

ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT

REPORT

INTRODUCTION

In this Report the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct (“Commission”) proposes both format and substantive changes to the present ABA Model Code of Judicial Conduct.

Created in July 2003, with a grant from The Joyce Foundation, the Joint Commission was appointed by and operated under the auspices of the ABA Standing Committees on Ethics and Professional Responsibility and on Judicial Independence. The Commission submits its Report with Recommendations for consideration by the ABA House of Delegates at the 2007 Midyear Meeting of the Association.

It has been nineteen years since the American Bar Association last undertook a comprehensive review of its judicial ethics policies. Between 1987 and 1990, a Subcommittee of the Standing Committee on Ethics and Professional Responsibility conducted an extensive review process that led to adoption of the present ABA Model Code of Judicial Conduct in 1990. Since that time, however, several developments occurred that suggested the need for a careful evaluation of the Model Code. First among them was the extensively reported collective experience of judges, judicial regulators and judicial ethics commissions that have worked with the existing Code for well over a decade. The Commission was motivated as well by specific issues, including those that had arisen as a result of the variety of methods utilized throughout the United States in the judicial selection process, those stemming from the development of new types of courts and court processes, and those relating to the increasing frequency of *pro se* representation in the courts.

The Joint Commission to Evaluate the Model Code of Judicial Conduct is chaired by Mark I. Harrison of Phoenix, Arizona. Mr. Harrison is a former member of the ABA Standing Committee on Ethics and Professional Responsibility, and a former chair of the ABA Standing Committee on Professional Discipline. He has extensive experience in all aspects of lawyer and judicial regulation, having represented the Arizona Judicial Conduct Commission and judges in judicial discipline proceedings. The Commission membership includes ten distinguished judges and lawyers whose breadth of experience in various courts and areas of practice ensured a thorough and multidimensional review of the Judicial Code. It also includes a public member whose participation in a wide array of civic, business, and charitable affairs brought to the review process a valuable public perspective, and eleven advisors with extensive experience in judicial ethics and disciplinary matters, many of whom served as formal liaisons from organizations interested in different aspects of judicial conduct. The Commission was supported in its evaluative work by two Reporters and by counsel from the ABA Center for Professional

Responsibility and the ABA Justice Center. A roster of the Commission members, advisors, Reporters, and counsel appears at <http://www.abanet.org/judicialethics/roster.html>.

THE EVALUATION PROCESS

Over the course of thirty-nine months, the Commission met in person nineteen times and convened via teleconference thirty-two times. At its in-person meetings, widely advertised in advance the Commission sponsored nine public hearings at which it heard comments from several dozen individuals regarding their interests, or the interests of entities they represented, on a broad range of judicial conduct issues. Representatives of the Commission met on several occasions with the Conference of Chief Justices, with various entities within the Judicial Division of the ABA, and with other interested entities. The Commission also received written comments from some of those who appeared in person and from a number of other interested persons. The Commission's developing work product, in the form of drafts of discrete portions of the Judicial Code, was posted periodically on a Web site maintained by the ABA, along with requests for responses and suggestions for further revisions. The Commission's work was also disseminated to representatives of sixteen entities whose work focuses upon judicial conduct matters, and to more than two hundred and fifty individuals who had expressed interest in the process and asked that they be provided with electronic notification of all the Commission's recommendations. All told, thirty-nine entities filed written comments with the Commission in relation to the existing Model Code, a Preliminary Report distributed by the Commission in June 2005, or a Proposed Final Draft in December 2005. In total, approximately three hundred individuals also filed comments regarding the Commission's draft revisions to the Code. A listing of the commentators, as well as the text of their comments, can be found at <http://www.abanet.org/judicialethics/comments>.

The proposed new Model Code of Judicial Conduct is the result of vigorous and informed discussion and debate among the Commission members and advisors. The formulations contained in these Model Rules were established by vote of the members of the Commission. Although there was majority support for each of the proposed Canons and Rules, there was inevitably some disagreement, ranging from mild to strong, with the formulation of particular proposals. Important differences between the proposed Rules and the present Code are addressed in the section of this Report titled, "Principal Substantive Areas of Concern and Changes from the 1990 Code."

MATERIALS CONTAINED IN THIS REPORT

To assist the reader with review, the Commission provides here a clean copy of the Proposed Model Code of Judicial Conduct, which includes a Preamble, sections on Scope, Terminology, and Application, the Canons, and the Rules and their accompanying Comments. Interspersed throughout the document are extensive and detailed "Reporter's Explanation of Changes," ("RECs"), which provide explanations of substantive differences between the treatment of the subject matter in the proposed Model Rules and the present Model Code, as well as the sources from which the proposed Model Rules

have been derived. All substantive deletions of provisions in the current Model Code are also discussed.

ORGANIZATIONAL CHANGES FROM THE 1990 CODE

The structure of these proposed Model Rules presents two notable differences from the 1990 Code.

The first difference is the presentation of Canons, which state overarching principles of judicial conduct, followed by black letter “Rules.” In the 1990 Code, each Canon was followed by “sections” that discursively established the parameters of permissible and prohibited conduct. A consensus was reached by the Commission in its first year of deliberations that a structure similar to that of the ABA Model Rules of Professional Conduct, which address permitted and prohibited conduct for lawyers, would be more straightforward and user-friendly. This consensus developed from consideration of the Commission members’ own experience in using the present Code both for guidance and for the purpose of judicial discipline proceedings, and from the experience and testimony of numerous other individuals providing comments to the Commission. Similar to the organization of the Model Rules of Professional Conduct, the Rules here are usually followed by comments that provide both aspirational statements and guidance in interpreting and applying the Rules. These comments neither add to nor subtract substantively from the force of the Rules themselves.

Second, the material treated under each of the Canons has been reorganized to provide what the Commission considers a more logical, functional and helpful arrangement of topics. Canon 1 and its Rules combine most of the subject matter of present Canons 1 and 2, addressing the obligations of judges to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office. Canon 2 and its Rules address solely the judge’s professional duties as a judge, which constitute most of Canon 3 in the present Code. Canon 3 and its Rules address specific types of personal conduct, including involvement in extrajudicial activities and in business or financial activities; most of which is now addressed in Canon 4. Finally, Canon 4 and its Rules address, as does present Canon 5, acceptable political conduct of judges and judicial candidates. The current Preamble has been divided into two parts: a new Preamble, which states the objectives of the Model Rules, and a Scope section, which describes the manner in which they are to be interpreted, used for guidance, and enforced.

PRINCIPAL SUBSTANTIVE AREAS OF CONCERN AND CHANGES FROM THE 1990 CODE

CANON 1

Canon 1 combines the previous Canons 1 and 2, placing at the forefront of the document the judge's duties to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office. In doing so, it embraces the most general, but overarching, obligations of a judge, leaving a judge's specific activities—whether occurring while the judge is on the bench, in the judge's personal life, or in the political arena—to be addressed in the remaining three Canons.

The Commission heard much oral testimony and received numerous written communications on the question, identified by the Commission itself as an important one at the beginning of the project, of whether the “appearance of impropriety” concept should be retained. A majority of commentators on the subject, citing to judicial discipline cases decided over a three-decade period, strongly urged that the concept be retained. Others, among them lawyers who represent judges and judicial candidates in disciplinary proceedings, voiced concerns that the concept is not clearly definable and does not provide judges and judicial candidates with adequate notice about what conduct might constitute a disciplinable offense. Some of those commentators also questioned whether that aspect of the provision might make it subject to challenge on constitutional grounds. The Commission was persuaded by the former group of commentators. Thus, the Commission proposes to move to the very first Canon the injunction to avoid impropriety and its appearance. In addition, the Terminology section adds a definition of the term “impropriety.”

Comment [2] to Rule 1.3, Avoiding Abuse of the Prestige of Judicial Office, retains the concept presently in Commentary to Canon 2B whereby letters of recommendation submitted by a judge on behalf of another person may be based upon any “personal knowledge” the judge possesses. In an earlier draft of this provision, the Commission had proposed, based upon considerable discussion and the comments of numerous witnesses, that only knowledge obtained by a judge in his or her official capacity ought to be used in letters of recommendation. In the end, the Commission was persuaded that the formulation in the 1990 Code was well balanced and preferable.

CANON 2

Rule 2.3, Bias, Prejudice, and Harassment, has added to the 1990 Code's list of improper bases for discrimination the categories of ethnicity, marital status, gender, and political affiliation. Also new is the inclusion of “harassment” in the Rule's black letter language, and explanatory Comment that describes both harassment generally and sexual harassment.

Rule 2.5, Competence, Diligence, and Cooperation, combines in a single Rule the treatment of adjudicative competence, addressed in the 1990 Code under the rubric of

competence “in the law,” Canon 3B(2), and administrative competence, Canon 3C(1). The new Rule identifies in a single location the judge’s obligation to perform all judicial duties competently.

Rule 2.6, Ensuring the Right to Be Heard, expands considerably the present Canon 3B(7)(d), discussing judges’ actions in encouraging parties and their lawyers to settle disputes when possible, and cautioning judges against using coercion in doing so. The Comment is expanded to enumerate some of the factors judges should take into account if they participate in settlement proceedings. Whether a judge who participates in facilitating settlement of a matter pending before him or her should be permitted to hear that matter if settlement efforts are unsuccessful is not addressed in these rules.

Rule 2.8, Decorum, Demeanor, and Communication with Jurors, contains a new comment acknowledging the developing practice of judges allowing jurors to discuss court proceedings with them following trial, though cautioning them about discussing the merits of a case. This Comment accommodates recently developed formal and informal procedures the Commission learned of, whereby judges engage in voluntary “debriefing” processes with jurors after their jury service concludes.

Paragraph (A)(2) of Rule 2.9, Ex Parte Communications, introduces new requirements when a judge seeks to obtain the written advice of a disinterested expert on the law applicable to a proceeding. The parties must receive advance notice of the person to be consulted and the substance of the advice to be solicited, and must be given a reasonable opportunity to object and respond, both to the notice and to the advice received.

Rule 2.9(C) contains a new provision prohibiting a judge from “investigat[ing] facts in a matter independently.” The Comment to the Rule states that the prohibition extends to a judge’s use of electronic research, which includes Internet research.

New Comment [4] to Rule 2.9 addresses developing practices in recently created “specialized courts,” such as drug courts, domestic abuse courts, and others. Numerous commentators informed the Commission that rules specially developed for application in such courts frequently authorize—or even require—judges to engage in communications with individuals and entities outside the court system. By virtue of the “authorized by law” exception to Rule 2.9, ex parte communications made in compliance with such rules are permitted.

Rule 2.14 is a new Rule requiring that a judge take “appropriate action” when he or she believes that a lawyer’s or judge’s performance is impaired by drugs, alcohol or some mental, emotional or physical condition. This new Rule is directed toward both protecting the public and assisting the judge or lawyer.

Rule 2.16 is a new Rule, addressing the duty of a judge to cooperate with judicial and lawyer disciplinary authorities.

CANON 3

In Rule 3.6, Affiliation with Discriminatory Organizations, the categories of gender, ethnicity, and sexual orientation have been added to the list of factors for which discrimination is prohibited in the policies of clubs and other membership entities to which judges seek to belong. Sexual orientation is presently contained in the 1990 Code's provision prohibiting the manifestation of bias in the court, but neither it nor gender nor ethnicity presently appear in connection with organizational memberships held by a judge. The comment to this rule notes, as does the current Code, that the determination of whether a particular organization's exclusionary membership practices constitute "invidious discrimination," such that a judge may not belong to it, can be made only by considering numerous factors. Two of those factors are whether the organization is "dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members," and whether it is an "intimate, purely private organization" whose membership limitations could not constitutionally be prohibited.

The proposed Code also adds to the black letter of Rule 3.6 a statement that a judge's attendance at an event in a facility of a group that the judge could not join as a member does not constitute a rule violation when it is an isolated event that "could not reasonably be perceived as an endorsement of the organization's practices."

Comment [3] to Rule 3.6 interprets the black letter to require that a judge immediately resign from an organization to which he or she belongs upon discovering that it engages in invidious discrimination. In the 1990 Code, the prohibition against membership in discriminatory organizations was newly introduced, and Commentary provided that a judge be given one year to withdraw from membership, unless he or she was successful in influencing the organization to abandon its discriminatory policies. The Commission considers that both the policy and practice of prohibiting judges from belonging to discriminatory organizations are now well established, so that a per se prohibition is appropriate.

The substance of Rule 3.13, Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, and Other Things of Value remains largely unchanged from its former presentation in Canon 4D(5) of the 1990 Code, although the Rule's structure has been revised. The extensive discussion of what does *not* constitute a gift has been deleted.

Rule 3.14, Reimbursement of Expenses and Waivers of Fees or Charges, adds language not contained in the 1990 Code, Canon 4H, to clarify that in addition to actual reimbursement to judges for expenses they may have incurred, waivers of fees or other charges are also regulated by the Rule. In an important addition to the Commentary on this subject, Comments [2] and [3] discuss the analysis a judge should employ in making a determination about whether to accept reimbursements or fee waivers.

Rule 3.15, Reporting Requirements, sets out the requirements for reporting extrajudicial compensation, gifts, and other things of value, as well as reimbursements and waivers of fees. Paragraph (A)(2) of the Rule introduces an important change, prohibiting judges from accepting gifts in excess of specific dollar limits to be established by individual

jurisdictions. The present Code provision simply requires that gifts be reported. The new provision enables judges to receive modest and innocuous gifts not excepted elsewhere in the rules, but prohibits gifts of unlimited size. Also of significant note is the time line established for reporting of reimbursements. Following the recent issuance of guidelines for federal judges by the Judicial Conference of the United States, paragraph (C) of this Rule requires that reimbursement of expenses and waivers of fees be reported within thirty days following the conclusion of the event or program to which they relate. Consistent with the new rules' acknowledgment of the impact of developing technology upon judicial practices, the Rule requires the posting of information relating to compensation and reimbursement on appropriate Web sites.

