher or other facilitator at an event, the dangers associated with direct solicitation of funds are not present. It is not logical to assume that someone will make a larger donation, merely because a judge is tending the barbeque pit at a charity picnic.

The Commission stopped short, however, of giving as specific examples situations involving the handling of money, such as when a judge serves as ticket-taker or cashier (at a charity bingo night, for example, or a charity auction). At the same time, these activities were not specifically excluded, either. Whether such activities are appropriate depends upon analysis of the overall event, and the significance of the judge's participation. As long as there is no coercion—even subtle and unstated coercion—and as long as the judge's position as a judge is not being exploited, the activity is permissible.

[4] This Comment is based upon parts of the second paragraph of the Commentary to Canon 4C(3)(b) of the 1990 Code, but simplified. Letterhead including a judge's name and position, even when used for fund-raising or membership solicitation purposes, is not coercive and does not abuse the prestige of judicial office, as long as the judge is identified in the same way as other persons on the letterhead. It must be assumed, of course, that the judge's service in some official position in the organization or entity is itself appropriate under other provisions of Rules 3.7 and 3.1.

[5] New Comment [5], responsive to new Rule 3.7(B), makes clear that judges may encourage lawyers to engage in *pro bono publico* service generally, quite apart from situations in which judges may appoint counsel for indigent parties in individual cases. Although the Joint Commission assumed that participation in organizations that promote *pro bono publico* legal services would generally be permissible under rule 3.7(A), it wanted to stress the importance of such service by including a specific provision on this topic.

RULE 3.8

1990 MODEL CODE COMPARISON

Rule 3.8(A) is essentially identical to Canon 4E(1), with only minor stylistic revisions.

Rule 3.8(B) is essentially identical to Canon 4E(2), also with only minor revisions.

Rule 3.8(C) bears the same relationship to Canon 4E(3).

Rule 3.8(D) is based upon the first paragraph of the Commentary to Canon 4E, but states more directly the time for compliance with the Rule.

Comment [1] is similar to the second paragraph of Commentary to Canon 4E, but recast.

EXPLANATION OF BLACK LETTER

1. Rule 3.8(A): changed the phrase “A judge shall not serve” to “A judge shall not accept appointment to.”

No significant substantive change is intended. The new language suggests more of a choice on the judge’s part—a choice that must be rejected, except in the case of family members.

2. Rule 3.8(B): changed the phrase “shall not serve as a fiduciary” to “shall not serve in a fiduciary position.”

No substantive change is intended, except that serving in a fiduciary *position* connotes a formal appointment and acceptance, as in Rule 3.8(A).

3. Rule 3.8(C): changed the phrase “the same restrictions that apply” to “shall be subject to the same restrictions.”

The change is stylistic only.

4. Rule 3.8(D): is new to the black letter text.

It states when a newly elected or appointed judge, who is *already* serving in a fiduciary capacity, must comply with this Rule. The suggested outer limit is one year, but jurisdictions may choose some other time limit.

EXPLANATION OF COMMENTS

[1] This is a slight recasting of the second paragraph of the 1990 Commentary. The Comment serves as a reminder that in addition to the restrictions set forth in Rule 3.8, other provisions of the proposed Code may implicate the permissibility of serving in a fiduciary capacity. For example, if serving as a fiduciary (even for a family member, which is generally permitted) would cause the judge frequently to be disqualified under Rule 2.11, the judge must resign as fiduciary to avoid violation of Rule 3.1(B).

RULE 3.9

1990 MODEL CODE COMPARISON

Rule 3.9 is based upon Canon 4F, slightly recast.

Comment [1] is the same as the Commentary to Canon 4F, except that an additional sentence was added.

EXPLANATION OF BLACK LETTER

1. Rule 3.9: changed the phrase “in a private capacity” to “apart from the judge’s official duties,” and slightly revised the text in other respects.

The only substantive change was made in recognition of the fact that a judge could be called upon to provide dispute resolution services *for another governmental entity*. Thus, the phrase “in a private capacity” was deemed to be too narrow.

EXPLANATION OF COMMENTS

[1] The first sentence of this Comment is carried forward from the 1990 Commentary. The second sentence explains that the prohibition extends to judges going outside their regular judicial duties to assist in dispute resolution, whether or not for economic gain, unless doing so is expressly authorized by law, such as by court rule.

The Commission heard testimony and received comments on this issue. Some objected that allowing judges to participate in private “rent-a-judge” programs for economic gain would allow judges to trade on their status as judges, thus abusing the prestige of judicial office. Others expressed concern that allowing judges to routinely perform extrajudicial “judicial” services, even without compensation, could create public confusion about the role of the judiciary as an independent branch of the government, thus diminishing respect for the judicial system. Still others were concerned that extrajudicial participation even in *pro bono publico* mediation and arbitration could distract judges from their primary obligations.

Several judges stated their support for permitting judges to provide alternative dispute resolution services to other court systems or to private parties, but without compensation. In their view, this would provide an important public service to the community, demystify the law, and integrate judges into the community as Canon 3 encourages.

The Commission continued the proscription of Canon 4F of the 1990 Code that all such activities are prohibited, whether or not compensation is involved, but that courts or jurisdictions could authorize such activities as conditions warrant.

RULE 3.10

1990 MODEL CODE COMPARISON

Rule 3.10 is essentially identical to Canon 4G, with language based upon the second paragraph of Commentary to 4G added as black letter text.

Comment [1] is based upon the first paragraph of the Commentary to Canon 4G.

EXPLANATION OF BLACK LETTER

1. Rule 3.10: blended the two sentences of Canon 4G into one.
2. Commentary from the 1990 Code interpreting Canon 4G as prohibiting a judge from representing a family member has been added to the black letter.

The prohibition against “representing a family member in any court” is a narrower restriction than was “acting as an advocate or negotiator...in a legal matter.” The Commission took the view that in some informal settings, such as a dispute in a neighborhood association or a purely private and minor commercial dispute, a judge may serve as an “advocate” for a family member without becoming his or her lawyer and thus practicing law in violation of Rule 3.10.

EXPLANATION OF COMMENTS

[1] The first paragraph of the Commentary to Canon 4G was revised slightly and recast. “A judge must not abuse the prestige of office to advance” was replaced with “A judge must not use the prestige of office to advance.” No substantive change is intended.

RULE 3.11

1990 MODEL CODE COMPARISON

Rule 3.11(A) is derived from Canon 4D(2), excluding the last two clauses.

Rule 3.11(B) is essentially the same as Canon 4D(3).

Rule 3.11(C) combines some new provisions with elements of Canon 4D(1)(b) and Canon 4D(4).

Comment [1] is largely new, but incorporates several aspects of the Commentary to Canon 4D.

Comment [2] is derived from the black letter text of Canon 4D(4).

EXPLANATION OF BLACK LETTER

1. Rule 3.11(A): retained the core language of Canon 4D(2), but deleted the lead-in phrase “subject to the requirements of this Code,” as well as the references to “real estate” holdings and “other remunerative activities.”

Rule 3.11 represents a reorganization of most of the material governing extrajudicial financial activities found in Canon 4D of the 1990 Code, except for the gift-related provisions in Canon 4D(5).

In Rule 3.11(A), the initial “subject to the requirements of this Code” was deleted as no longer necessary, in light of Rule 3.11(C)(4), as well as Comment [1]. The reference to “real estate” was deemed too specific for inclusion in the black letter text, and moved to Comment [1] as an example of the kinds of investments that a judge might hold or manage. The last clause, “engage in other remunerative activity,” was removed as far too broad, and thus inconsistent with other aspects of Rule 3.11. For example, the remunerative activity of being a director or employee of a for-profit business entity is prohibited by Rule 3.11(B), unless the business is closely held by the judge or the judge’s family.

2. Rule 3.11(B) is identical to Canon 4D(3) of the 1990 Code, except that the caveat “subject to the requirements of this Code” was eliminated as unnecessary, for the reasons stated immediately above.

The Commission discussed the substantive point of Rule 3.11(B), which is to prohibit judges from engaging in off-bench remunerative activity, except in the case of closely held family businesses, including the investment of financial resources. This exception has been criticized as inconsistent with the rationale for the basic prohibition, and as unfair to judges who do not have family businesses.

Two alternatives were considered, but not adopted. First, it would have been possible to allow judges broadly to engage in remunerative extrajudicial activities, as long as they did not interfere with the performance of judicial duties, lead to frequent disqualification, or otherwise violate the prohibitions found in Rule 3.11(C). The other possibility would have been to eliminate the family business exception and to require all judges to divest themselves of any interests in the family business when ascending the bench. The Commission elected to maintain the status quo of the 1990 Code as a reasonable middle ground.

3. Rule 3.11(C) is a new provision that gathers in one place some of the caveats about extrajudicial financial activities found throughout Canon 4D of the 1990 Code, while adding additional caveats.

These caveats are meant to apply as restrictions on otherwise permissible activities. The specific language of Rule 3.11(C)(1) is taken from the fourth paragraph of the Commentary to Canon 4D(1); the concept is also drawn in part from the second paragraph of the Commentary to Canon 4D(3): otherwise appropriate business activities (falling within the family business exception) would become improper if “participation requires significant time away from judicial duties.”

Rule 3.11(C)(2) is a paraphrase of Canon 4D(4), which requires a judge to minimize the number of cases in which the judge is disqualified. The phraseology used in the proposed Code, “will lead to frequent disqualification of the judge,” is used elsewhere in the Code—most significantly for present purposes in Rule 3.1(B).

Rule 3.11(C)(3) is taken from Canon 4D(1)(b), and Rule 3.11(C)(4) is a catchall that makes some other caveats found in Canon 4D unnecessary. For example, the Canon 4D(1)(a) provision, “may reasonably be perceived to exploit the judge’s judicial position,” was not retained in the proposed Code, because of the prohibition against abusing the prestige of judicial office already found in Rule 1.3.

EXPLANATION OF COMMENTS

[1] New Comment [1] restates the rationale of several of the provisions gathered into Rule 3.11(C), giving some practical examples.

[2] New Comment [2] is essentially the same as the black letter text of Canon 4D(4).

RULE 3.12

1990 MODEL CODE COMPARISON

Rule 3.12 is based upon Canon 4H(1), but only as it relates to compensation, not reimbursement of expenses associated with extrajudicial activities. (Reimbursement is governed by Rule 3.14 in the proposed Code.)

Comment [1] is based upon the black letter text of Canon 4H(1)(a) and some aspects of the Commentary to Canon 4H, but substantially revised.

Comment [2] is new, and serves as a cross-reference to the public reporting provisions of the proposed Code. (Public reporting was addressed in Canon 4H(2), but in connection with compensation only, not reimbursement of expenses. Rule 3.15 addresses all forms of public reporting—compensation, gifts, other things of value, reimbursement of expenses, and waivers of fees.)

EXPLANATION OF BLACK LETTER

1. Rule 3.12: removed references to reimbursement of expenses, and substituted “reasonable compensation” for “shall not exceed for a person who is not a judge would receive for the same activity”; replaced the phrase “give the appearance of influencing the judge’s performance of judicial duties or otherwise give the appearance of impropriety” with “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

The Joint Commission completely reorganized the material on compensation, reimbursement for expenses, acceptance of gifts and the like, and public reporting of all these. After the reorganization, Rule 3.12 deals only with compensation for permissible extrajudicial activities. Public reporting of the compensation received, as well as all other reporting, is governed by Rule 3.15.

The language measuring the reasonableness of compensation by what a non-judge would receive was deleted as unsound: if a judge were to be compensated for teaching a law school course on judicial ethics, or giving a lecture on evidentiary rulings, for example, the judge’s services would in fact likely be more valuable than those of a non-judge. On the other hand, it was recognized that significant overcompensation could be a mask for an improper gift or an attempt to influence the judge’s conduct in office. Accordingly, the language in Canon 4H(1) about appearances was replaced by the language used throughout Canon 3 of the proposed Code: “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

EXPLANATION OF COMMENTS

[1] New Comment [1] is based in part upon some of the language in Canon 4H of the 1990 Code and Rule 3.12 of the proposed Code.

[2] New Comment [2] makes a cross-reference to the public reporting requirement. Some aspects of public reporting were treated in Canon 4H(2), but now all are treated in Rule 3.15.

RULE 3.13

1990 MODEL CODE COMPARISON

Rule 3.13 is based upon Canon 4D(5), its subsections (a) through (h), and the related Commentary. The Commission thoroughly reorganized this material. In the analysis of the black letter and Comments that follows, the source of the language used in the proposed Code will be identified, where germane.

EXPLANATION OF BLACK LETTER

1. Rule 3.13(A): expanded the universe of coverage to include “other things of value,” and linked the overall prohibition of acceptance to what “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.”

This paragraph has some similarity to Canon 4D(5), but ultimately establishes a different organization and a different mode of analysis. Canon 4D(5) established a general prohibition against a judge accepting gifts or loans or similar items from anyone, but then proceeded to make exceptions in subsections (a) through (h).

Rule 3.13(A) also begins with a list of gifts and things of value that judges are prohibited from accepting. There are no exceptions. The later provisions in Rule 3.13 permit acceptance of some items, sometimes accompanied by public reporting and sometimes not, but in each instance permission is granted only after it has been determined that acceptance has not already been barred by paragraph (A).

This different relationship between earlier and later provisions within Rule 3.13 is characteristic of the Commission’s tiered approach to this subject matter. Paragraph (A) establishes a first tier of situations in which acceptance is not permitted at all; paragraph (B) deals with acceptance of items that are not problematic and do not require the transparency of public reporting; and paragraph (C) deals with the tier of items that do not warrant being banned, but must be reported to maintain the public’s confidence in the judiciary.

The dividing line between gifts and other items that cannot be accepted at all and those that may be accepted subject to the requirement of public reporting, is when acceptance “would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality.” The language is new, and is used thematically throughout Canon 3. It requires judges to evaluate their conduct as would a “reasonable person” subject to later oversight by disciplinary authorities.

2. Rule 3.13(B): established a “tier” of gifts and other things of value that may be accepted without limitation and without public reporting, drawing several items from the exceptions set forth in the subsections of Canon 4D(5), but with an eye toward classifying them according to the proposed new organizational scheme.

In the 1990 Code, the exceptions to the basic rule were set out serially, without further classification, and—except in the catchall provision of Canon 4D(5)(h)—without adverting to whether public

reporting was a condition of acceptance. The Commission has now gathered in Rule 3.13(B) the items that are sufficiently non-threatening to the integrity of the judicial system as to warrant no further regulation.

For example, subparagraphs (4), (5), and (6) deal with situations in which the listed benefits are equally available to similarly situated persons who are not judges, thus allaying any fears that the benefit is being extended to influence the judge's decision-making or to curry favor with the judge. Subparagraph (2) is similar to Canon 4D(5)(e), but clarifies the category. If a person's appearance or interest in a case pending or impending before a particular judge would require the disqualification of the judge, then any gift or favor from that person could not influence the judge—because by definition the judge would no longer be sitting on the case.

3. Rule 3.13(C): establishes the third “tier” of items that may be accepted by a judge. These items, while not causing a reasonable person to believe that the judge's independence, integrity, or impartiality would be undermined, are of sufficient concern that public reporting is required.