CANON 4

Throughout its deliberations, the Joint Commission has sought to find a balance that accommodates the political realities of judicial selection and election while ensuring that the concepts of judicial independence, integrity, and impartiality are not undermined by the participation of judges and judicial candidates in political activity. The Commission has expanded the title of the Canon, specifically identifying "campaign" activities in addition to political activities generally. More importantly, it has replaced the difficult-to-define term "inappropriate political activity" with the phrase "activity inconsistent with the independence, integrity, or impartiality of the judiciary." This extends to the political arena the focus that the new Model Rules apply consistently on those fundamental principles. The Commission also has added extensive commentary to the Rules it proposes within Canon 4, confident that it will enhance compliance with and, when necessary, enforcement of the Rules.

The internal organization of Canon 4 (formerly Canon 5) has been significantly modified. Rule 4.1 signals, in its introductory clause ("except as permitted by law, or by Rules 4.2, 4.3 and 4.4") that there will be exceptions to its provisions. It then addresses the prohibitions against political activity that apply generally to judges and judicial candidates, as does the present Canon, leaving it to Rules 4.2, 4.3 and 4.4 to identify those obligations and prohibitions that relate to judges and judicial candidates who seek office through various judicial selection processes. Depending upon the type of selection process involved, these rules may introduce new restrictions, reduce the scope of prohibitions set out in Rule 4.1, or eliminate them entirely. Rule 4.5 applies solely to judges who seek election to nonjudicial office.

There are several notable changes effected by Rule 4.1 and its Comment. A broad prohibition against seeking, accepting, or using endorsements from political organizations has been included. Although this is among the prohibitions that are ultimately relaxed somewhat in specific Rules that follow, it nonetheless carries forth from the present Code the statement of a preference for reducing the level of politicization in judicial selection.

Rule 4.1 broadens the present Code's prohibition against a judge "knowingly misrepresent[ing] the identity, qualifications, present position, or other fact concerning the candidate or an opponent," instead prohibiting judges and judicial candidates from

“knowingly, or with reckless disregard for the truth, ... making any false or misleading statement.”

The Commission deleted language that required judges and judicial candidates to maintain “appropriate dignity,” finding the phrase both unhelpful and less effective at capturing the fundamental characteristics of proper judicial conduct, independence, integrity, and impartiality, than using the terms themselves.

Where the present Code discusses only briefly the fact that judges are entitled to engage in the political process as voters, Comment [6] specifically notes that judges in jurisdictions that employ caucus procedures to select political candidates are not prohibited from participating in such caucuses.

Perhaps the most significant addition to the Comment accompanying Rule 4.1, however, is the series of five comments that discuss the distinction between “announce clauses,” which have been found unconstitutional and therefore eliminated from judicial ethics rules and “pledges and promises clauses,” which the Commission remains convinced are solidly supportable limits that must be set to prohibit judges from promising to reach particular results on specific issues that may come before them. Comment [14] explains that promises respecting a judge’s intentions to handle matters of court administration are exempt from the general prohibition against “pledges and promises.”

Rule 4.2, which permits certain political activity, as part of the electoral process, that otherwise would be prohibited in Rule 4.1, nevertheless narrows the time frame in which such activity is permitted. Although leaving to the discretion of each adopting jurisdiction the question of what time period will be used, the Rule permits certain political activity “not earlier than [amount of time] before the first applicable primary election, caucus, or general or retention election.”

The Rule departs from the 1990 Code in permitting judges to seek “public support,” while retaining the Code’s prohibition against personally soliciting or accepting campaign contributions. Except with respect to those who are running in partisan judicial races, however, it limits judges to seeking such support from political organizations other than partisan ones.

Finally, Rule 4.2 imposes a new requirement that judges personally approve the contents of campaign literature and other materials employed to promote their election.

The activities permitted to candidates seeking appointive judicial office under proposed Rule 4.3 reach beyond what was permitted in the 1990 Code. First, a candidate for appointment is not obligated to wait to be invited to seek an endorsement, but is free to initiate a request for endorsement. Second, the candidate is not limited to seeking endorsements from organizations “regularly making recommendations to appointing authorities,” but may seek endorsement from any individual or organization.

Rule 4.4, relating to the activities of a judge’s or judicial candidate’s campaign committee, carries forth the provisions of the present Code, but adds to them a specific

injunction that the judge or judicial candidate is responsible for ensuring that his or her campaign committee complies with both the provisions of the Model Rules and other applicable law.

Rule 4.5, which relates to the activities of judges who become candidates for nonjudicial office, has been expanded beyond its counterpart in the 1990 Code, which solely addressed the obligation of a judge to resign when he or she becomes a candidate for a nonjudicial office. A second paragraph is added to establish that judges who are merely seeking appointment to some nonjudicial office are not required to resign their position simply to be considered for an appointment – especially because there may be a large pool of potential appointees being considered.

CONCLUSION

In closing, the Commission expresses its gratitude to The Joyce Foundation of Chicago, Illinois, whose generous funding made possible this entire endeavor. I also want to express personally my gratitude to and admiration of my colleagues. The abiding commitment, good will and tireless efforts of the Commission members, Advisors, Reporters, and ABA staff have been exceptional. It is my hope that the judiciary, the legal profession and public will be enriched by their efforts.

Respectfully submitted,

Mark I. Harrison

Chair, ABA Joint Commission to Evaluate the Model Code of Judicial Conduct
February 2007

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CANON 3

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PREAMBLE

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3 [1] An independent judiciary is indispensable to our system of justice. The United
4 States legal system is based upon the principle that an independent, impartial, and
5 competent judiciary, composed of men and women of integrity, will interpret and apply
6 the law that governs our society. Thus, the judiciary plays a central role in preserving the
7 principles of justice and the rule of law. Inherent in all the Rules contained in this Code
8 are the precepts that judges, individually and collectively, must respect and honor the
9 judicial office as a public trust and strive to maintain and enhance confidence in the legal
10 system.

11
12 [2] Judges should maintain the dignity of judicial office at all times, and avoid both
13 impropriety and the appearance of impropriety in their professional and personal lives.
14 They should aspire at all times to conduct that ensures the greatest possible public
15 confidence in their independence, impartiality, integrity, and competence.

16
17 [3] The Model Code of Judicial Conduct establishes standards for the ethical conduct
18 of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct
19 of judges and judicial candidates, who are governed in their judicial and personal conduct
20 by general ethical standards as well as by the Code. The Code is intended, however, to
21 provide guidance and assist judges in maintaining the highest standards of judicial and
22 personal conduct, and to provide a basis for regulating their conduct through disciplinary
23 agencies.

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PREAMBLE
REPORTER'S EXPLANATION OF CHANGES

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The "Reporters' Explanations of Changes" have not been approved by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. They have been 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 prior to their being considered at the ABA 2007 Midyear Meeting. THEY ARE NOT TO BE ADOPTED AS PART OF THE MODEL CODE.

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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

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3 [1] The Model Code of Judicial Conduct consists of four Canons, numbered Rules
4 under each Canon, and Comments that generally follow and explain each Rule. Scope
5 and Terminology sections provide additional guidance in interpreting and applying the
6 Code. An Application section establishes when the various Rules apply to a judge or
7 judicial candidate.

8
9 [2] The Canons state overarching principles of judicial ethics that all judges must
10 observe. For a judge to be disciplined for violating a Canon, violation of a Rule must be
11 established. Where a Rule contains the term “shall” or “shall not,” it establishes a
12 mandatory standard to which the judge or candidate for judicial office will be held.
13 Where a Rule contains a permissive term, such as “may” or “should,” the conduct being
14 addressed is committed to the personal and professional discretion of the judge or
15 candidate in question, and no disciplinary action should be taken for action or inaction
16 within the bounds of such discretion.

17
18 [3] The Comments that accompany the Rules serve two functions. First, they provide
19 guidance regarding the purpose, meaning, and proper application of the Rules. They
20 contain explanatory material and, in some instances, provide examples of permitted or
21 prohibited conduct. Comments neither add to nor subtract from the binding obligations
22 set forth in the Rules. Therefore, when a Comment contains the term “must,” it does not
23 mean that the Comment itself is binding or enforceable; it signifies that the Rule in
24 question, properly understood, is obligatory as to the conduct at issue.

25
26 [4] Second, the Comments identify aspirational goals for judges. To implement fully
27 the principles of this Code as articulated in the Canons, judges should strive to exceed the
28 standards of conduct established by the Rules, holding themselves to the highest ethical
29 standards and seeking to achieve those aspirational goals, thereby enhancing the dignity
30 of the judicial office.

31
32 [5] The Rules of the Model Code of Judicial Conduct are rules of reason that should
33 be applied consistent with constitutional requirements, statutes, other court rules, and
34 decisional law, and with due regard for all relevant circumstances. The Rules should not
35 be interpreted to impinge upon the essential independence of judges in making judicial
36 decisions.

37
38 [6] Although the black letter of the Rules is binding and enforceable, it is not
39 contemplated that every transgression will result in disciplinary action. Whether
40 disciplinary action is appropriate should be determined through a reasonable and
41 reasoned application of the Rule, and should depend upon factors such as the seriousness
42 of the transgression, the extent of any pattern of improper activity, and the effect of the
43 improper activity upon the judicial system or others.

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45 [7] The Code is not designed or intended as a basis for civil or criminal liability.
46 Neither is it intended to be the basis for litigants to seek collateral remedies against each
47 other or to obtain tactical advantages in proceedings before a court.

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SCOPE
REPORTER'S EXPLANATION OF CHANGES

The "Reporters' Explanations of Changes" have not been approved by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. They have been 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 prior to their being considered at the ABA 2007 Midyear Meeting. THEY ARE NOT TO BE ADOPTED AS PART OF THE MODEL CODE.

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. With regard to the Canons, or Rule headings, the Scope section explains that the Canons are given effect by the Rules, and for a judge to be disciplined for violating a Canon, violation of a Rule must be established.

TERMINOLOGY

The first time any term listed below is used in a Rule in its defined sense, it is followed by an asterisk (*).

“Aggregate,” in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate’s campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate’s opponent. See Rules 2.11 and 4.4.

“Appropriate authority” means the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported. See Rules 2.14 and 2.15.

“Contribution” means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. See Rules 2.11, 2.13, 3.7, 4.1, and 4.4.

“De minimis,” in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality. See Rule 2.11.

“Domestic partner” means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. See Rules 2.11, 2.13, 3.13, and 3.14.

“Economic interest” means ownership of more than a de minimis legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

- (1) an interest in the individual holdings within a mutual or common investment fund;
- (2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge’s spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant;
- (3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or
- (4) an interest in the issuer of government securities held by the judge.

See Rules 1.3 and 2.11.

“Fiduciary” includes relationships such as executor, administrator, trustee, or guardian. See Rules 2.11, 3.2, and 3.8.

1
2 **“Impartial,” “impartiality,” and “impartially”** mean absence of bias or prejudice in
3 favor of, or against, particular parties or classes of parties, as well as maintenance of an
4 open mind in considering issues that may come before a judge. See Canons 1, 2, and 4,
5 and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1, and 4.2.

6
7 **“Impending matter”** is a matter that is imminent or expected to occur in the near future.
8 See Rules 2.9, 2.10, 3.13, and 4.1.

9
10 **“Impropriety”** includes conduct that violates the law, court rules, or provisions of this
11 Code, and conduct that undermines a judge’s independence, integrity, or impartiality. See
12 Canon 1 and Rule 1.2.

13
14 **“Independence”** means a judge’s freedom from influence, or controls other than those
15 established by law. See Canons 1 and 4, and Rules 1.2, 3.1, 3.12, 3.13, and 4.2.

16
17 **“Integrity”** means probity, fairness, honesty, uprightness, and soundness of character.
18 See Canon 1 and Rule 1.2.

19
20 **“Judicial candidate”** means any person, including a sitting judge, who is seeking
21 selection for or retention in judicial office by election or appointment. A person becomes
22 a candidate for judicial office as soon as he or she makes a public announcement of
23 candidacy, declares or files as a candidate with the election or appointment authority,
24 authorizes or, where permitted, engages in solicitation or acceptance of contributions or
25 support, or is nominated for election or appointment to office. See Rules 2.11, 4.1, 4.2,
26 and 4.4.

27
28 **“Knowingly,” “knowledge,” “known,” and “knows”** mean actual knowledge of the
29 fact in question. A person’s knowledge may be inferred from circumstances. See Rules
30 2.11, 2.13, 2.15, 2.16, 3.6, and 4.1.

31
32 **“Law”** encompasses court rules as well as statutes, constitutional provisions, and
33 decisional law. See Rules 1.1, 2.1, 2.2, 2.6, 2.7, 2.9, 3.1, 3.4, 3.9, 3.12, 3.13, 3.14, 3.15,
34 4.1, 4.2, 4.4, and 4.5.

35
36 **“Member of the candidate’s family”** means a spouse, domestic partner, child,
37 grandchild, parent, grandparent, or other relative or person with whom the candidate
38 maintains a close familial relationship.

39
40 **“Member of the judge’s family”** means a spouse, domestic partner, child, grandchild,
41 parent, grandparent, or other relative or person with whom the judge maintains a close
42 familial relationship. See Rules 3.7, 3.8, 3.10, and 3.11.

43 **“Member of a judge’s family residing in the judge’s household”** means any relative of
44 a judge by blood or marriage, or a person treated by a judge as a member of the judge’s
45 family, who resides in the judge’s household. See Rules 2.11 and 3.13.