Placement of these items in Rule 3.13(C) rather than paragraphs (A) or (B) represents the Commission's assessment of the level of concern that may attend the acceptance of various benefits. In subparagraph (C)(2)(a), for example, the judgment was made that the gift of a free ticket to attend a law-related event must be reported, so that others might be able to assess whether a particular judge had a particularly close association with a particular bar association or organization. On the other hand, if a judge is invited to attend, free of charge, an event sponsored by a non-law-related organization, the judge cannot accept *at all* unless the additional condition of equal treatment is met. If that condition is met, however, then public reporting should be sufficient to allay concerns about possible lack of impartiality. (This distinction between events and organizations that are or are not law-related is another theme that occurs throughout Canon 3.)

Rule 3.13(C)(3) addresses the same issue as Canon 4D(5)(h), but according to a more discriminating analysis. Under the 1990 Code, a judge cannot accept any gift or favor from a lawyer or party who has come or is likely to come before the judge. (The further requirement of publicly reporting items over \$150 appears to apply to other gifts, not the above.) If this means to impose a lifetime ban once a lawyer or the lawyer's firm “has appeared” before the judge, it appears to be more stringent than necessary, and unworkable in practice, as a judge's career lengthens.

Under Rule 3.13(C)(3), the proposed rule provides that such gifts may be accepted as long as they are reported—which will give another party in litigation an opportunity to consider whether disqualification of the judge is required. More important, placement of this item in paragraph (C) assumes that the size of a particular gift or other circumstances will not cause a reasonable person to fear that the judge's impartiality will be impaired. If a reasonable person would take that view, then the gift is wholly impermissible to accept, because it will have failed the test of Rule 3.13(A).

EXPLANATION OF COMMENTS

[1] New Comment [1] explains the three-tiered approach and its rationale.

[2] New Comment [2] explains the classification in Rule 3.13 of gifts and other things of value given to a judge. This subject was treated in both Canon 4D(5)(d) (gifts for special occasions) and Canon 4D(5)(e) (judge would be disqualified in any event), but without an explanation of the rationale. Rule 3.13(B)(2) does not distinguish between different types of gifts from this category of donor, and Comment [2] provides the common rationale.

[3] New Comment [3] provides the rationale for and giving a concrete example of the principle that acceptance of benefits and other things of value that are generally available to non-judges on the same basis as they are available to judges causes no ethical concerns; accordingly, these items may be accepted, without public reporting.

[4] This Comment builds on the introductory language of Canon 4D(5) of the 1990 Code. The point is that while a code of judicial ethics cannot directly bind family members and others close to a judge, it is still prudent for a judge to urge such individuals not to put the judge in a difficult position by accepting gifts and benefits that the judge could not, because others might perceive the benefit as intended for the judge, but given indirectly.

Comment [4] also adds discussion of a contrasting scenario, which is new. Rule 3.13(B)(8) states that when a gift or other benefit is given to a family member, because of the family member's business or other activities, and the judge benefits merely incidentally, concern that the judge is being influenced or importuned is no longer reasonable, and those gifts need not be reported by the judge. Comment [4] explains the rationale for this new provision.

[5] This Comment paraphrases the first paragraph of the Commentary following Canon 4D(5). The Comment thus makes clear that gifts, donations, or contributions to a judge's campaign for judicial office are governed entirely by Canon 4, which includes regulation of campaign committees.

RULE 3.14

1990 MODEL CODE COMPARISON

Rule 3.14(A) is derived from Canon 4H(1), except that the provisions relating to compensation have been moved to Rule 3.12. Rule 3.14 addresses reimbursement of expenses and waivers of fees or charges only.

Rule 3.14(B) is essentially identical to Canon 4H(1)(b).

Rule 3.14(C) is new as it relates to public reporting of reimbursements and waivers of charges, but is similar to Canon 4(H)(2), which deals with public reporting of compensation received.

Comments [1] through [3] are new.

EXPLANATION OF BLACK LETTER

1. Rule 3.14(A) applies to reimbursement of expenses only, rather than both reimbursement and compensation, but adds waivers of fees and charges as equivalent to reimbursement.

By cross-reference to other Rules it requires judges to consider whether attending an event on a fee-waived or expenses-reimbursed basis would require later disqualification or undermine the judge's independence, integrity, or impartiality. Rule 3.14 and its subparagraph (A) are integral to the total reorganization of Canons 4D and 4H of the 1990 Code. Compensation for extrajudicial activity is no longer linked with reimbursement for expenses, but is addressed separately in Rule 3.12. Reimbursement, in turn, is addressed separately in Rule 3.14. (Other aspects of Canon 4D, such as engaging in financial and business activities, and receipt of gifts and other things of value, are covered by Rules 3.11 and 3.13, respectively.)

The Commission recognized that attendance at tuition-waived and expense-paid seminars and similar events has been a matter of public concern and media attention. It heard much testimony and received numerous comments about the need for more transparency regarding both the amount of fees waived or expenses reimbursed and the nature and sponsorship of the event attended on a cost-free or reduced-cost basis. In response, the Commission elected to treat acceptance of such benefits separately from acceptance of gifts and other things of value generally (see Rule 3.13), and to require public reporting of the benefits received together with other public reporting (see Rule 3.15). The Commission concluded that separating reimbursement and waivers for treatment in this way makes Canon 3 more readable and easier to follow. Moreover, treatment in a separate Rule allows more careful attention to be paid to whether the invitation to attend should be accepted at all.

Although Rule 3.14 applies to events other than privately funded educational seminars, much of the testimony and comments received by the Commission focused upon that subject. In the Commission's view, judicial education of all kinds is of great value; it helps keep judges current on recent developments, alerts them to future trends, and exposes them to new ways of thinking about the law. Moreover, there was recognition that judicial budgets may not always be adequate to support educational opportunities for judges. For that reason, Rule 3.14—like Canon 4H(1)—permits judges to accept reimbursement for reasonably necessary expenses associated with otherwise permissible extrajudicial activities, and further permits acceptance of waivers of otherwise applicable fees or charges.

A critical aspect of Canon 4H(1) is that permission to accept benefits in connection with extrajudicial activities is conditioned upon the acceptance not giving the appearance of influencing the judge in the performance of judicial duties and not otherwise creating the appearance of impropriety. Rule 3.14 carries this condition forward, for both reimbursements and waivers of fees and charges, but uses language more in harmony with other parts of Canon 3 and the rest of the Model Code. Thus, by cross-referencing Rules 3.1 and 3.13(A), Rule 3.14(A) makes clear that a judge may not accept the proffered benefits if doing so would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality, or if accepting would, for example, lead to frequent disqualification or otherwise interfere with the proper performance of the judge's judicial duties.

2. Rule 3.14(B) is substantially the same as Canon 4H(1)(b) of the 1990 Code.

The exception is that it applies to both reimbursements and waivers of fees and charges, and applies to an accompanying domestic partner as well as to a spouse or guest.

3. Rule 3.14(C) is similar to the public reporting requirement set out in Canon 4H(2).

The exception is that it applies to reimbursements and waivers rather than compensation. In addition, the actual mechanism for reporting is not contained in Rule 3.14(C) itself; the Rule instead cross-references Rule 3.15, which describes all the public reporting required by various Rules in Canon 3.

EXPLANATION OF COMMENTS

[1] New Comment [1] states the rationale for allowing judges to accept these two forms of benefits, and also making clear that Rule 3.14 can apply to any permissible extrajudicial activity, not just privately funded educational programs.

[2] New Comment [2] focuses attention upon educational programs specifically. Not only must a judge consider whether accepting an invitation to attend on an expenses-paid or fee-waived basis would be proper (under Rules 3.1, 3.13(A), and 3.14(A)), but the judge also has an affirmative duty to make reasonable inquiry into the factors that should inform that decision.

Near the end of its deliberations, the Commission became aware of guidelines newly issued by the Judicial Conference of the United States on this subject. The Guidelines delineate a process for helping judges make the inquiry just noted. Any program that wishes to invite judges to attend on a cost-free basis is required to provide considerable information about funding, sponsorship, and program content in advance, and have this information available to judges receiving an invitation. The Commission thought this “pre-registration” approach had merit, but considered the possibility that it would be more difficult to implement throughout all the state jurisdictions, as opposed to in the single federal jurisdiction for which it was designed. Thus the Commission thought it more prudent to wait until the operation of the federal program could be assessed.

[3] New Comment [3] provides guidance to judges in making the determination required by Rule 3.14(A), as explained in Comment [2]. It is founded on revised Advisory Opinion 67 of the Committee on Codes of Conduct of the Judicial Conference of the United States. The factors identified in Opinion 67 can usefully be employed by each judge who has been issued an invitation to attend a cost-free event and is considering whether to accept.

RULE 3.15

1990 MODEL CODE COMPARISON

Rule 3.15 is based upon Canon 4H(2). However, consistent with the reorganization of Canon 3, this provision is no longer limited to public reporting of compensation received for extrajudicial activities, but includes public reporting of gifts and other things of value accepted pursuant to Rule 3.13, and reimbursement of expenses and waiver or partial waiver of fees and charges accepted pursuant to Rule 3.14.

Technical matters such as what and where to report, on what schedule, and how the information will become transparent to the general public are derived from Canon 4H(2) as well, but with several modifications.

EXPLANATION OF BLACK LETTER

1. Rule 3.15(A) requires that in addition to reporting compensation received, judges must report gifts and other things of value accepted, as well as reimbursements of expenses and waivers of fees and charges.

It deletes a 1990 Code provision on treatment of a spouse's compensation or income in community property states. An important feature of the reorganization of Canon 3 is the gathering of all the public reporting provisions in one place, now Rule 3.15(A), and then cross-referencing this Rule in the Rules where reportable events are discussed.

This organization has the important side effect of removing discussion of monetary limits (if any) from the earlier Rules, and repositioning it in Rule 3.15(A). Thus, for example, Canon 4D(5)(h) of the 1990 Code, which established a reporting threshold of \$150 per item, has been recast and moved to Rule 3.15(A)(2). Instead of establishing a threshold amount for all jurisdictions, which might have to be raised periodically in any event on account of inflation, the Commission required establishment of an annual threshold amount that takes into account aggregation of items from the same source. The actual dollar amount, however, was left for each jurisdiction to supply according to conditions there.

The reminder in the 1990 Code that community property earned by a judge's spouse is not attributable to the judge for purposes of public reporting was deleted as unnecessary: all the substantive provisions in Canon 3 speak of the judge receiving compensation or receiving gifts or reimbursement of expenses.

Canon 4I of the 1990 Code, which required disclosure of a judge's income and assets in some circumstances, is not included in the proposed Code. The Commission concluded that this form of public reporting is already regulated by statute or court rule in most jurisdictions; thus, its inclusion in a Code of Judicial Conduct is unnecessary.

2. Rule 3.15(B) provides a list of what must be reported when reporting is required under paragraph (A).

3. Rule 3.15(C) addresses the frequency of mandatory public reporting.

The requirement of reporting no less frequently than annually is consistent with Canon 4H(2) of the 1990 Code. Reporting in connection with reimbursements and waivers of fees or charges, however, is required within thirty days of the underlying event, not on a calendar-based schedule.

The Commission borrowed this special reporting requirement from the guidelines recently issued by the Judicial Conference of the United States. Such a requirement can be implemented immediately, is responsive to the need for transparency, and should not be overly burdensome to judges. In

situations involving reimbursement in particular, a judge will have to gather receipts for submission to the reimbursing entity, which can be used to satisfy the public reporting requirement. With respect to fee waivers, a judge should be able to obtain a statement of what the fees or charges would have been for a person who was not being offered a waiver. As this requirement becomes better known, it is likely that the sponsoring entity granting the waiver will develop this information and provide the requisite statement as a matter of course.

4. Rule 3.15(D) directs that the reports required by Rule 3.15 be located in a central place and made accessible to the public to ensure transparency.

It tracks Canon 4H(2), except that it calls for posting on the appropriate website when feasible, to facilitate public access. Ordinarily, it is assumed that such posting will be to the court's official website, and will be done by court personnel according to a uniform format, rather than by each reporting judge individually.

CANON 4

1990 MODEL CODE COMPARISON

Canon 4 of the proposed Code is derived from Canon 5 of the 1990 Code, as amended in 1997, 1999, and 2003—the last time in response to the decision of the U.S. Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). Much of the material in Canon 5 was retained, but was reorganized along several axes. The reorganized Canon 4 differentiates more clearly between sitting judges who are and are not also judicial candidates and nonjudges who become candidates. Canon 4 continues to differentiate between judicial candidates running in public elections and those seeking appointment, and, within the former category, it further differentiates between partisan, nonpartisan, and retention elections.

EXPLANATION OF BLACK LETTER

1. Replaced “shall refrain from” with “shall not engage in.”

The new language is less passive and fits more comfortably with the language of the other three Canons.

2. Replaced “political activity” with “political or campaign activity.”

This more accurately reflects the actual content of Canon 4. Canon 5 of the 1990 Code also dealt with more than just “political” activity so the new Canon 4 title has been amplified.

3. Replaced “inappropriate activity” with “activity that is inconsistent with the independence, integrity, or impartiality of the judiciary.”

The undefined term “inappropriate” was not sufficiently precise. Concern that the independence, integrity, or impartiality of the judiciary (including candidates who aspire to join the judiciary) will be compromised or undermined is a pervasive theme in the proposed Code.

RULE 4.1

1990 MODEL CODE COMPARISON

Rule 4.1(A)(1) is virtually identical to Canon 5A(1)(a).

Rule 4.1(A)(2) is identical to Canon 5A(1)(c).

Rule 4.1(A)(3) is essentially the same as Canon 5A(1)(b).

Rule 4.1(A)(4) is virtually identical to the first clause of Canon 5A(1)(e).

Rule 4.1(A)(5) is closely patterned on the second clause of Canon 5A(1)(e), and includes the concept embodied in Canon 5A(1)(d), which was eliminated.

Rule 4.1(A)(6) is new, but the prohibition it establishes is removed by later Rules in Canon 4 in some situations.

Rule 4.1(A)(7) is new, and is similar to Rule 4.1(A)(6) in terms of its relationship to other Rules in Canon 4.

Rule 4.1(A)(8) is derived from the first two sentences of Canon 5C(2), but employs different terminology and applies only to solicitation of campaign contributions, not “publicly stated support.”

Rule 4.1(A)(9) is essentially identical to the last sentence of Canon 5C(2).

Rule 4.1(A)(10) is new, but is a corollary of one aspect of Canon 2B: lending the prestige—here the trappings—of judicial office to advance a judge’s interests.

Rule 4.1(A)(11) is based upon Canon 5A(3)(d)(ii), but substantially revised.

Rule 4.1(A)(12) is new to the Canon on political and campaign activity, but is substantially similar to the first sentence of Canon 3B(9).

Rule 4.1(A)(13) is essentially identical to Canon 5A(3)(d)(i).

Rule 4.1 (B) is based upon elements of Canon 5A(3)(a) and Canon 5A(3)(b), which have been combined and recast.

Comment [1] is new.

Comment [2] is based upon Canon 5E, which has been removed from the black letter text.

Comment [3] is new, but includes a principle taken from the first sentence of the Commentary following Canon 5A(1). See also Comment [6].

Comment [4] is new, but includes reference to the principles embodied in Canon 5C(1)(b), substantially reworded.