46
47 **“Nonpublic information”** means information that is not available to the public.
48 Nonpublic information may include, but is not limited to, information that is sealed by

1 statute or court order or impounded or communicated in camera, and information offered
2 in grand jury proceedings, presentencing reports, dependency cases, or psychiatric
3 reports. See Rule 3.5.

4
5 **“Pending matter”** is a matter that has commenced. A matter continues to be pending
6 through any appellate process until final disposition. See Rules 2.9, 2.10, 3.13, and 4.1.

7
8 **“Personally solicit”** means a direct request made by a judge or a judicial candidate for
9 financial support or in-kind services, whether made by letter, telephone, or any other
10 means of communication. See Rule 4.1.

11
12 **“Political organization”** means a political party or other group sponsored by or affiliated
13 with a political party or candidate, the principal purpose of which is to further the election
14 or appointment of candidates for political office. For purposes of this Code, the term does
15 not include a judicial candidate’s campaign committee created as authorized by Rule 4.4.
16 See Rules 4.1 and 4.2.

17
18 **“Public election”** includes primary and general elections, partisan elections, nonpartisan
19 elections, and retention elections. See Rules 4.2 and 4.4.

20
21 **“Third degree of relationship”** includes the following persons: great-grandparent,
22 grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild,
23 nephew, and niece. See Rule 2.11.

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TERMINOLOGY
REPORTER'S EXPLANATION OF CHANGES

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EXPLANATION OF BLACK LETTER

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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."

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

3
4 “Pro tempore part-time judge” (same reason as above)

5
6 “Require,” which the Commission believed is easily understood.

7
8 The following definitions have been modified:

9
10 “De minimis” is defined specifically in the context of “interests pertaining to the
11 disqualification of a judge,” because it is only in Rule 2.11 (“Disqualification”) that the
12 Commission believes a precise definition of the term need be applied.

13
14 “Judicial candidate” is similar to the 1990 Code’s term “candidate.” The phrase
15 “including a sitting judge” has been added for clarification. The language stating that the
16 term “candidate” applies to a judge who is seeking a non-judicial office has been deleted,
17 consistent with the reformulation of the term being defined.

18
19 “Political organization” has been expanded to include the qualifying language “sponsored
20 by or affiliated with a political party or candidate,” the principal purpose of which is to
21 further the election or appointment of candidates for political office. In addition,
22 language has been added to clarify that the term is not meant to include a judicial
23 candidate’s own campaign committee.

24
25 4. The following new defined terms have been added:

26
27 “Domestic partner,” on the theory that now commonplace “non-traditional” relationships
28 that exist outside marriage are deserving of treatment equal to that afforded marital
29 relationships in evaluating their potential conflict-of-interest implications under the
30 Rules.

31
32 “Impartiality,” because it is a fundamental goal of the judicial system, and additionally
33 because it has become a defined term in recent decisional law with respect to political
34 activity of judges.

35
36 “Impending matter,” in order to set temporal limits on the phrase.

37
38 “Impropriety,” because of its fundamental importance as a concept underlying the
39 importance of appearances created by judges.

40
41 “Independence,” as a fundamental concept underlying the justice system.

42
43 “Integrity,” for the same reason as above.

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

46

APPLICATION

The Application section establishes when the various Rules apply to a judge or judicial candidate.

I. APPLICABILITY OF THIS CODE

(A) The provisions of the Code apply to all full-time judges. Parts II through V of this section identify those provisions that apply to four distinct categories of part-time judges. Canon 4 applies to judicial candidates.

(B) A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative judiciary.¹

COMMENT

[1] The Rules in this Code have been formulated to address the ethical obligations of any person who serves a judicial function, and are premised upon the supposition that a uniform system of ethical principles should apply to all those authorized to perform judicial functions.

[2] The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. The determination of which category and, accordingly, which specific Rules apply to an individual judicial officer, depends upon the facts of the particular judicial service.

[3] In recent years many jurisdictions have created what are often called “problem solving” courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and monitoring the progress of participants in those courts’ programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and others outside the context of their usual judicial role as independent decision makers on issues of fact and law. When local rules specifically authorize conduct not otherwise permitted under these Rules, they take precedence over the provisions set forth in the Code. Nevertheless, judges serving on “problem solving” courts shall comply with this Code except to the extent local rules provide and permit otherwise.

II. RETIRED JUDGE SUBJECT TO RECALL

¹Each jurisdiction should consider the characteristics of particular positions within the administrative judiciary in adopting, adapting, applying, and enforcing the Code for the administrative judiciary. *See, e.g.*, Model Code of Judicial Conduct for Federal Administrative Law Judges (1989) (endorsed by the National Conference of Administrative Law Judges in February 1989).

1 **A retired judge subject to recall for service, who by law is not permitted to practice**
2 **law, is not required to comply:**

3
4 **(A) with Rule 3.9 (Service as Arbitrator or Mediator), except while**
5 **servicing as a judge; or**

6
7 **(B) at any time with Rule 3.8 (Appointments to Fiduciary Positions).**
8

9 **COMMENT**

10
11 [1] For the purposes of this section, as long as a retired judge is subject to being
12 recalled for service, the judge is considered to “perform judicial functions.”
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15 **III. CONTINUING PART-TIME JUDGE**

16
17 **A judge who serves repeatedly on a part-time basis by election or under a**
18 **continuing appointment, including a retired judge subject to recall who is permitted**
19 **to practice law (“continuing part-time judge”),**

20
21 **(A) is not required to comply:**

22
23 **(1) with Rules 2.10(A) and 2.10(B) (Judicial Statements on**
24 **Pending and Impending Cases), except while serving as a judge; or**

25
26 **(2) at any time with Rules 3.4 (Appointments to Governmental**
27 **Positions), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as**
28 **Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (Financial,**
29 **Business, or Remunerative Activities), 3.14 (Reimbursement of**
30 **Expenses and Waivers of Fees or Charges), 3.15 (Reporting**
31 **Requirements), 4.1 (Political and Campaign Activities of Judges and**
32 **Judicial Candidates in General), 4.2 (Political and Campaign**
33 **Activities of Judicial Candidates in Public Elections), 4.3 (Activities of**
34 **Candidates for Appointive Judicial Office), 4.4 (Campaign**
35 **Committees), and 4.5 (Activities of Judges Who Become Candidates**
36 **for Nonjudicial Office); and**

37
38 **(B) shall not practice law in the court on which the judge serves or in any**
39 **court subject to the appellate jurisdiction of the court on which the judge**
40 **serves, and shall not act as a lawyer in a proceeding in which the judge has**
41 **served as a judge or in any other proceeding related thereto.**
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1 **COMMENT**

2
3 [1] When a person who has been a continuing part-time judge is no longer a
4 continuing part-time judge, including a retired judge no longer subject to recall, that
5 person may act as a lawyer in a proceeding in which he or she has served as a judge or in
6 any other proceeding related thereto only with the informed consent of all parties, and
7 pursuant to any applicable Model Rules of Professional Conduct. An adopting
8 jurisdiction should substitute a reference to its applicable rule.
9

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12 **IV. PERIODIC PART-TIME JUDGE**

13
14 **A periodic part-time judge who serves or expects to serve repeatedly on a part-time**
15 **basis, but under a separate appointment for each limited period of service or for**
16 **each matter,**

17
18 (A) **is not required to comply:**

19
20 (1) **with Rule 2.10 (Judicial Statements on Pending and Impending**
21 **Cases), except while serving as a judge; or**

22
23 (2) **at any time with Rules 3.4 (Appointments to Governmental**
24 **Positions), 3.7 (Participation in Educational, Religious, Charitable,**
25 **Fraternal, or Civic Organizations and Activities), 3.8 (Appointments**
26 **to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10**
27 **(Practice of Law), 3.11 (Financial, Business, or Remunerative**
28 **Activities), 3.13 (Acceptance and Reporting of Gifts, Loans, Bequests,**
29 **Benefits, or Other Things of Value), 3.15 (Reporting Requirements),**
30 **4.1 (Political and Campaign Activities of Judges and Judicial**
31 **Candidates in General), and 4.5 (Activities of Judges Who Become**
32 **Candidates for Nonjudicial Office); and**

33
34 (B) **shall not practice law in the court on which the judge serves or in any**
35 **court subject to the appellate jurisdiction of the court on which the judge**
36 **serves, and shall not act as a lawyer in a proceeding in which the judge has**
37 **served as a judge or in any other proceeding related thereto.**
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41 **V. PRO TEMPORE PART-TIME JUDGE**

42
43 **A pro tempore part-time judge who serves or expects to serve once or only**
44 **sporadically on a part-time basis under a separate appointment for each period of**
45 **service or for each case heard is not required to comply:**
46

1 (A) except while serving as a judge, with Rules 1.2 (Promoting Confidence
2 in the Judiciary), 2.4 (External Influences on Judicial Conduct), 2.10
3 (Judicial Statements on Pending and Impending Cases), or 3.2 (Appearances
4 before Governmental Bodies and Consultation with Government Officials);
5 or

6
7 (B) at any time with Rules 3.4 (Appointments to Governmental Positions),
8 3.6 (Affiliation with Discriminatory Organizations), 3.7 (Participation in
9 Educational, Religious, Charitable, Fraternal, or Civic Organizations and
10 Activities), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as
11 Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (Financial, Business, or
12 Remunerative Activities), 3.13 (Acceptance and Reporting of Gifts, Loans,
13 Bequests, Benefits, or Other Things of Value), 3.15 (Reporting
14 Requirements), 4.1 (Political and Campaign Activities of Judges and Judicial
15 Candidates in General), and 4.5 (Activities of Judges Who Become
16 Candidates for Nonjudicial Office).

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20 **VI. TIME FOR COMPLIANCE**

21
22 A person to whom this Code becomes applicable shall comply immediately with its
23 provisions, except that those judges to whom Rules 3.8 (Appointments to Fiduciary
24 Positions) and 3.11 (Financial, Business, or Remunerative Activities) apply shall
25 comply with those Rules as soon as reasonably possible, but in no event later than
26 one year after the Code becomes applicable to the judge.

27
28 **COMMENT**

29
30 [1] If serving as a fiduciary when selected as judge, a new judge may,
31 notwithstanding the prohibitions in Rule 3.8, continue to serve as fiduciary, but only for
32 that period of time necessary to avoid serious adverse consequences to the beneficiaries
33 of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at
34 the time of judicial selection in a business activity, a new judge may, notwithstanding the
35 prohibitions in Rule 3.11, continue in that activity for a reasonable period but in no event
36 longer than one year.
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**APPLICATION
REPORTER'S EXPLANATION OF CHANGES**

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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 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.

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 judiciary is consistent with policy adopted by the ABA House of Delegates in Report 101B (2001), which provided that members of the administrative judiciary should be accountable under appropriate ethical standards adapted from the Code in light of the unique characteristics of particular positions in the administrative judiciary. The rationale for applying the Rules to justices of the peace and members of the administrative 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 judiciary positions in adopting, adapting, applying and enforcing the Rules for the administrative judiciary. See, e.g., Model Code of Judicial Conduct for Federal Administrative Law Judges (1989) (endorsed by the National Conference of Administrative Law Judges in February 1989)." The Commission deleted the language that alluded to the executive branch of government in order to avoid difficulties associated with separation of powers issues.

1
2 7. The phrase “[F]or service” was added to Part II to explain more fully the meaning
3 of a judge’s being “subject to recall.” No substantive change is intended.
4

5 8. In Parts III, IV and V, the definitions of the various types of part-time judges have
6 been introduced into the text, and deleted from the “Terminology” section of the Code,
7 consistent with the Commission’s decision to place terminology within the body of a
8 Rule when that is the only time that it appears.
9

10 9. Sections I(D)(2) and I(E)(2) of the 1990 Code were deleted in acknowledgement
11 that this code is not meant to reach the conduct of lawyers, but that of judges. The
12 situations described in both provisions arise under and are to be decided according to the
13 Model Rules of Professional Conduct for lawyers.
14

15 10. Part VI, "Time for Compliance," has not changed in substance. Taken directly
16 from Section F of the 1990 Code’s Application section, it acknowledges the need to
17 allow new judges to continue to serve as fiduciaries or in a business relationship for a
18 period of up to one year in order to avoid hardship or serious adverse consequences to the
19 beneficiaries of the fiduciary relationship.
20

21 22 **EXPLANATION OF COMMENTS**

23 **PART I**

24
25 [1] A new introductory Comment has been added to highlight the fact that it is
26 desirable to have a uniform system of ethical principles that applies to all individuals
27 serving a judicial function.
28

29 [2] The Commission moved the statement, “[t]he four categories of judicial service in
30 other than a full-time capacity are necessarily defined in general terms because of the
31 widely varying forms of judicial service” from commentary to the present Code’s Section
32 A.
33

34 [3] This new Comment confirms the propriety of using nontraditional methods in
35 “problem solving” courts, such as drug and domestic violence courts, where they are
36 permitted by law, including court rules.
37

38
39 NOTE: The published Model Code of Judicial Conduct contains several Appendices that
40 are not part of the Code itself. Accordingly, the reference to the Appendices was deleted
41 from the Comment and will be reinstated elsewhere following the revised Code’s
42 approval by the House of Delegates.
43

CANON 1

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.

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CANON 1
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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, Comment [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

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

10
11 To address the concern that a duty to avoid the appearance of impropriety was too
12 vague to be independently enforceable, the Commission considered making the standard
13 hortatory rather than mandatory. In an initial draft circulated for public comment, the
14 Commission proposed to leave the appearance of impropriety as it found it: as a standard
15 in the Canon itself. To address the concern that a duty to avoid the appearance of
16 impropriety was too vague to be independently enforceable, the preliminary draft
17 included a Comment to the effect that “ordinarily,” when judges are disciplined for
18 violating their duty to avoid the appearance of impropriety, it is in combination with
19 other, more specific rule violations that give rise to the appearance problem.