Comment [5] is new, but is tangentially related to the Commentary following Canon 5A(3)(a).

Comment [6] is based upon the first sentence of the Commentary following Canon 5A(1), but includes fuller treatment.

Comment [7] is a new Comment, but is based upon Canon 5A(3)(d)(ii), which is now embodied in Rule 4.1(A)(11).

Comment [8] is based upon Canon 5A(3)(e), which has been removed from the black letter text; the new Comment is more detailed and covers slightly more ground.

Comment [9] is new, but also is based upon Canon 5A(3)(e).

Comment [10] is new, but is derived from aspects of Canon 3B(9) and following Commentary.

Comment [11] is new.

Comment [12] is new.

Comment [13] is new.

Comment [14] is based upon the fourth sentence of the Commentary following Canon 5A(3)(d), but provides more detailed treatment, with examples.

Comment [15] is loosely based upon the last paragraph of the Commentary following Canon 5C(2), but provides far more detailed discussion.

EXPLANATION OF BLACK LETTER

1. Rule 4.1(A)'s lead-in added cross-references to specific Rules in Canon 4.

This formulation is critical to the reorganization of Canon 4. Rule 4.1(A) sets out a generally applicable set of prohibitions that apply to all sitting judges and to all judicial candidates (including sitting judges seeking to retain current office or to achieve other judicial office). Rule 4.2 (various forms of public elections), Rule 4.3 (appointment to judicial office), and Rule 4.4 (campaign committees) then selectively eliminate these prohibitions, as appropriate to the specific situation.

2. Rule 4.1(A)(4) replaced “political organization or candidate” with “political organization or a candidate for public office.”

No substantive change is intended. The Commission wanted to make clear that the prohibition against soliciting funds or making contributions applies to all candidates for public office, not just candidates for judicial office (as is clear in other provisions of both the 1990 Code and the proposed Code).

3. Rule 4.1(A)(5): made several stylistic revisions in the course of blending Canon 5A(1)(d) and the second clause of Canon 5A(1)(e).

No substantive change is intended. The earlier “attend political gatherings” was eliminated, but the word “attend” was added to the blended Rule. “[D]inners or other events” was substituted for “political party dinners or other functions.”

4. Rule 4.1(A)(6) adds a prohibition against a candidate self-identifying as a “candidate of” a political organization.

Canon 5C(1)(a)(ii) of the 1990 Code specifically permitted judges subject to public election to identify themselves at any time as political party *members*. This provision has been eliminated in the proposed Code as unnecessary.

The purpose of Rule 4.1(A)(6) is a different one, however. In the organizational scheme of Canon 4, it is necessary first to prohibit for all judges and judicial candidates what is to be prohibited for any. In the later Rules, exceptions are made as appropriate, leaving in place the general prohibitions that are not singled out for exception. For example, in connection with Rule 4.1(A)(6), see Rule 4.2(C)(1): a candidate running in a partisan public election for judicial office must be permitted to communicate to voters the fact that a particular political organization or party nominated him or her. Thus, because an exception to Rule 4.1(A)(6) appears only in Rule 4.2(C)(1), a candidate running in another type of judicial election is still subject to Rule 4.1(A)(6).

5. Rule 4.1(A)(7): added this provision, which broadly prohibits judicial candidates from seeking, accepting, or using endorsements from political organizations.

As with Rule 4.1(A)(6), the full impact of this new Rule can be judged only by ascertaining the situations in which later Rules in Canon 4 make an exception to it.

6. Rule 4.1(A)(8): retained the language “personally solicit . . . campaign contributions,” now defined in the Terminology section; deleted the prohibition against personally soliciting “publicly stated support,” and retained the provision permitting contributions to be accepted only through a duly established campaign committee.

The prohibition against seeking “support”—at least from political organizations—is covered (and more broadly) in Rule 4.1(A)(7), and was no longer needed in this Rule.

The Commission was urged to change the operative language (and the definition in the Terminology section) to “solicit campaign contributions in person,” to focus more clearly upon the immediacy of the situation and the possibility of coercion. By analogy to the rules regulating lawyer advertising and solicitation, a ban on “in-person” solicitation of campaign contributions would *permit* mailings and similar communications, but would continue to forbid both hand-to-hand transfer of funds and live telephone solicitation. If the original broader language was retained, even a simple mailing to friends and neighbors would be prohibited.

The Commission considered the two possibilities through long debate over many meetings. The Commission was aware that several courts have struck down provisions forbidding “personal solicitation” of campaign funds—often in broad language. Ultimately, the Commission adopted the broader prohibition on the theory that the solicitation of campaign funds in the judicial election context could justify restrictions greater than are permitted for lawyer advertising.

7. Rule 4.1(A)(9) replaces “for the private benefit of the candidate or others” (in Canon 5C(2)) with “for the private benefit of the judge, the candidate, or others.”

No substantive change is intended. Rule 4.1(A) applies to both judges who are *not* currently candidates and to all current judicial candidates.

8. Rule 4.1(A)(10), which prohibits use of official resources for a judge’s campaign, breaks little new ground.

Although new to the Canon on political and campaign activity, this provision breaks little new ground. Compare Rule 1.3 (abusing the prestige of judicial office) and Rule 3.1(E) (using official resources in connection with extrajudicial activity).

9. Rule 4.1(A)(11) replaces “knowingly misrepresent the identity, qualifications, present position or other fact” (in Canon 5A(3)(d)(ii)) with “knowingly, or with reckless disregard for the truth, make any false or misleading statement.”

Although the 1990 Code language was specific, its precise reach was unclear. The new language used in the proposed Code is established in the law of libel and slander.

10. Rule 4.1(A)(12): added this provision that is new material for Canon 4 on political and campaign activity, but that is a reiteration for emphasis of Rule 2.10(A).

This reiteration is helpful because Rule 2.10(A) can apply only to sitting judges.

11. Rule 4.1(A)(13): replaced “with respect to” (in Canon 5(A)(3)(d)(i)) with “in connection with.”

This is a stylistic change only. The language is otherwise identical to policy adopted in 2003 in the wake of the decision in *Republican Party of Minnesota v. White*.

To encourage adoption of an appropriately narrow interpretation of the pledges and promises clause, by disciplinary authorities and by judges and candidates assessing their own conduct, the Commission has included several Comments describing the intended reach of Rule 4.1(A)(13). See Comments [11] through [15]. A judge or candidate who announces his or her personal views on a matter that is likely to come before the court does not compromise impartiality unless the announcement demonstrates a closed mind on the subject, or includes a pledge or a promise to rule in a particular way if the matter comes before the court.

12. Rule 4.1(B) combines in a single Rule, and greatly simplifies, most provisions of Canon 5A(3)(a) and Canon 5A(3)(b).

First, it changes the separate treatment of actions of members of a candidate’s family and actions of employees and others who are under the control of a candidate to unitary treatment of actions of “other persons”; second, it explains that the judge or candidate is required to take “reasonable measures” to ensure that these other persons do not undertake action on behalf of the judge or candidate that would otherwise be prohibited; and third, it eliminates the injunction to maintain the dignity appropriate to the judicial office during a judicial campaign.

The Commission concluded that “maintaining appropriate dignity” was too subjective a standard for use in a Rule with potential disciplinary consequences.

No significant substantive changes are intended by other adjustments in the Rule. What constitutes a “reasonable measure” will obviously depend upon whether the person who is attempting to act improperly *on behalf of* the judge or candidate is a family member, an employee, or an appointee.

EXPLANATION OF COMMENTS

[1] New Comment [1] in effect serves as a preamble to Canon 4. Two key points are involved: that states have a compelling interest in the quality of their judiciary and in the regularity of the selection process; and that restrictions on political and campaign-related speech must be narrowly tailored and the least restrictive possible, even when serving such a compelling state interest.

[2] The jurisdictional point of this Comment was originally placed in Canon 5E of the 1990 Code. The Commission concluded that treatment in the black letter text was not required, given that this provision does not establish independent standards of conduct. In transferring this material to a Comment, the Commission also significantly reduced its level of detail. Prior references to the jurisdictional situation when a candidate is successful or unsuccessful in obtaining judicial office were eliminated as not properly within the scope of this Code.

[3] New Comment [3] explains how restrictions on political participation of judges and judicial candidates were drawn: mere participation in electoral politics does not warrant a restriction, but assuming a leadership role would call into question the judge's or candidate's independence.

[4] New Comment [4] gathers in one place several provisions of Canon 5C(1) of the 1990 Code, and substantially revises the language. Although judicial candidates generally are not permitted to endorse *other* candidates, to avoid abusing the prestige of judicial office, they are nevertheless permitted to campaign on their own behalf. Moreover, although the pros and cons as a matter of policy seemed to be evenly balanced, the Commission elected to retain the traditional exception that permits campaigning for other *judicial candidates* who are effectively running in the same race.

[5] New Comment [5] serves as a reminder that judges and judicial candidates must avoid abusing the prestige of office when their own family members are involved in politics. Thus, while family members are not and cannot be subject to this Code, the people who *are* subject to it must take reasonable steps to ensure that the public does not receive the impression that a judge or judicial candidate is endorsing a family member's candidacy.

[6] This Comment carries forward Commentary from the 1990 Code, noting that judges and judicial candidates do not forfeit the right to vote, and adds a reminder that this principle applies in both general and primary elections. For jurisdictions that employ caucuses rather than secret ballot voting in primary elections, the Commission ultimately concluded that even though a caucus participant may take a public stand in favor of a particular candidate, this should not be counted as a prohibited endorsement, because there is no other way to vote or express a preference in such situations.

[8] This Comment carries forward and expands upon the "right to reply" provision originally found in Canon 5A(3)(e) of the 1990 Code. The last sentence, an aspirational standard, was added to stem increased use of negative campaign ads run by independent groups not controlled by a candidate or the candidate's campaign committee.

[10] New Comment [10] is a reminder that Rule 4.1(A)(12) has brought into the political and electoral context the traditional prohibition against making statements that will improperly influence a trial. Compare Rule 2.10(A). The last sentence of Comment [10] serves as an additional reminder that some statements are *designed* to affect the outcome of a trial, and properly so. A lawyer making a closing argument to a jury and a judge instructing that jury are prime examples.

[11] New Comments [11] and [12] introduce the series of Comments explicating “pledges and promises clause,” which is carried forward from Canon 5A(3)(d)(i) of the 1990 Code essentially unchanged.

[13] New Comment [13] describes the fundamental difference between “pledges” and “promises,” which are prohibited, and “statements or announcements of personal views,” which are permitted and constitutionally protected. The key distinction is between personal statements that are truly personal and that *will not interfere with future decision making*, and improper pledges and promises that commit a judge or judicial candidate to decide a future case in a particular way. A prohibited pledge or promise concerns future decision making.

[14] This Comment is based upon Commentary following Canon 5A(3)(d), but is more complete. It makes the important point that pledges and promises regarding *administration* of the judicial system, as opposed to *decision making in actual cases*, is not prohibited.

[15] The constitutional distinction between (1) making pledges and promises about future decision making, and (2) making statements or announcements about personal views, has emerged in recent years as issue advocacy and other citizen groups (as well as the media) have become more affirmative in issuing questionnaires for judicial candidates to answer. The Commission received testimony and commentary on this issue, and deliberated at length. Comment [15] represents the Commission’s understanding of how this issue can and must be resolved.

First, citizens are not subject to the Code of Judicial Conduct, and may inquire of judicial candidates their position on issues. Each citizen is entitled to decide what qualities in a judicial candidate will earn that citizen’s vote, and all citizens are entitled to applaud or criticize the answers given, or to comment on a candidate’s failure or refusal to answer.

Second, judicial candidates who choose to answer the questionnaires cannot be prevented from doing so, as long as their answers take the form of constitutionally protected statements and announcements of personal views, and do not constitute pledges and promises about future decision making.

Third, and critically important, judicial candidates have the right to refuse to answer, with or without giving reasons, or to answer only in formats that are agreeable to them (assuming they comply with Rule 4.1(A)(13)).

Thus, the Commission took no firm stand on the best response to questionnaires of this kind (and explicitly noted in Comment [15] that the black letter text of Rule 4.1(A)(13) does not provide a clear answer, either). But the principles set forth in this Comment and the previous Comments should assist judicial candidates in formulating their positions on judicial campaign speech.

RULE 4.2

1990 MODEL CODE COMPARISON

Rule 4.2 is derived from the specific regulation of campaign activity included in Canon 5C, with the exception of provisions concerning campaign committees, which are treated in Rule 4.4. Rule 4.2, in tandem with Rule 4.1, has imposed a logical and tiered organization on this material without making major substantive changes.

The key to understanding the organization of Canon 4 of the proposed Code is to remember that Rule 4.1 applies to all judges (whether or not they are also judicial candidates) and to all judicial candidates (whether or not they are also sitting judges). Rule 4.2 applies only to judicial candidates running in partisan, nonpartisan, or retention public elections. Rule 4.2 adds some restrictions on the activity of judicial candidates that do not appear in Rule 4.1, makes exceptions to some of the restrictions set out in Rule 4.1, and then makes further exceptions that apply only to judicial candidates in partisan elections.

Rule 4.3 applies to the activities of judicial candidates seeking appointive judicial office, but these provisions are relatively straightforward and did not require significant reorganization.

The lead-in to Rule 4.2(A) is similar to that of Canon 5C(1), except that it identifies the three modes of public elections to which this paragraph (and the rest of the Rule) will apply.

Rule 4.2(A)(1) is based upon parts of Canon 5A(3).

Rule 4.2(A)(2) is new as a separate provision, but is consistent with the pervasive statement in the 1990 Code that activities prohibited by law are also prohibited by Canon 5.

Rule 4.2(A)(3) is a new provision, but the requirement that candidates actively take responsibility for campaign literature and other campaign activities is implicit in many provisions of Canon 5 of the 1990 Code.

Rule 4.2(A)(4) is derived from parts of Canon 5A(3)(a)–(c). This material, which governs judicial candidates only, has been repositioned to Rule 4.2.

The lead-in to Rule 4.2(B) is based upon Canon 5C(1), but with a different disposition of the *timing* of the activities that are permitted for judicial candidates. In addition, Rule 4.2(B), like the rest of Rule 4.2, applies only to candidates, whereas Canon 5C(1) applies to sitting judges as well.

Rule 4.2(B)(1) is based upon the second sentence of Canon 5C(2), except that the timing provided for the establishment of campaign committees is different.

Rule 4.2(B)(2) combines and rewords Canons 5C(1)(b)(i)–(b)(iii).

Rule 4.2(B)(3) is virtually identical to Canon 5C(1)(b)(iv).

Rule 4.2(B)(4) is based upon Canon 5C(1)(a)(i), but reworded for consistency with other Rules in Canon 4 of the proposed Code.

Rule 4.2(B)(5) takes the opposite stance from that found in Canon 5C(2), but with an important caveat. The 1990 Code allows judicial candidates to solicit endorsements—“publicly stated support”—only through campaign committees. The proposed Code permits candidates to solicit such support on their own, but not from partisan political organizations.

Rule 4.2(B)(6) is similar to Canon 5C(1)(a)(iii), but establishes dollar limitations (to be supplied by each jurisdiction) on the contributions that can be made.