20
21 When the preliminary draft was circulated for public comment in June 2005, it
22 was criticized for diluting the “appearance of impropriety” standard unnecessarily. Of
23 particular concern was the preliminary draft’s deletion of former Canon 2A’s directive
24 that “a judge shall . . . act at all times in a manner that promotes public confidence in the
25 integrity and impartiality of the judiciary” (the “act at all times” clause), which had been
26 a rule through which the appearance of impropriety was commonly enforced. In
27 addition, the draft Comment that disciplinary authorities will not “ordinarily” enforce the
28 appearance of impropriety was criticized as inappropriate for a Comment and more
29 suitably discussed—if at all—in the Preamble or Application sections.

30
31 In a subsequent draft, the Commission responded by deleting the offending draft
32 Comment, restoring the “act at all times clause,” and adding the duty to avoid the
33 appearance of impropriety as a freestanding rule. Eventually, the Commission was
34 persuaded to eliminate the black letter rule, which could provide a basis for court
35 challenge, and to retain “Avoidance of Impropriety and the Appearance of Impropriety”
36 in the Canon. The Comments to Rule 1.2 cumulatively focus on conduct that undermines
37 independence, integrity, and impartiality of the judiciary, a more identifiable
38 measurement standard than “appearance of impropriety.”

39
40 4. Use of “independence, integrity, and impartiality”

41
42 In the prior Code, “impartiality” did not appear in the titles of Canons 1 or 2, even
43 though it did appear in underlying sections, such as Canon 2A. In the Commission’s
44 view, independence, integrity, and impartiality are overarching, fundamental values that
45 the Rules promote, which warrant mention in the title of Canon 1. The term
46 “impartiality” has been added to integrity and independence throughout the Rules, and
47 the Rules have been revised throughout to preserve consistency.

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

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RULE 1.1

Compliance with the Law

A judge shall comply with the law,* including the Code of Judicial Conduct.

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RULE 1.1
REPORTER’S EXPLANATION OF CHANGES

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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.

1 **EXPLANATION OF COMMENTS**

2
3 The Commentary to Canon 1A was deleted as unnecessary. Integrity and independence,
4 which were discussed in the deleted comment, are defined terms in the revised
5 Terminology Section.
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1 **RULE 1.2**

2 *Promoting Confidence in the Judiciary*

3
4 **A judge shall act at all times in a manner that promotes public confidence in the**
5 **independence,* integrity,* and impartiality* of the judiciary.**

6
7 **COMMENT**

8
9 [1] Public confidence in the judiciary is eroded by improper conduct and conduct that
10 creates the appearance of impropriety. This principle applies to both the professional and
11 personal conduct of a judge.

12
13 [2] A judge should expect to be the subject of public scrutiny that might be viewed as
14 burdensome if applied to other citizens, and must accept the restrictions imposed by the
15 Code.

16
17 [3] Conduct that compromises or appears to compromise the independence, integrity,
18 and impartiality of a judge undermines public confidence in the judiciary. Because it is
19 not practicable to list all such conduct, the Rule is necessarily cast in general terms.

20
21 [4] Judges should participate in activities that promote ethical conduct among judges
22 and lawyers, support professionalism within the judiciary and the legal profession, and
23 promote access to justice for all.

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RULE 1.2
REPORTER’S EXPLANATION OF CHANGES

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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.

EXPLANATION OF BLACK LETTER

Creation of a new rule

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.

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.

1 **RULE 1.3**

2 *Avoiding Abuse of the Prestige of Judicial Office*

3
4 **A judge shall not abuse the prestige of judicial office to advance the personal or**
5 **economic interests* of the judge or others, or allow others to do so.**

6
7 **COMMENT**

8
9 [1] It is improper for a judge to use or attempt to use his or her position to gain
10 personal advantage or deferential treatment of any kind. For example, it would be
11 improper for a judge to allude to his or her judicial status to gain favorable treatment in
12 encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain
13 an advantage in conducting his or her personal business.

14
15 [2] A judge may provide a reference or recommendation for an individual based upon
16 the judge's personal knowledge. The judge may use official letterhead if the judge
17 indicates that the reference is personal and if there is no likelihood that the use of the
18 letterhead would reasonably be perceived as an attempt to exert pressure by reason of the
19 judicial office.

20
21 [3] Judges may participate in the process of judicial selection by cooperating with
22 appointing authorities and screening committees, and by responding to inquiries from
23 such entities concerning the professional qualifications of a person being considered for
24 judicial office.

25
26 [4] Special considerations arise when judges write or contribute to publications of
27 for-profit entities, whether related or unrelated to the law. A judge should not permit
28 anyone associated with the publication of such materials to exploit the judge's office in a
29 manner that violates this Rule or other applicable law. In contracts for publication of a
30 judge's writing, the judge should retain sufficient control over the advertising to avoid
31 such exploitation.

1 **RULE 1.3**

2 **REPORTER'S EXPLANATION OF CHANGES**

3
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6 **drafted by the Commission's Reporters, based on the proceedings and record of the**
7 **Commission, solely to inform the ABA House of Delegates about each of the**
8 **proposed amendments to the Model Code prior to their being considered at the**
9 **ABA 2007 Midyear Meeting. THEY ARE NOT TO BE ADOPTED AS PART OF**
10 **THE MODEL CODE.**

11
12 **1990 MODEL CODE COMPARISON:**

13
14 The Rule and its Comment come from Canon 2B and its Commentary.

15
16 **EXPLANATION OF BLACK LETTER**

17
18 1. Creation of separate Rule on abusing prestige of office

19
20 This Rule was segregated from former Canon 2B for treatment as a stand-alone
21 Rule because it relates directly to a judge's personal conduct. Former Canon 2B's
22 prohibition on a judge allowing family, social, and political relationships to influence
23 judicial conduct and its prohibition on a judge conveying or allowing others to convey the
24 impression that other persons are in a position to influence the judge related directly to a
25 judge's judicial decision-making responsibilities. For that reason, these provisions
26 belonged more logically in proposed Canon 2. Former Canon 2B's limitation on a judge
27 serving as a character witness, on the other hand, related to a judge's personal conduct
28 and has been moved to Rule 3.3.

29
30 2. Substitution of "abuse" for "lend"

31
32 The term "abuse" has been substituted for "lend." In the Commission's view, the
33 term "lend" created unnecessary confusion. For example, a judge who wrote a letter of
34 recommendation for a law clerk "lent" the prestige of the judge's office to the
35 recommendation, and some judges told the Commission that they declined to write letters
36 on their clerks' behalf as a consequence. In the Commission's view, however, the
37 problem that Rule 1.3 seeks to address is more accurately characterized as "abuse" of the
38 office.

39
40 3. Addition of "economic" interests

41
42 Although a judge's "personal" interests might commonly be thought to include
43 "economic" interests, the Commission wanted to avoid any possibility of confusion, and
44 thus made it clear that a judge may not abuse the prestige of office to advance either.

45
46 4. Addition of prohibition on others' abuse

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

7
8 **EXPLANATION OF COMMENTS**

9
10 [1] This Comment elaborates on the core objective underlying the Rule by making
11 plain that a judge should not use his or her position as a judge to gain personal advantage
12 in business or daily life. The last sentence was changed to limit the admonition that a
13 judge should not use his or her judicial letterhead for personal business to situations in
14 which the use of letterhead could “gain advantage.” There are times when a judge might
15 draft a personal note on stationery that includes the judge’s title that could not
16 conceivably enable the judge to “gain advantage,” as, for example, when the judge
17 corresponds with a long-time acquaintance who is well aware of the judge’s position.
18 Material from the 1990 comment regarded as too general to be helpful was deleted.

19
20 [2] The Commission was in accord that judges should be permitted to use their titles
21 and office letterheads when writing references for people with respect to whom the
22 judge’s experience as a judge was relevant. The prohibition on abusing the prestige of
23 judicial office to advance the interests of another is intended to prevent inappropriate
24 exploitation of judges’ positions, and there is nothing inappropriate about judges
25 identifying themselves as such when judicial experience is germane to the
26 recommendation. The Comment thus clarifies that a judge may write letters on the basis
27 of a judge’s experience on the job (e.g., law clerks) or general expertise in the law (e.g., a
28 neighbor applying for admission to law school). This Comment does not admonish
29 judges to avoid writing letters of reference on behalf of someone with respect to whom
30 the judge’s status as a judge is irrelevant, rather, it merely advises judges to consider
31 whether their position as a judge might be perceived as exerting pressure by reason of
32 their office and to refrain if it would.

33
34 [3] Changes were stylistic and not intended to change substantive meaning.

35
36 [4] Deleted material was redundant of the text and otherwise not illuminating.
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CANON 2

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY,
COMPETENTLY, AND DILIGENTLY.

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CANON 2
REPORTER’S EXPLANATION OF CHANGES

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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.

1 **RULE 2.1**

2 *Giving Precedence to the Duties of Judicial Office*

3
4 **The duties of judicial office, as prescribed by law,* shall take precedence over all of**
5 **a judge’s personal and extrajudicial activities.**

6
7 **COMMENT**

8
9 [1] To ensure that judges are available to fulfill their judicial duties, judges must
10 conduct their personal and extrajudicial activities to minimize the risk of conflicts that
11 would result in frequent disqualification. See Canon 3.

1 **RULE 2.1**

2 **REPORTER'S EXPLANATION OF CHANGES**

3
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5 **Joint Commission to Evaluate the Model Code of Judicial Conduct. They have been**
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9 **ABA 2007 Midyear Meeting. THEY ARE NOT TO BE ADOPTED AS PART OF**
10 **THE MODEL CODE.**

11
12 **1990 MODEL CODE COMPARISON**

13
14 The Canon is Canon 3A.

15 The Comment is new.

16
17 **EXPLANATION OF BLACK LETTER**

18
19 1. Deletion of heading

20
21 2. Change "judicial duties" to "duties of judicial office"

22
23 The wording was changed to emphasize that its application goes beyond
24 adjudicative functions to reach the broader scope of responsibilities that accompany the
25 judicial office.

26
27 3. Addition of "shall"

28
29 The Commission wanted to make clear that this rule was doing more than making
30 the descriptive point that judicial functions do take precedence; by inserting the term
31 "shall," the Code clearly imposes an ethical duty on judges to give priority to the duties
32 of judicial office.

33
34 4. Replace "all the judge's other activities" with "all of the judge's personal and
35 extrajudicial activities"

36
37 This change was made to avoid confusion. Judges should give priority to their
38 judicial duties, broadly defined to reach not only adjudication but also the other duties of
39 judicial office (such as administration and discipline), and the Commission wanted to be
40 clear that the matters of secondary importance were limited to personal and extrajudicial
41 activities.

42
43 5. Deletion of third sentence

44
45 This sentence was deleted as unnecessary.

1 **EXPLANATION OF COMMENTS**

2
3 [1] New Comment

4
5 This Comment has been added to highlight the relationship between Canon 2 and
6 Canon 3: because judges must disqualify themselves from cases in which they have a
7 conflict of interest, they must conduct their extrajudicial activities in ways that minimize
8 their need to disqualify themselves.
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1 **RULE 2.2**

2 ***Impartiality and Fairness***

3
4 **A judge shall uphold and apply the law,* and shall perform all duties of judicial**
5 **office fairly and impartially.***

6
7 **COMMENT**

8
9 [1] To ensure impartiality and fairness to all parties, a judge must be objective and
10 open-minded.

11
12 [2] Although each judge comes to the bench with a unique background and personal
13 philosophy, a judge must interpret and apply the law without regard to whether the judge
14 approves or disapproves of the law in question.

15
16 [3] When applying and interpreting the law, a judge may on occasion make a good-
17 faith error of fact or law. An error of this kind does not violate this Rule.

18
19 [4] It is not a violation of this Rule for a judge to make reasonable accommodations
20 to ensure pro se litigants the opportunity to have their matters fairly heard.

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RULE 2.2
REPORTER’S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

The Rule is the first half of the first sentence of Canon 3B(2).
Comments [1] – [3] 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.

1 [3] Comment [3] underscores the difference between judges who may occasionally
2 commit good faith errors of fact or law and judges who deliberately or repeatedly
3 disregard court orders or other clear requirements of law.
4

5 [4] Throughout the life of the Commission, some witnesses urged the Commission to
6 create special rules enabling judges to assist pro se litigants, while others urged the
7 Commission to disregard calls for such rules. This Comment makes clear that judges do
8 not compromise their impartiality when they make reasonable accommodations to pro se
9 litigants who may be completely unfamiliar with the legal system and the litigation
10 process. To the contrary, by leveling the playing field, such judges ensure that pro se
11 litigants receive the fair hearing to which they are entitled. On the other hand, judges
12 should resist unreasonable demands for assistance that might give an unrepresented party
13 an unfair advantage.
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1 **RULE 2.3**

2 *Bias, Prejudice, and Harassment*

3
4 (A) A judge shall perform the duties of judicial office, including
5 administrative duties, without bias or prejudice.
6

7 (B) A judge shall not, in the performance of judicial duties, by words or
8 conduct manifest bias or prejudice, or engage in harassment, including but
9 not limited to bias, prejudice, or harassment based upon race, sex, gender,
10 religion, national origin, ethnicity, disability, age, sexual orientation, marital
11 status, socioeconomic status, or political affiliation, and shall not permit
12 court staff, court officials, or others subject to the judge's direction and
13 control to do so.
14

15 (C) A judge shall require lawyers in proceedings before the court to
16 refrain from manifesting bias or prejudice, or engaging in harassment, based
17 upon attributes including but not limited to race, sex, gender, religion,
18 national origin, ethnicity, disability, age, sexual orientation, marital status,
19 socioeconomic status, or political affiliation, against parties, witnesses,
20 lawyers, or others.
21

22 (D) The restrictions of paragraphs (B) and (C) do not preclude judges or
23 lawyers from making legitimate reference to the listed factors, or similar
24 factors, when they are relevant to an issue in a proceeding.
25

26 **COMMENT**

27
28 [1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of
29 the proceeding and brings the judiciary into disrepute.
30

31 [2] Examples of manifestations of bias or prejudice include but are not limited to
32 epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based
33 upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections
34 between race, ethnicity, or nationality and crime; and irrelevant references to personal
35 characteristics. Even facial expressions and body language can convey to parties and
36 lawyers in the proceeding, jurors, the media, and others an appearance of bias or
37 prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or
38 biased.
39

40 [3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical
41 conduct that denigrates or shows hostility or aversion toward a person on bases such as
42 race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation,
43 marital status, socioeconomic status, or political affiliation.
44

45 [4] Sexual harassment includes but is not limited to sexual advances, requests for
46 sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.
47

1 **RULE 2.3**

2 **REPORTER'S EXPLANATION OF CHANGES**

3
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10 **THE MODEL CODE.**

11
12 **1990 MODEL CODE COMPARISON**

13
14 Paragraph (A) is taken from the first sentence of Canon 3B(5).

15
16 Paragraph (B) is taken from the second sentence of Canon 3B(5).

17
18 Paragraph (C) is taken from Canon 3B(6).

19
20 Comment [1] is the second sentence of the second paragraph of Commentary to Canon
21 3B(5).

22
23 Comment [2] is the third and fourth sentences of the second paragraph of Commentary to
24
25 Canon 3B(5).

26
27 Comments [3] and [4] are new.

28
29 The first paragraph of Commentary to Canon 3B(5) was deleted.

30
31 **EXPLANATION OF BLACK LETTER**

32
33 1. Paragraphs (B) and (C): Addition of "harassment"

34
35 Canon 3B(5) required judges to avoid bias and prejudice, but included nothing in
36 the black letter about harassment, which it relegated to a discussion in the Commentary,
37 limited to sexual harassment. The Commission agreed that harassment was a form of bias
38 or prejudice that the Rules proscribed but wanted to expand it beyond sexual harassment
39 to reach other forms of harassment as well, for which reason it deleted the term "sexual"
40 from the Commentary in an early draft. Witnesses, however, argued that the proposed
41 change could be construed to have an unintended consequence. By deleting the reference
42 to "sexual" harassment per se, the change could be construed as deleting sexual
43 harassment from the range of behaviors barred by the Rules, or at least diminishing its
44 significance. The Commission remained of the view that harassment—including but not
45 limited to sexual harassment—should be proscribed by the Rules. It was, however,
46 persuaded both that sexual harassment deserved special mention, given the significance
47 of the problem, and that harassment per se was sufficiently distinct from bias and
48 prejudice to deserve separate mention in the black letter of the Rule.

1
2 2. Paragraphs (B) and (C): Additions to list of factors upon which bias, prejudice, or
3 harassment can be based
4

5 Although the Rule prohibits bias, prejudice, or harassment on any basis, it
6 includes an illustrative list, to which four new items were added: gender (“sex” is a term
7 of art employed in sex discrimination statutes, but may not capture bias, prejudice, or
8 harassment against trans-gendered individuals); ethnicity (which the Commission
9 regarded as distinct from national origin; for example, in the case of an Arab-Canadian,
10 discrimination on the basis of Arab ancestry would relate to ethnicity, while
11 discrimination based on Canadian derivation would relate to national origin); marital
12 status (the Commission was made aware of instances in which judges had berated a party
13 for cohabiting or having a child outside of wedlock); and political affiliation (as, for
14 example, when a judge displays animus toward plaintiffs affiliated with a particular
15 political party).
16

17 3. Paragraph (D): Legitimate reference to listed factors
18

19 When a case before the judge raises issues of bias or prejudice, the judge must be
20 in a position to discuss such issues without fear of violating this rule, for which reason an
21 exception has been created in the text. The substance of this provision formerly was in
22 Canon 3B(6).
23

24 **EXPLANATION OF COMMENTS**
25

26 The first paragraph of Commentary to Canon 3B(5) was deleted given the new
27 black letter provision prohibiting harassment and new Comments [2] – [4].
28

29 [1] Comment [1] is the second sentence of the second paragraph of Commentary to
30 Canon 3B(5). The phrase “or prejudice” was added to reach not only favoritism or
31 opposition by a judge to an idea, which is the more common understanding of “bias,” but
32 also specially favoring or opposing individuals, which is generally contemplated by the
33 term “prejudice.”
34

35 [2] The new language was added after several witnesses urged the Commission to
36 provide some illustrations of bias and to better inform judges of what bias entails and
37 what some of the most common bias-related problems are. The list is explicitly non-
38 exclusive and self-explanatory. The last two sentences are taken from the second
39 paragraph of the comment to Canon 3B(5). The terms “on any basis” and “in addition to
40 oral communication” and “judicial” were deleted as excess language.
41

42 The term “behavior” was replaced with “conduct” in the last sentence for
43 consistency with the rest of the Rules. The last sentence now instructs judges to avoid
44 conduct that may be perceived as “prejudiced or biased” in order to be more
45 comprehensive and consistent with the thrust of the Rule. The addition of the term
46 “reasonably” in the last sentence is consistent with Title VII jurisprudence, which
47 separates the merely vulgar from the deeply offensive.
48

1 [3] This new Comment defines harassment and underscores that the prohibition in the
2 black letter includes, but is not limited to, sexual harassment.

3
4 [4] This new Comment separately elaborates on the meaning of “sexual harassment.”
5 Although the Rule forbids all forms of harassment, witnesses before the Commission
6 were emphatic about the need to single out sexual harassment for special mention, given
7 the nature, extent, and history of the problem.

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1 **RULE 2.4**

2 *External Influences on Judicial Conduct*

3
4 (A) A judge shall not be swayed by public clamor or fear of criticism.

5
6 (B) A judge shall not permit family, social, political, financial, or other
7 interests or relationships to influence the judge's judicial conduct or
8 judgment.

9
10 (C) A judge shall not convey or permit others to convey the impression
11 that any person or organization is in a position to influence the judge.

12
13 **COMMENT**

14
15 [1] An independent judiciary requires that judges decide cases according to the law
16 and facts, without regard to whether particular laws or litigants are popular or unpopular
17 with the public, the media, government officials, or the judge's friends or family.
18 Confidence in the judiciary is eroded if judicial decision making is perceived to be
19 subject to inappropriate outside influences.

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RULE 2.4
REPORTER’S EXPLANATION OF CHANGES

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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.

1 **EXPLANATION OF COMMENTS**

2
3 [1] Comment [1] is new.

4
5 This new Comment is intended to underscore the general purpose underlying
6 paragraphs (A) and (B) by linking the duty not to be swayed by public, friends, or family
7 to the judge's primary obligation to follow the law and facts impartially.
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1 **RULE 2.5**

2 ***Competence, Diligence, and Cooperation***

3
4 (A) A judge shall perform judicial and administrative duties, competently
5 and diligently.

6
7 (B) A judge shall cooperate with other judges and court officials in the
8 administration of court business.

9
10 **COMMENT**

11
12 [1] Competence in the performance of judicial duties requires the legal knowledge,
13 skill, thoroughness, and preparation reasonably necessary to perform a judge's
14 responsibilities of judicial office.

15
16 [2] A judge should seek the necessary docket time, court staff, expertise, and
17 resources to discharge all adjudicative and administrative responsibilities.

18
19 [3] Prompt disposition of the court's business requires a judge to devote adequate
20 time to judicial duties, to be punctual in attending court and expeditious in determining
21 matters under submission, and to take reasonable measures to ensure that court officials,
22 litigants, and their lawyers cooperate with the judge to that end.

23
24 [4] In disposing of matters promptly and efficiently, a judge must demonstrate due
25 regard for the rights of parties to be heard and to have issues resolved without
26 unnecessary cost or delay. A judge should monitor and supervise cases in ways that
27 reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

1 **RULE 2.5**

2 **REPORTER'S EXPLANATION OF CHANGES**

3
4 **The "Reporters' Explanations of Changes" have not been approved by the ABA**
5 **Joint Commission to Evaluate the Model Code of Judicial Conduct. They have been**
6 **drafted by the Commission's Reporters, based on the proceedings and record of the**
7 **Commission, solely to inform the ABA House of Delegates about each of the**
8 **proposed amendments to the Model Code prior to their being considered at the**
9 **ABA 2007 Midyear Meeting. THEY ARE NOT TO BE ADOPTED AS PART OF**
10 **THE MODEL CODE.**

11
12 **1990 MODEL CODE COMPARISON**

13
14 The Rule is the second half of the first sentence of Canon 3B(2) and the first half of the
15 first sentence in Canon 3C(1).

16
17 Comments [1] and [2] are new.

18
19 Comment [3] is the second paragraph of Commentary to Canon 3B(8).

20
21 Comment [4] is the first three sentences of Commentary to 3B(8).

22
23 **EXPLANATION OF BLACK LETTER**

24
25 1. New Rule combining duties of competence and diligence

26
27 This Rule governs competence, formerly governed by Canon 3B(2), and
28 diligence, formerly governed by Canon 3C. The duty of competence is analogous to a
29 lawyer's professional duty of competence, while the duty to apply the law is discussed
30 elsewhere (the term "fidelity" is no longer used). Corresponding Commentary was
31 moved accordingly. The phrasing was changed from passive to active voice for stylistic
32 reasons.

33
34 2. Expansion of Rule

35
36 The black letter rule was clarified to make plain that the duty at issue was one of
37 diligence, and expanded slightly to extend the duty of diligence to all judicial duties and
38 not just "judicial matters," which is generally understood to be limited to case
39 adjudication.

40
41 3. Change Rule standard

42
43 The obligation to cooperate with others in judicial administration was upgraded
44 from hortatory to mandatory. Efficient and effective administration is a duty of the
45 judicial office, the proper execution of which necessitates cooperation among the judges
46 of the court.

1 **EXPLANATION OF COMMENTS**

2
3 [1] Comment [1] was added simply to define competence and underscore its
4 fundamental importance in relation to core judicial functions.

5
6 [2] New Comment [2] was added to emphasize that the duty to perform judicial and
7 administrative duties competently and diligently requires judges to devote time to proper
8 time management and use of court resources and personnel.

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1 **RULE 2.6**

2 ***Ensuring the Right to Be Heard***

3
4 (A) A judge shall accord to every person who has a legal interest in a
5 proceeding, or that person’s lawyer, the right to be heard according to law.*

6
7 (B) A judge may encourage parties to a proceeding and their lawyers to
8 settle matters in dispute but shall not act in a manner that coerces any party
9 into settlement.

10
11 **COMMENT**

12
13 [1] The right to be heard is an essential component of a fair and impartial system of
14 justice. Substantive rights of litigants can be protected only if procedures protecting the
15 right to be heard are observed.

16
17 [2] The judge plays an important role in overseeing the settlement of disputes, but
18 should be careful that efforts to further settlement do not undermine any party’s right to
19 be heard according to law. The judge should keep in mind the effect that the judge’s
20 participation in settlement discussions may have, not only on the judge’s own views of
21 the case, but also on the perceptions of the lawyers and the parties if the case remains
22 with the judge after settlement efforts are unsuccessful. Among the factors that a judge
23 should consider when deciding upon an appropriate settlement practice for a case are (1)
24 whether the parties have requested or voluntarily consented to a certain level of
25 participation by the judge in settlement discussions, (2) whether the parties and their
26 counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by
27 the judge or a jury, (4) whether the parties participate with their counsel in settlement
28 discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the
29 matter is civil or criminal.

30
31 [3] Judges must be mindful of the effect settlement discussions can have, not only on
32 their objectivity and impartiality, but also on the appearance of their objectivity and
33 impartiality. Despite a judge’s best efforts, there may be instances when information
34 obtained during settlement discussions could influence a judge’s decision making during
35 trial, and, in such instances, the judge should consider whether disqualification may be
36 appropriate. See Rule 2.11(A)(1).

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RULE 2.6
REPORTER'S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

The Rule is Canon 3B(8). Paragraph (A) is the first sentence of Canon 3B(7).

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] This new Comment 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.

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[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.

1 **RULE 2.7**

2 ***Responsibility to Decide***

3
4 **A judge shall hear and decide matters assigned to the judge, except when**
5 **disqualification is required by Rule 2.11 or other law.***

6
7 **COMMENT**

8
9 [1] Judges must be available to decide the matters that come before the court.
10 Although there are times when disqualification is necessary to protect the rights of
11 litigants and preserve public confidence in the independence, integrity, and impartiality
12 of the judiciary, judges must be available to decide matters that come before the courts.
13 Unwarranted disqualification may bring public disfavor to the court and to the judge
14 personally. The dignity of the court, the judge's respect for fulfillment of judicial duties,
15 and a proper concern for the burdens that may be imposed upon the judge's colleagues
16 require that a judge not use disqualification to avoid cases that present difficult,
17 controversial, or unpopular issues.

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RULE 2.7
REPORTER’S EXPLANATION OF CHANGES

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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] This Comment 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.

1 **RULE 2.8**

2 *Decorum, Demeanor, and Communication with Jurors*

3
4 (A) A judge shall require order and decorum in proceedings before the
5 court.

6
7 (B) A judge shall be patient, dignified, and courteous to litigants, jurors,
8 witnesses, lawyers, court staff, court officials, and others with whom the
9 judge deals in an official capacity, and shall require similar conduct of
10 lawyers, court staff, court officials, and others subject to the judge's direction
11 and control.

12
13 (C) A judge shall not commend or criticize jurors for their verdict other
14 than in a court order or opinion in a proceeding.

15
16 **COMMENT**

17
18 [1] The duty to hear all proceedings with patience and courtesy is not inconsistent
19 with the duty imposed in Rule 2.5 to dispose promptly of the business of the court.
20 Judges can be efficient and businesslike while being patient and deliberate.