Rule 4.2(C) and its two subparagraphs permit only candidates in partisan elections to identify themselves as candidates of political organizations’ and to seek such organizations’ endorsements. Canon 5(C)(1)(a)(ii) had permitted the first of these two activities for candidates in both partisan and non-partisan elections. The 1990 Code did not advert to the distinction between partisan and nonpartisan or retention elections. In furtherance of the organizational scheme of the proposed Code, Rule 4.2(C) states the additional activities that are permitted only for candidates in partisan public elections.

Comments [1] and [2] explain the relationship of Rule 4.2 to Rule 4.1, which is the core of the new organizational scheme. They also explain that a person becomes a judicial candidate according to the definition in the Terminology section, but that the additional activities in which a candidate may engage depend upon the timing counting back from the primary or election in question. The first sentence of Comment [1] is a revision of Commentary to Canon 5C(1).

Comments [3] and [4] are new; the 1990 Code did not distinguish between partisan, nonpartisan, and retention public elections for judicial office.

Comment [5] is similar to Canon 5C(1)(a)(i), but with the important difference that the provision applies *only* to judicial candidates, *while* they are candidates.

Comments [6] and [7] clarify the intended meaning of Rule 4.2(B)(3), which is based upon Canon 5C(1)(b)(iv), and has some similarity to Canon 5C(5). In both instances, the key is to determine when candidates are running for the *same* judicial office.

EXPLANATION OF BLACK LETTER

1. Rule 4.2(A) lead-in: substituted “a judicial candidate in a partisan, nonpartisan, or retention public election” for “a [judge or] candidate subject to public election.”

This is an important element of the reorganization of Canon 4 of the proposed Code. By distinguishing between the three modes of public elections, Rule 4.2(A) sets up the possibility of applying further restrictions and permissive provisions to all three modes or to some designated subset, as required. In Rule 4.2(A), for example, obligations *in addition to those already imposed by Rule 4.1* are imposed upon all three types of candidates.

2. Rule 4.2(A)(1): substituted “act at all times in a manner” for “act in a manner,” and deleted the requirement that a candidate “shall maintain the dignity appropriate to judicial office.”

The first change is stylistic only. The mandatory duty to “maintain dignity” was deleted because it is too subjective.

3. Rule 4.2(A)(2): added this new broad provision that is consistent with the overarching principle that candidates for judicial office must obey applicable laws and regulations.

Some of the specific regulations regarding campaign finance are separately referenced in Rule 4.4, but Rule 4.2(A)(2) might well apply to restrictions on ballot insignia applicable to nonpartisan elections, for example. Thus, although a candidate in a nonpartisan election is not prevented from stating he or she is a member of a particular party, the candidate is prohibited from stating he or she is “the candidate” of that party, if the election laws do not allow party designations on the ballot. Compare Rule 4.1(A)(6), which prohibits all judges and judicial candidates from such self-designation, and Rule 4.2(C)(1), which allows candidates in *partisan* elections to do so.

4. Rule 4.2(A)(3): added the requirement that judicial candidates personally approve the contents of campaign literature and other materials.

The requirement is implicit in several other provisions of Canon 4. For example, if a candidate is prohibited by Rule 4.1(A)(11) from making false or misleading statements in a campaign, it is almost inevitable that the candidate will have a duty to review campaign materials before they are disseminated under his or her name.

5. Rule 4.2(A)(4): substituted “take reasonable measures to ensure” for “shall prohibit,” “shall discourage,” and “shall encourage to adhere.”

The language of the 1990 Code variously applied to employees and officials serving at the pleasure of the candidate (who can be prohibited), others under the direction and control of the candidate (who can be discouraged), and family members (who can be encouraged to assist the candidate in complying with the Rules). What constitutes a “reasonable measure” depends upon circumstances such as those noted above. Rule 4.2(A)(4), which applies only to judicial candidates, is already covered by Rule 4.1(B), which applies to all judges *and* candidates.

6. Rule 4.2(B) lead-in identifies a time period prior to the relevant primary or election, during which certain activities that would or might otherwise be prohibited by Rule 4.1(A) are permitted.

Although the creation of this time period is not new, its use in this Rule to disconnect the status of *being* a judicial candidate from being permitted to engage in the *activities* of a candidate is an important feature of the reorganization of Canon 4. During its deliberations, the Commission was mindful of the need to establish a time period to ensure that a judge elected to a ten-year term could not immediately announce plans to run for reelection, establish a campaign committee, and raise campaign funds for almost ten full years. With the time period in place, the judge can continue to

call himself or herself a candidate for ten years, but can raise campaign funds only after the time period has been satisfied, typically one year before the first primary.

7. Rules 4.2(B)(1), 4.2(B)(2), and 4.2(B)(3): retained provisions allowing candidates to establish campaign committees, speak on their own behalf through various communications media, and endorse (or oppose) candidates running for *the same* judicial office.

These activities have traditionally been allowed, and the Commission did not modify these provisions in any substantive ways. It is important to note that permission is granted to all three types of judicial election candidates to engage in these activities, but only during the stated time period.

8. Rule 4.2(B)(4): specifically permitted what Rule 4.1(A)(5) prohibits for both judges and candidates; the permission applies to all candidates, including candidates running in nonpartisan and retention elections.

This is approximately the same result as would be obtained under the 1990 Code, but in a reorganized format. Under Canon 5A(1), judicial candidates are prohibited from attending events of political organizations, unless otherwise permitted. But Canon 5C(1) permits a candidate to “attend political gatherings” *at any time*, which negates the prescription.

In the proposed Code, Rule 4.1(A)(5) generally prohibits attending such political organization functions—as the first layer. Rule 4.2(B)(4) permits an exception, but only during a candidate’s candidacy *and after a specific time*.

9. Rule 4.2(B)(5) provides an important distinction between judicial candidates running in partisan and other types of public judicial elections; the full impact of this paragraph depends on other parts of Rule 4.2, especially Rule 4.2(C).

This provision showcases the tiered approach of the proposed Code. According to Rule 4.1(A)(7), judges and candidates may not seek, accept, or use endorsements from a political organization. Rule 4.2(B)(5) continues this prohibition for *all* public election judicial candidates during the time period, because all are permitted to accept endorsements *only* from organizations that are *not* political organizations.

It is only in Rule 4.2(C)(2) that this restriction is finally removed—but for judicial candidates running in partisan elections *only*.

10. Rule 4.2(B)(6) represents an important compromise that allows all candidates for judicial office to make contributions to political organizations or other candidates for public office, but only during the time period.

Under the Canon 5(C)(1)(a)(iii) of the 1990 Code, a judge who was subject to public election at some later time (perhaps ten years away, as in the previous example) and any candidate running in a public election could make such contributions *at any time*. This included candidates running in nonpartisan and retention elections, because the 1990 Code did not distinguish between different

modes of public election. Under Rule 4.2(B)(6), all candidates (including sitting judges who become candidates) may make contributions, even to political organizations, but only during the time period.

11. Rule 4.2(C): stated the two exceptions to the earlier prohibitions that apply *only* to judicial candidates in partisan public elections.

This provision permits identification as a candidate of a political organization and acceptance of endorsements from a political organization.

EXPLANATION OF COMMENTS

New Comments [1] through [7] help explain the relationships between the several paragraphs of Rule 4.2, as well as the relationship of this Rule to other Rules in Canon 4, especially Rule 4.1.

RULE 4.3

1990 MODEL CODE COMPARISON

Rule 4.3(A) is essentially the same as Canon 5B(2)(a)(i), except that it includes a more expansive list of those whom candidates for appointive judicial office may contact.

Rule 4.3(B) is derived from Canon 5B(2)(a)(ii), but it allows candidates to seek endorsements for the appointment from a broader array of persons and organizations.