21
22 [2] Commending or criticizing jurors for their verdict may imply a judicial
23 expectation in future cases and may impair a juror's ability to be fair and impartial in a
24 subsequent case.

25
26 [3] A judge who is not otherwise prohibited by law from doing so may meet with
27 jurors who choose to remain after trial but should be careful not to discuss the merits of
28 the case.

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RULE 2.8
REPORTER’S EXPLANATION OF CHANGES

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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 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.

1 **RULE 2.9**

2 *Ex Parte Communications*

3
4 (A) A judge shall not initiate, permit, or consider ex parte
5 communications, or consider other communications made to the judge
6 outside the presence of the parties or their lawyers, concerning a pending* or
7 impending matter,* except as follows:
8

9 (1) When circumstances require it, ex parte communication for
10 scheduling, administrative, or emergency purposes, which does not
11 address substantive matters, is permitted, provided:
12

13 (a) the judge reasonably believes that no party will gain a
14 procedural, substantive, or tactical advantage as a result of the
15 ex parte communication; and
16

17 (b) the judge makes provision promptly to notify all other
18 parties of the substance of the ex parte communication, and
19 gives the parties an opportunity to respond.
20

21 (2) A judge may obtain the written advice of a disinterested expert
22 on the law applicable to a proceeding before the judge, if the judge
23 gives advance notice to the parties of the person to be consulted and
24 the subject matter of the advice to be solicited, and affords the parties
25 a reasonable opportunity to object and respond to the notice and to
26 the advice received.
27

28 (3) A judge may consult with court staff and court officials whose
29 functions are to aid the judge in carrying out the judge's adjudicative
30 responsibilities, or with other judges, provided the judge makes
31 reasonable efforts to avoid receiving factual information that is not
32 part of the record, and does not abrogate the responsibility personally
33 to decide the matter.
34

35 (4) A judge may, with the consent of the parties, confer separately
36 with the parties and their lawyers in an effort to settle matters
37 pending before the judge.
38

39 (5) A judge may initiate, permit, or consider any ex parte
40 communication when expressly authorized by law* to do so.
41

42 (B) If a judge inadvertently receives an unauthorized ex parte
43 communication bearing upon the substance of a matter, the judge shall make
44 provision promptly to notify the parties of the substance of the
45 communication and provide the parties with an opportunity to respond.
46

1 **(C) A judge shall not investigate facts in a matter independently, and shall**
2 **consider only the evidence presented and any facts that may properly be**
3 **judicially noticed.**

4
5 **(D) A judge shall make reasonable efforts, including providing**
6 **appropriate supervision, to ensure that this Rule is not violated by court**
7 **staff, court officials, and others subject to the judge’s direction and control.**

8
9 **COMMENT**

10
11 [1] To the extent reasonably possible, all parties or their lawyers shall be included in
12 communications with a judge.

13
14 [2] Whenever the presence of a party or notice to a party is required by this Rule, it is
15 the party’s lawyer, or if the party is unrepresented, the party, who is to be present or to
16 whom notice is to be given.

17
18 [3] The proscription against communications concerning a proceeding includes
19 communications with lawyers, law teachers, and other persons who are not participants in
20 the proceeding, except to the limited extent permitted by this Rule.

21
22 [4] A judge may initiate, permit, or consider ex parte communications expressly
23 authorized by law, such as when serving on therapeutic or problem-solving courts, mental
24 health courts, or drug courts. In this capacity, judges may assume a more interactive role
25 with parties, treatment providers, probation officers, social workers, and others.

26
27 [5] A judge may consult with other judges on pending matters, but must avoid ex
28 parte discussions of a case with judges who have previously been disqualified from
29 hearing the matter, and with judges who have appellate jurisdiction over the matter.

30
31 [6] The prohibition against a judge investigating the facts in a matter extends to
32 information available in all mediums, including electronic.

33
34 [7] A judge may consult ethics advisory committees, outside counsel, or legal experts
35 concerning the judge’s compliance with this Code. Such consultations are not subject to
36 the restrictions of paragraph (A)(2).

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RULE 2.9
REPORTER'S EXPLANATION OF CHANGES

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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 new.

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.

1 **EXPLANATION OF BLACK LETTER**

2
3 1. “Issues on the merits” was deleted as duplicative; the Rule’s exclusion of
4 “substantive matters” from the scope of permissible ex parte communications would
5 necessarily subsume all “issues on the merits.” Replacing “authorized” with “permitted”
6 is stylistic and does not change the substance of the provision.

7
8 2. Paragraph (A)(1)(a): Addition of “substantive”

9
10 “Substantive” was added in recognition of the fact that a scheduling,
11 administrative, or emergency ex parte communication that is unrelated to substantive
12 matters per se could nonetheless, in some instances, enable a party to gain an
13 inappropriate advantage related to the substance or merits of the case.

14
15 3. Paragraph (A)(1)(b): Addition of delegation

16
17 Paragraph (A)(1)(b) is Canon 3B(7)(a)(ii), but reworded to clarify that the
18 judge may delegate the task of notifying other parties of ex parte communications
19 undertaken for administrative and scheduling purposes. Eliminating the opportunity for
20 the judge to delegate the task would be unnecessarily onerous.

21
22 4. Paragraph (A)(2): Addition of requirement of advance notice

23
24 Paragraph (A)(2) is Canon 3B(7)(b), but modified to add the requirement of
25 advance notice. Under the 1990 Code, a judge could consult with an outside legal expert
26 ex parte before notifying the parties. If such a consultation was problematic for reasons
27 that had not occurred to the judge, post-consultation notification to the parties would
28 come too late to prevent the problem from arising. As revised, the Rule calls upon the
29 judge to notify the parties before the ex parte contact is made.

30
31 5. Paragraph (A)(3): Addition of limitation on consultation

32
33 Paragraph (A)(3) is a modified version of Canon 3B(7)(c). The permissibility of a
34 judge’s consultation on a case with other court personnel was qualified to include the
35 common sense limitations that the judge must not relinquish ultimate responsibility for
36 deciding the case and, in the course of such consultation, should be careful not to acquire
37 improper factual information.

38
39 6. Paragraph (B): Creation of new paragraph on inadvertent communications

40
41 This new paragraph addresses an issue not covered by the former Code. In
42 situations where a judge inadvertently receives an unauthorized ex parte communication,
43 the new Rule directs the judge to notify all the other parties of the substance of the
44 communication and give them an opportunity to respond. In an age when misdirected
45 faxes and email are common, the need for some provision to deal with inadvertent
46 disclosures of ex parte information impressed the Commission as necessary.

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

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

10
11 8. Paragraph (D): Creation of new paragraph on avoiding communication through
12 staff

13
14 Paragraph (D) was moved to the black letter from the eighth paragraph of
15 Commentary to Canon 3B(7). In the Commission’s view, a judge’s duty to take steps to
16 avoid violating the Rule against ex parte communications through staff could not be
17 inferred from the black letter of the former Rule.

18
19 **EXPLANATION OF COMMENTS**

20
21 [3] Comment [3] is the first paragraph of Commentary to Canon 3B(7), with the
22 addition of “by this Rule,” a revision made for stylistic reasons and not intended to
23 change substantive meaning.

24
25 [4] New comment dealing with problem-solving and therapeutic courts

26
27 The Commission heard a great deal of testimony about therapeutic or problem-
28 solving courts. In these non-traditional courts that hear matters on an increasingly broad
29 array of issues ranging from drugs to juvenile justice, domestic relations, and crime,
30 judges communicate with parties, service providers (such as social workers), and others
31 in ways that can be in tension with traditional rules governing ex parte communications.
32 Several witnesses thus urged the Commission to create special rules for such courts. The
33 Commission was reluctant to do so because therapeutic courts were too many and varied
34 for the Commission to devise rules of general applicability. Instead, the Commission
35 drafted this new Comment, which calls special attention to the exception for ex parte
36 communications authorized by law and notes that this exception enables individual
37 jurisdictions to devise special rules for their therapeutic courts.

38
39 [5] New comment regarding judge-to-judge consultations

40
41 New Comment [5] was added to clarify that while a judge may consult with other
42 judges about a case, the judge should not consult with judges who have been disqualified
43 from hearing the case. If, for whatever reason, a judge is disqualified from hearing a
44 given matter, it would defeat the purpose of the disqualification rules to permit another
45 judge to confer with the disqualified colleague. In addition, the Comment clarifies that a
46 judge should not consult on a matter with any judge having appellate jurisdiction over the
47 matter.

1 [6] New Comment containing prohibition against independently investigating facts
2 extended to judge's staff
3

4 Given the ease with which factual investigation can now be accomplished via
5 electronic databases and the Internet, the risk that a judge or the judge's staff could
6 inadvertently violate Rules 2.10(B) and (C) has heightened considerably. The need for
7 vigilance on the part of judges has increased accordingly.
8

9 [7] New Comment regarding judges seeking ex parte guidance regarding compliance
10 with Rules
11

12 The Commission wanted to make clear that judges may seek ex parte guidance
13 concerning their compliance with the Code without violating this Rule. Judges routinely
14 consult ethics advisory committees, counsel and outside experts concerning their
15 obligations under the Code in a given context. Because such consultations are not
16 problematic, this Comment was added accordingly.
17

18 Deletion of the fourth, fifth, seventh and ninth paragraphs of Commentary to
19 Canon 3B(7)
20

21 The Commission deleted the reference to requests for amicus briefs in the fourth
22 paragraph of Canon 3B(7) Commentary as being "often desirable procedures," because it
23 is not an ethical concern.
24

25 The fifth paragraph of Canon 3(B)(7) Commentary concerning clearly acceptable
26 purposes for ex parte communications was deleted because it is redundant of the black
27 letter Rule.
28

29 The Commission decided to delete Commentary language in the seventh
30 paragraph of Canon 3B(7) authorizing a judge to request that a party submit proposed
31 findings of fact and conclusions of law as long as the other party was given an
32 opportunity to respond to the submission. In the Commission's view, the permissibility
33 of the practice was so free from doubt as to render the Comment unnecessary.
34

35 The Commission deleted the ninth paragraph of Canon 3B(7) Commentary. The
36 subject matter, keeping records of communications, is an administrative, rather than an
37 ethical matter.
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1 **RULE 2.10**

2 *Judicial Statements on Pending and Impending Cases*

3
4 (A) A judge shall not make any public statement that might reasonably be
5 expected to affect the outcome or impair the fairness of a matter pending* or
6 impending* in any court, or make any nonpublic statement that might
7 substantially interfere with a fair trial or hearing.

8
9 (B) A judge shall not, in connection with cases, controversies, or issues
10 that are likely to come before the court, make pledges, promises, or
11 commitments that are inconsistent with the impartial* performance of the
12 adjudicative duties of judicial office.

13
14 (C) A judge shall require court staff, court officials, and others subject to
15 the judge's direction and control to refrain from making statements that the
16 judge would be prohibited from making by paragraphs (A) and (B).

17
18 (D) Notwithstanding the restrictions in paragraph (A), a judge may make
19 public statements in the course of official duties, may explain court
20 procedures, and may comment on any proceeding in which the judge is a
21 litigant in a personal capacity.

22
23 (E) Subject to the requirements of paragraph (A), a judge may respond
24 directly or through a third party to allegations in the media or elsewhere
25 concerning the judge's conduct in a matter.

26
27 **COMMENT**

28
29 [1] This Rule's restrictions on judicial speech are essential to the maintenance of the
30 independence, integrity, and impartiality of the judiciary.

31
32 [2] Depending upon the circumstances, the judge should consider whether it may be
33 preferable for a third party, rather than the judge, to respond or issue statements in
34 connection with allegations concerning the judge's conduct in a matter.

35
36 [3] This Rule does not prohibit a judge from commenting on proceedings in which
37 the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an
38 official capacity, such as a writ of mandamus, the judge must not comment publicly.

RULE 2.10
REPORTER'S EXPLANATION OF CHANGES

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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 "duties" 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,

1 the judge may respond as long as the response will not affect the fairness of the
2 proceeding.

3
4
5 **EXPLANATION OF COMMENTS**

6
7 Deletion of reference to Model Rules of Professional Conduct

8
9 In the Commentary to Canon 3B(10), the cross-reference to the Model Rules of
10 Professional Conduct was deleted as unnecessary.

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

13
14 The Commission moved Canon 3B(11) and its Commentary, relating to judges
15 commending or criticizing jurors, to Rule 2.8, the Rule devoted to judicial decorum,
16 demeanor, and communication with jurors.

17
18 The definitions of “pending” and “impending” in Commentary to Canon 3B(10)
19 were moved to Terminology.

20
21 **Comment [2] suggests that it may be appropriate in some instances for**
22 **statements that explain or defend the role or action of a judge in a particular matter**
23 **to be made by a third person, rather than by the judge. This suggestion reflects a**
24 **preference for keeping to a minimum the extent to which judges discuss cases**
25 **directly with the media.**

1 **RULE 2.11**

2 ***Disqualification***

3
4 (A) A judge shall disqualify himself or herself in any proceeding in which
5 the judge's impartiality* might reasonably be questioned, including but not
6 limited to the following circumstances:

7
8 (1) The judge has a personal bias or prejudice concerning a party
9 or a party's lawyer, or personal knowledge* of facts that are in
10 dispute in the proceeding.

11
12 (2) The judge knows* that the judge, the judge's spouse or
13 domestic partner,* or a person within the third degree of
14 relationship* to either of them, or the spouse or domestic partner of
15 such a person is:

16
17 (a) a party to the proceeding, or an officer, director,
18 general partner, managing member, or trustee of a party;

19
20 (b) acting as a lawyer in the proceeding;

21
22 (c) a person who has more than a de minimis* interest that
23 could be substantially affected by the proceeding; or

24
25 (d) likely to be a material witness in the proceeding.

26
27 (3) The judge knows that he or she, individually or as a fiduciary,*
28 or the judge's spouse, domestic partner, parent, or child, or any other
29 member of the judge's family residing in the judge's household,* has
30 an economic interest* in the subject matter in controversy or is a
31 party to the proceeding.

32
33 (4) The judge knows or learns by means of a timely motion that a
34 party, a party's lawyer, or the law firm of a party's lawyer has within
35 the previous [insert number] year[s] made aggregate* contributions*
36 to the judge's campaign in an amount that is greater than \$[insert
37 amount] for an individual or \$[insert amount] for an entity [is
38 reasonable and appropriate for an individual or an entity].

39
40 (5) The judge, while a judge or a judicial candidate,* has made a
41 public statement, other than in a court proceeding, judicial decision,
42 or opinion, that commits or appears to commit the judge to reach a
43 particular result or rule in a particular way in the proceeding or
44 controversy.

45
46 (6) The judge:

1 (a) served as a lawyer in the matter in controversy, or was
2 associated with a lawyer who participated substantially as a
3 lawyer in the matter during such association;
4

5 (b) served in governmental employment, and in such
6 capacity participated personally and substantially as a lawyer
7 or public official concerning the proceeding, or has publicly
8 expressed in such capacity an opinion concerning the merits of
9 the particular matter in controversy;
10

11 (c) was a material witness concerning the matter; or
12

13 (d) previously presided as a judge over the matter in
14 another court.
15

16 (B) A judge shall keep informed about the judge's personal and fiduciary
17 economic interests, and make a reasonable effort to keep informed about the
18 personal economic interests of the judge's spouse or domestic partner and
19 minor children residing in the judge's household.
20

21 (C) A judge subject to disqualification under this Rule, other than for bias
22 or prejudice under paragraph (A)(1), may disclose on the record the basis of
23 the judge's disqualification and may ask the parties and their lawyers to
24 consider, outside the presence of the judge and court personnel, whether to
25 waive disqualification. If, following the disclosure, the parties and lawyers
26 agree, without participation by the judge or court personnel, that the judge
27 should not be disqualified, the judge may participate in the proceeding. The
28 agreement shall be incorporated into the record of the proceeding.
29

30 COMMENT

31
32 [1] Under this Rule, a judge is disqualified whenever the judge's impartiality might
33 reasonably be questioned, regardless of whether any of the specific provisions of
34 paragraphs (A)(1) through (6) apply. In many jurisdictions, the term "recusal" is used
35 interchangeably with the term "disqualification."
36

37 [2] A judge's obligation not to hear or decide matters in which disqualification is
38 required applies regardless of whether a motion to disqualify is filed.
39

40 [3] The rule of necessity may override the rule of disqualification. For example, a
41 judge might be required to participate in judicial review of a judicial salary statute, or
42 might be the only judge available in a matter requiring immediate judicial action, such as
43 a hearing on probable cause or a temporary restraining order. In matters that require
44 immediate action, the judge must disclose on the record the basis for possible
45 disqualification and make reasonable efforts to transfer the matter to another judge as
46 soon as practicable.
47

1 [4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a
2 relative of the judge is affiliated does not itself disqualify the judge. If, however, the
3 judge's impartiality might reasonably be questioned under paragraph (A), or the relative
4 is known by the judge to have an interest in the law firm that could be substantially
5 affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is
6 required.

7
8 [5] A judge should disclose on the record information that the judge believes the
9 parties or their lawyers might reasonably consider relevant to a possible motion for
10 disqualification, even if the judge believes there is no basis for disqualification.

11
12 [6] "Economic interest," as set forth in the Terminology section, means ownership of
13 more than a de minimis legal or equitable interest. Except for situations in which a judge
14 participates in the management of such a legal or equitable interest, or the interest could
15 be substantially affected by the outcome of a proceeding before a judge, it does not
16 include:

- 17 (1) an interest in the individual holdings within a mutual or common
18 investment fund;
- 19 (2) an interest in securities held by an educational, religious, charitable,
20 fraternal, or civic organization in which the judge or the judge's spouse, domestic
21 partner, parent, or child serves as a director, officer, advisor, or other participant;
- 22 (3) a deposit in a financial institution or deposits or proprietary interests the
23 judge may maintain as a member of a mutual savings association or credit union,
24 or similar proprietary interests; or
- 25 (4) an interest in the issuer of government securities held by the judge.

1 **RULE 2.11**

2 **REPORTER'S EXPLANATION OF CHANGES**

3
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5 **Joint Commission to Evaluate the Model Code of Judicial Conduct. They have been**
6 **drafted by the Commission's Reporters, based on the proceedings and record of the**
7 **Commission, solely to inform the ABA House of Delegates about each of the**
8 **proposed amendments to the Model Code prior to their being considered at the**
9 **ABA 2007 Midyear Meeting. THEY ARE NOT TO BE ADOPTED AS PART OF**
10 **THE MODEL CODE.**

11
12 **1990 MODEL CODE COMPARISON**

13
14 Paragraph (A) is Canon 3E(1).

15
16 Paragraph (A)(1) is Canon 3E(1)(a).

17
18 Paragraph (A)(2) is Canon 3E(1)(d).

19
20 Paragraph (A)(2)(a) is Canon 3E(1)(d)(i).

21
22 Paragraph (A)(2)(b) is Canon 3E(1)(d)(ii).

23
24 Paragraph (A)(2)(c) is Canon 3E(1)(d)(iii).

25
26 Paragraph (A)(2)(d) is Canon 3E(1)(d)(iv).

27
28 Paragraph (A)(3) is Canon 3E(1)(c).

29
30 Paragraph (A)(4) is Canon 3E(1)(e).

31
32 Paragraph (A)(5) combines Canons 3E(1)(f), 3E(1)(f)(i), and 3E(1)(f)(ii).

33
34 Paragraph (A)(6) is the first two words of Canon 3E(1)(b).

35
36 Paragraph (A)(6)(a) is the remainder of the first half of Canon 3E(1)(b).

37
38 Paragraph (A)(6)(b) is the Commentary to Canon 3E(1)(b).

39
40 Paragraph (A)(6)(c) is the second half of Canon 3E(1)(b).

41
42 Paragraph (A)(6)(d) is new.

43
44 Paragraph (B) is Canon 3E(2).

45
46 Paragraph (C) is Canon 3F.

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

48

1 Comment [2] is new.

2
3 Comment [3] is the third paragraph of Commentary to Canon 3E(1).

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

6
7 Comment [5] is the second paragraph of Commentary to Cannon 3E(1).

8
9 Comment [6] is new.

10
11 The Commentary to Canon 3F was deleted, as being largely redundant of the
12 black letter and otherwise administrative, rather than ethical, in its recommendations.

13 14 **EXPLANATION OF BLACK LETTER**

15
16 Most changes to this Rule and its accompanying Comment are stylistic and
17 structural rather than substantive. Only substantive changes are addressed below.

18
19 1. Paragraphs (A)(2), (A)(3), and (B): Addition of “domestic partner”
20 “Domestic partner” was added to treat domestic partners comparably to spouses
21 for purposes of evaluating economic conflicts.

22
23 2. Paragraph (A)(2)(a): Addition of “general partner, managing member”

24
25 These additions were made to ensure completeness of the list.

26
27 3. In Paragraph (A)(2)(d), “to the judge’s knowledge”, which is included in former
28 Canon 3E (1) (d) (iv), was deleted as unnecessary.

29
30 4. Paragraph (A)(6)(b): New paragraph on government lawyers

31
32 Paragraph (A)(6)(b) makes explicit in the black letter what former Canon
33 3E(1)(b) stated only in Commentary. Judges must not sit on cases concerning matters
34 with which they were involved as government lawyers, for the same reason that they
35 must not sit on cases concerning matters in which they were involved as lawyers, and the
36 Rule has been revised to so state.

37
38 5. Paragraph A(6)(d): New paragraph on judges sitting on cases they previously
39 heard:

40
41 Trial judges sometimes sit by designation on courts of appeal, and vice versa.
42 Such judges should not hear cases over which they presided in a different court, and this
43 Rule makes that clear. This Rule, however, leaves unaffected the propriety of a judge
44 who decided a case on a panel of an appellate court participating in the rehearing of the
45 case en banc with that same court.

1 **EXPLANATION OF COMMENTS**

2
3 [2] New Comment [2] was added to clarify that the disqualification rules apply
4 regardless of whether a motion to disqualify has been filed. The terms “recusal” and
5 “disqualification” have been defined in different and sometimes inconsistent ways to
6 apply where judges act on their own initiative or pursuant to a motion by a party. This
7 Comment is intended to render such distinctions irrelevant here.

8
9 [6] New Comment [6] was added to elaborate on the meaning of “economic interest.”
10 Although the term is separately defined in the Terminology section, it is important
11 enough to bear recapitulation here.

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1 **RULE 2.12**

2 *Supervisory Duties*

3
4 (A) A judge shall require court staff, court officials, and others subject to
5 the judge's direction and control to act in a manner consistent with the
6 judge's obligations under this Code.

7
8 (B) A judge with supervisory authority for the performance of other
9 judges shall take reasonable measures to ensure that those judges properly
10 discharge their judicial responsibilities, including the prompt disposition of
11 matters before them.

12
13 **COMMENT**

14
15 [1] A judge is responsible for his or her own conduct and for the conduct of others,
16 such as staff, when those persons are acting at the judge's direction or control. A judge
17 may not direct court personnel to engage in conduct on the judge's behalf or as the
18 judge's representative when such conduct would violate the Code if undertaken by the
19 judge.

20
21 [2] Public confidence in the judicial system depends upon timely justice. To promote
22 the efficient administration of justice, a judge with supervisory authority must take the
23 steps needed to ensure that judges under his or her supervision administer their workloads
24 promptly.

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RULE 2.12
REPORTER'S EXPLANATION OF CHANGES

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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] This new Comment 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.

1 [2] New Comment [2] was added to underscore that public confidence in the courts
2 depends on judges with supervisory authority taking the steps needed to ensure that
3 judges under their supervision administer their workloads both properly and
4 expeditiously.
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1 **RULE 2.13**

2 *Administrative Appointments*

3
4 (A) In making administrative appointments, a judge:

5
6 (1) shall exercise the power of appointment impartially* and on
7 the basis of merit; and

8
9 (2) shall avoid nepotism, favoritism, and unnecessary
10 appointments.

11
12 (B) A judge shall not appoint a lawyer to a position if the judge either
13 knows* that the lawyer, or the lawyer's spouse or domestic partner,* has
14 contributed more than \$[insert amount] within the prior [insert number]
15 year[s] to the judge's election campaign, or learns of such a contribution* by
16 means of a timely motion by a party or other person properly interested in
17 the matter, unless:

18
19 (1) the position is substantially uncompensated;

20
21 (2) the lawyer has been selected in rotation from a list of qualified
22 and available lawyers compiled without regard to their having made
23 political contributions; or

24
25 (3) the judge or another presiding or administrative judge
26 affirmatively finds that no other lawyer is willing, competent, and able
27 to accept the position.

28
29 (C) A judge shall not approve compensation of appointees beyond the fair
30 value of services rendered.

31
32 **COMMENT**

33
34 [1] Appointees of a judge include assigned counsel, officials such as referees,
35 commissioners, special masters, receivers, and guardians, and personnel such as clerks,
36 secretaries, and bailiffs. Consent by the parties to an appointment or an award of
37 compensation does not relieve the judge of the obligation prescribed by paragraph (A).
38

39 [2] Unless otherwise defined by law, nepotism is the appointment or hiring of any
40 relative within the third degree of relationship of either the judge or the judge's spouse or
41 domestic partner, or the spouse or domestic partner of such relative.
42

43 [3] The rule against making administrative appointments of lawyers who have
44 contributed in excess of a specified dollar amount to a judge's election campaign includes
45 an exception for positions that are substantially uncompensated, such as those for which
46 the lawyer's compensation is limited to reimbursement for out-of-pocket expenses.
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RULE 2.13
REPORTER'S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

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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 eliminated and folded into the Rule later 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.

1 **EXPLANATION OF COMMENTS**

2
3 [2] The black letter directs judges to avoid nepotism, and new Comment [2] was
4 added simply to add clarity to the meaning of nepotism with a conventional definition.

5
6 [3] The black letter prohibits a judge from awarding appointments to contributors
7 who have given more than a specified amount to the judge’s election campaign but
8 creates an exception for “substantially uncompensated” positions. This new Comment
9 clarifies the meaning of “substantially uncompensated” to reach positions in which the
10 appointee is reimbursed for out-of-pocket expenses.

11

1 **RULE 2.14**

2 *Disability and Impairment*

3
4 **A judge having a reasonable belief that the performance of a lawyer or another**
5 **judge is impaired by drugs or alcohol, or by a mental, emotional, or physical**
6 **condition, shall take appropriate action, which may include a confidential referral**
7 **to a lawyer or judicial assistance program.**

8
9 **COMMENT**

10
11 [1] “Appropriate action” means action intended and reasonably likely to help the
12 judge or lawyer in question address the problem and prevent harm to the justice system.
13 Depending upon the circumstances, appropriate action may include but is not limited to
14 speaking directly to the impaired person, notifying an individual with supervisory
15 responsibility over the impaired person, or making a referral to an assistance program.

16
17 [2] Taking or initiating corrective action by way of referral to an assistance program
18 may satisfy a judge’s responsibility under this Rule. Assistance programs have many
19 approaches for offering help to impaired judges and lawyers, such as intervention,
20 counseling, or referral to appropriate health care professionals. Depending upon the
21 gravity of the conduct that has come to the judge’s attention, however, the judge may be
22 required to take other action, such as reporting the impaired judge or lawyer to the
23 appropriate authority, agency, or body. See Rule 2.15.