Comment [1] is new.

EXPLANATION OF BLACK LETTER

1. Rule 4.3(A): added “or confirming authority,” and substituted “any selection, screening, or nominating commission or similar agency” for “other agency designated to screen candidates.”

The second revision is stylistic only and introduced no substantive change. The Commission added a reference to a “confirming authority,” having in mind most obviously the U.S. Senate when sitting to confirm or reject presidential nominations of federal judges. Some state jurisdictions include a similar confirmation process in their overall appointment process, and in those jurisdictions candidates must be allowed to state their qualifications and views to confirming agencies as well as nominating and screening agencies.

2. Rule 4.3(B): greatly relaxed the restrictions on organizations or individuals from whom a candidate for appointive judicial office can seek support for the appointment.

Canon 5B(2)(a) of the 1990 Code limits candidates to seeking support from organizations that “regularly” make recommendations to appointing authorities, and to individuals who have been invited by the appointing (or confirming) authority to provide information.

By eliminating the restriction of obtaining support from only those organizations that regularly make recommendations, the Commission expanded the ability of a candidate to seek endorsement from any person or organization (with the exception of partisan political organizations).

The ability of a candidate to identify his or her own sponsors recognizes the realities in today's world, in which candidates almost universally seek the affirmative support of friends and allies with the appointing authority.

EXPLANATION OF COMMENTS

[1] New Comment [1] serves as a reminder that although candidates for appointive judicial office are not submitting themselves to the voting public, they are submitting themselves to a much smaller "electorate," an appointing authority. It is just as improper in the appointment system to make pledges and promises that are inconsistent with the impartial performance of judicial duties as it is in a campaign for elected office.

RULE 4.4

1990 MODEL CODE COMPARISON

Rule 4.4(A) combines aspects of the second sentence of Canon 5C(2), part of Canon 5C(4), and some of the Commentary following Canon 5C(2).

Rule 4.4(B)(1) is essentially the same as Canon 5C(3), but also includes an element from Canon 5C(2).

Rule 4.4(B)(2) is essentially the same as the fifth sentence of Canon 5C(2), but with additional language citing compliance with any applicable laws relating to divestiture of campaign funds subsequent to the campaign.

Rule 4.4(B)(3) is based upon Canon 5C(4), but includes an entirely new reference to divestiture of campaign funds.

Comment [1] is based upon the third, fourth, and fifth sentences of the Commentary following Canon 5C(2).

Comment [2] combines aspects of the second sentence of Canon 5C(2) and part of Canon 5C(4).

Comment [3] is partly new, but is based upon aspects of Canon 5C(2) and the following Commentary, plus parts of Canon 5C(4).

EXPLANATION OF BLACK LETTER

1. Rule 4.4(A) makes explicit that campaign committees are permitted only for candidates subject to public election, deleted reference to "committees of responsible persons," and adds a final sentence stating directly the candidate's responsibility for acts of his or her campaign committee.

The placement of the material on campaign committees within Canon 5C of the 1990 Code made it obvious (if not explicit) that these provisions applied only to candidates for elective judicial office (those “subject to public election”). Because Rule 4.4 stands alone in Canon 4, it was necessary to state the point explicitly.

The direction to establish committees composed only of “responsible persons” seemed unnecessary, and was deleted. The last sentence of Rule 4.4(A) is new in this form, but merely makes explicit what is referred to indirectly or assumed throughout Canon 5C of the 1990 Code.

2. Rule 4.4(B)(1) combines and recasts material from both Canon 5C(2) and Canon 5C(3) of the 1990 Code.

No substantive change is intended. This provision establishes that campaign contributions must be “reasonable” in amount (to avoid a suggestion of undue influence) and in addition are subject to aggregate limits (per campaign) for individuals and organizations, limits which each jurisdiction will set according to its conditions and policy choices.

3. Rule 4.4(B)(2) adds the word “current” before the word “campaign,” and leaves the post-election time period for ending campaign solicitation open for variation in each jurisdiction.

These are minor adjustments, but could become significant in some settings. The Joint Commission wanted to make it even clearer than in the 1990 Code that the time window for a campaign committee to solicit funds applies to *each* campaign separately. Thus, Rule 4.4(B)(2) specifies that it applies always to a candidate’s *current* campaign. More significantly, to prevent the early buildup of campaign funds, the Commission specified that a specific time restriction should be enacted (to be chosen by each jurisdiction) establishing the point at which contributions may be solicited and accepted. The time for continuing to raise campaign funds after the election to pay off debts of the campaign was left to each state to decide.

4. Rule 4.4(B)(3) adds “or within such other period as is provided by law.”

Only a minor substantive change is intended. The Commission, aware that many jurisdictions already have laws regulating elections, including the reporting of campaign contributions and divestiture of the contributions subsequent to a campaign, did not want to interfere with the operation of these laws. In the 1990 Code, possible obligations under law to divest a campaign of its funds were not addressed.

This paragraph recognizes that many jurisdictions already have provisions in their general election and campaign finance laws regarding disclosure and divestiture of campaign funds, and defers to local choices and existing law (if applicable) in setting the specific details.

EXPLANATION OF COMMENT

Comments [1]–[3] explain the operation and rationale for the black letter text of Rule 4.4, borrowing from and recasting both black letter text and Commentary from the 1990 Code.

The treatment of contributions from *lawyers* in Comment [3] builds upon the treatment given in Canon 5C(2) of the 1990 Code, but goes a step further. Canon 5C(2) merely states that solicitation (by a campaign committee) of such contributions is not prohibited whereas Comment [3] to Rule 4.4 urges special caution in light of the enhanced possibility that significant contributions from lawyers (and parties) who might later come before the judge would be a cause for disqualification of the judge under Rule 2.11.

RULE 4.5

1990 MODEL CODE COMPARISON

Rule 4.5(A) is derived from Canon 5A(2), but has been simplified and reworded.

Rule 4.5(B) is new, but is implicit in and derived from Canon 5A(2).

Comments [1] and [2] are new.

EXPLANATION OF BLACK LETTER

1. Rule 4.5(A) recasts text, substituting “nonjudicial elective office” for “in a primary or in a general election,” and deleting the specific exception for state constitutional conventions.

The Commission retained the “resign-to-run” rule with only minor revisions for style and clarity. Canon 5A(2) of the 1990 Code has always been interpreted to apply to elective nonjudicial offices only; the proposed Rule makes that explicit. The Commission also removed the special exception for judges who campaign for election to a state constitutional convention because of the rarity with which such a situation occurs. The remaining language, “unless permitted by law to continue to hold judicial office” should address such situations.

2. Rule 4.5(B) add a paragraph to clarify what seemed implicit in Canon 5A(2)—that if a judge becomes a candidate for appointment to a nonjudicial office, the judge is not required to resign from judicial office as a general proposition.

The Commission decided to make explicit that the “resign-to-run” rule applies only to nonjudicial elective offices, because it is only there that the dangers justifying the rule (as explained in Comments [1] and [2]) are at their height. In addition, because a sitting judge may become a “candidate” for an appointive non-judicial office—an undefined term in the proposed Code—merely by being considered by an executive branch officer for appointment, the Commission decided it was unwarranted to require automatic resignation. This consideration is especially strong when the executive branch may be considering several nominees for the same position, and when the confirmation process, if any, is both lengthy and of uncertain outcome.

As a fail-safe, the Commission added the reminder that a judge who remains on the bench while a candidate for appointive nonjudicial office must continue to abide by the other provisions of this Code (such as maintaining independence, integrity, and impartiality).

EXPLANATION OF COMMENTS

New Comments [1] and [2] explain the rationale for applying the “resign-to-run” rule to elective nonjudicial offices, but not to appointive ones. The rationale is based chiefly upon the federal decisional law.