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RULE 2.14
REPORTER'S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

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The Rule and Comment are new.

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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.

1 **RULE 2.15**

2 ***Responding to Judicial and Lawyer Misconduct***

3
4 (A) A judge having knowledge* that another judge has committed a
5 violation of this Code that raises a substantial question regarding the judge's
6 honesty, trustworthiness, or fitness as a judge in other respects shall inform
7 the appropriate authority.*

8
9 (B) A judge having knowledge that a lawyer has committed a violation of
10 the Rules of Professional Conduct that raises a substantial question
11 regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in
12 other respects shall inform the appropriate authority.

13
14 (C) A judge who receives information indicating a substantial likelihood
15 that another judge has committed a violation of this Code shall take
16 appropriate action.

17
18 (D) A judge who receives information indicating a substantial likelihood
19 that a lawyer has committed a violation of the Rules of Professional Conduct
20 shall take appropriate action.

21
22 **COMMENT**

23
24 [1] Taking action to address known misconduct is a judge's obligation. Paragraphs
25 (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary
26 authority the known misconduct of another judge or a lawyer that raises a substantial
27 question regarding the honesty, trustworthiness, or fitness of that judge or lawyer.
28 Ignoring or denying known misconduct among one's judicial colleagues or members of
29 the legal profession undermines a judge's responsibility to participate in efforts to ensure
30 public respect for the justice system. This Rule limits the reporting obligation to those
31 offenses that an independent judiciary must vigorously endeavor to prevent.

32
33 [2] A judge who does not have actual knowledge that another judge or a lawyer may
34 have committed misconduct, but receives information indicating a substantial likelihood
35 of such misconduct, is required to take appropriate action under paragraphs (C) and (D).
36 Appropriate action may include, but is not limited to, communicating directly with the
37 judge who may have violated this Code, communicating with a supervising judge, or
38 reporting the suspected violation to the appropriate authority or other agency or body.
39 Similarly, actions to be taken in response to information indicating that a lawyer has
40 committed a violation of the Rules of Professional Conduct may include but are not
41 limited to communicating directly with the lawyer who may have committed the
42 violation, or reporting the suspected violation to the appropriate authority or other agency
43 or body.

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RULE 2.15
REPORTER’S EXPLANATION OF CHANGES

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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

1
2 Former Canon 3(D)(1) was revised to state that when a judge receives information
3 indicating a substantial likelihood that another judge has violated the Rules, the judge
4 receiving such information shall—no longer should—take “appropriate action.” In the
5 Commission’s view, in situations where the judge does not “know” but receives
6 information making it substantially likely that another judge has violated the Rules, the
7 judge receiving such information shall take action. The appropriate action would vary
8 with the circumstances. In some instances, it could involve talking to the judge in
9 question or in other instances, taking steps to verify the information received and report it
10 to the appropriate authorities.

11
12 4. Deletion of Canon 3D(3)
13

14 Former Canon 3D(3) declared that the acts of a judge in the discharge of
15 disciplinary responsibilities were absolutely privileged. Although there was no
16 opposition to the concept that judges should be immune from suit in such situations, the
17 Commission concluded that such a provision was inappropriate for the Model Code of
18 Judicial Conduct. Neither the ABA nor an adopting court is in a position to grant or deny
19 judicial immunity in the context of judicial conduct standards. Accordingly, Canon 3D(3)
20 was viewed as a generalized statement of support for judicial immunity, which, in the
21 Commission’s view, was not appropriate for the Code.
22

23 **EXPLANATION OF COMMENTS**
24

25 [1] Language was added to underscore the relationship between reporting serious
26 misconduct of judges and lawyers and the judge’s responsibility to preserve public
27 confidence in the courts.
28

29 [2] Commentary concerning “appropriate action” in response to judicial and lawyer
30 misconduct is consistent with the Commentary in former Canon 3D.
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1 **RULE 2.16**

2 *Cooperation with Disciplinary Authorities*

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(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person known* or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

10
11 **COMMENT**

12
13 [1] Cooperation with investigations and proceedings of judicial and lawyer discipline
14 agencies, as required in paragraph (A), instills confidence in judges' commitment to the
15 integrity of the judicial system and the protection of the public.

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RULE 2.16
REPORTER’S EXPLANATION OF CHANGES

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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 proceeding. 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

A JUDGE SHALL CONDUCT THE JUDGE’S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

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CANON 3
REPORTER'S EXPLANATION OF CHANGES

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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*.

1 **RULE 3.1**

2 *Extrajudicial Activities in General*

3
4 **A judge may engage in extrajudicial activities, except as prohibited by law* or this**
5 **Code. However, when engaging in extrajudicial activities, a judge shall not:**

6
7 (A) **participate in activities that will interfere with the proper**
8 **performance of the judge’s judicial duties;**

9
10 (B) **participate in activities that will lead to frequent disqualification of**
11 **the judge;**

12
13 (C) **participate in activities that would appear to a reasonable person to**
14 **undermine the judge’s independence,* integrity,* or impartiality;***

15
16 (D) **engage in conduct that would appear to a reasonable person to be**
17 **coercive; or**

18
19 (E) **make use of court premises, staff, stationery, equipment, or other**
20 **resources, except for incidental use for activities that concern the law, the**
21 **legal system, or the administration of justice, or unless such additional use is**
22 **permitted by law.**

23
24 **COMMENT**

25
26 [1] To the extent that time permits, and judicial independence and impartiality are not
27 compromised, judges are encouraged to engage in appropriate extrajudicial activities.
28 Judges are uniquely qualified to engage in extrajudicial activities that concern the law,
29 the legal system, and the administration of justice, such as by speaking, writing, teaching,
30 or participating in scholarly research projects. In addition, judges are permitted and
31 encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial
32 activities not conducted for profit, even when the activities do not involve the law. See
33 Rule 3.7.

34
35 [2] Participation in both law-related and other extrajudicial activities helps integrate
36 judges into their communities, and furthers public understanding of and respect for courts
37 and the judicial system.

38
39 [3] Discriminatory actions and expressions of bias or prejudice by a judge, even
40 outside the judge’s official or judicial actions, are likely to appear to a reasonable person
41 to call into question the judge’s integrity and impartiality. Examples include jokes or
42 other remarks that demean individuals based upon their race, sex, gender, religion,
43 national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status. For
44 the same reason, a judge’s extrajudicial activities must not be conducted in connection or
45 affiliation with an organization that practices invidious discrimination. See Rule 3.6.

46 [4] While engaged in permitted extrajudicial activities, judges must not coerce others
47 or take action that would reasonably be perceived as coercive. For example, depending

1 upon the circumstances, a judge's solicitation of contributions or memberships for an
2 organization, even as permitted by Rule 3.7(A), might create the risk that the person
3 solicited would feel obligated to respond favorably, or would do so to curry favor with
4 the judge.

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1 **RULE 3.1**
2 **REPORTER'S EXPLANATION OF CHANGES**
3

4 **The "Reporters' Explanations of Changes" have not been approved by the ABA**
5 **Joint Commission to Evaluate the Model Code of Judicial Conduct. They have been**
6 **drafted by the Commission's Reporters, based on the proceedings and record of the**
7 **Commission, solely to inform the ABA House of Delegates about each of the**
8 **proposed amendments to the Model Code prior to their being considered at the**
9 **ABA 2007 Midyear Meeting. THEY ARE NOT TO BE ADOPTED AS PART OF**
10 **THE MODEL CODE.**

11
12 **1990 MODEL CODE COMPARISON**
13

14 To the extent that Rule 3.1 serves as a general list of restrictions upon a judge's
15 participation in extrajudicial activities, it is chiefly derived from Canon 4A. However, the
16 new set of restrictions is somewhat different, as it focuses attention more sharply upon
17 interference with the independence, integrity, and impartiality of judges.
18

19 Rule 3.1(A) is essentially the same as Canon 4A(3).
20

21 Rule 3.1(B) is new, but is derived from Canon 4A(3), but contains more specific content.
22 See Rule 3.1(A).
23

24 Rule 3.1(C) is based upon Canon 4A(1), but with expanded coverage and revised
25 language.
26

27 Rule 3.1(D) is new.
28

29 Rule 3.1(E) is new, but has some overlap with aspects of Canon 2B ("lend the prestige of
30 judicial office to advance the private interests of the judge or others").
31

32 Comment [1] is derived from the first paragraph of the Commentary following Canon 4B,
33 although the subject matter of Canon 4B, Avocational Activities, is not addressed
34 separately.
35

36 Comment [2] is based upon the first paragraph of the Commentary following Canon 4A.
37

38 Comment [3] is new.
39

40 **EXPLANATION OF BLACK LETTER**
41

42 1. Rule 3.1, lead-in is restructured to permit extrajudicial activities generally, but
43 subject to the listed prohibitions.
44

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

47 2. Rule 3.1(A): added the italicized words interfere with the proper performance of
48 *the judge's* judicial duties.

1
2 3. Rule 3.1(B) is newly added as a specific instance of the prohibition contained in
3 Rule 3.1(A).

4
5 One way to interfere with the proper performance of judicial duties is to become involved
6 in extrajudicial activities that will lead to frequent disqualification.

7
8 No substantive change is intended.

9
10 4. Rule 3.1(C): substituted the phrase “would appear to a reasonable person to
11 undermine” for “cast reasonable doubt on,” and broadened coverage from “act
12 impartially” to “the judge’s independence, integrity, or impartiality.”

13
14 The Commission decided that the words “cast reasonable doubt on” are too closely
15 associated with the criminal law, and did not accurately express the proper level of
16 certainty required. The substitute wording makes the standard turn upon the thought
17 processes of a “reasonable person,” which is a familiar standard in the law generally and
18 also suggestive of the “might reasonably be questioned” language of 28 U.S.C. § 455.
19 Concern with impairment of a judge’s independence, integrity, and impartiality, rather
20 than impartiality alone, is a theme that is prevalent in the Rules.

21
22 5. Rule 3.1(D): added a new provision to guard against overt or subtle efforts by a
23 judge to coerce others into participating in extrajudicial activities favored by the judge.

24
25 The Commission heard testimony suggesting that coercion of this kind can be a
26 significant problem in small communities with only one judge or a small number of
27 judges, and a small number of lawyers who need to maintain good relations with the
28 judiciary.

29
30 6. Rule 3.1(E): added a new prohibition against using court facilities and other
31 resources for a judge’s extrajudicial activities, but with an exception for incidental use in
32 connection with a law-related event.

33
34 The rationale for the general restriction is that favoring a particular charity or other
35 extrajudicial event by providing access to facilities that are closed to others is an abuse of
36 the prestige of judicial office; see Rule 1.3. The rationale for the exception, however, is
37 that certain activities, such as opening a real courtroom for use in a moot court
38 competition or using a court’s conference room for a meeting of a bar association task
39 force that includes the judge, are not abuses of judicial office.

40
41 **EXPLANATION OF COMMENTS**

42
43 [1] This Comment was reworded to confirm the special role that judges can play in
44 engaging in extrajudicial activities that involve the law, the legal system, and the
45 administration of justice, but also to approve participation in activities that are *not* law-
46 related, as long as they are undertaken in connection with not-for-profit organizations.

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

4
5 Specific examples in the 1990 Code, both in black letter (avocational activities such as
6 speaking and writing) and in the Commentary (improving criminal and juvenile justice
7 and expressing opposition to the persecution of lawyers and judges in other countries),
8 were removed as unnecessarily restrictive or of insufficiently general application.

9
10 [2] This Comment is a slightly revised version of the first paragraph of the existing
11 Commentary to Canon 4A.

12
13 No substantive change is intended.

14
15 [3] This Comment is modified from the second paragraph of the Commentary
16 following Canon 4A.

17
18 The cross-reference to Section 2C in the 1990 Code was to the provision on
19 discriminatory organizations, although the Commentary did not make that sufficiently
20 clear. The provision regarding discriminatory organizations has been repositioned to
21 Canon 3; accordingly, the cross-reference is to Rule 3.6.

22
23 [4] This is a new Comment to flesh out the intendment of Rule 3.1(D), which is also
24 new.

1 **RULE 3.2**

2 *Appearances before Governmental Bodies and Consultation with*
3 *Government Officials*

4
5 **A judge shall not appear voluntarily at a public hearing before, or otherwise consult**
6 **with, an executive or a legislative body or official, except:**

7
8 **(A) in connection with matters concerning the law, the legal system, or the**
9 **administration of justice;**

10
11 **(B) in connection with matters about which the judge acquired knowledge**
12 **or expertise in the course of the judge’s judicial duties; or**

13
14 **(C) when the judge is acting pro se in a matter involving the judge’s legal**
15 **or economic interests, or when the judge is acting in a fiduciary* capacity.**

16
17 **COMMENT**

18
19 [1] Judges possess special expertise in matters of law, the legal system, and the
20 administration of justice, and may properly share that expertise with governmental bodies
21 and executive or legislative branch officials.

22
23 [2] In appearing before governmental bodies or consulting with government officials,
24 judges must be mindful that they remain subject to other provisions of this Code, such as
25 Rule 1.3, prohibiting judges from using the prestige of office to advance their own or
26 others’ interests, Rule 2.10, governing public comment on pending and impending
27 matters, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that
28 would appear to a reasonable person to undermine the judge’s independence, integrity, or
29 impartiality.

30
31 [3] In general, it would be an unnecessary and unfair burden to prohibit judges from
32 appearing before governmental bodies or consulting with government officials on matters
33 that are likely to affect them as private citizens, such as zoning proposals affecting their
34 real property. In engaging in such activities, however, judges must not refer to their
35 judicial positions, and must otherwise exercise caution to avoid using the prestige of
36 judicial office.

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RULE 3.2
REPORTER'S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

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

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

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Rule 3.2(B) is new.

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47

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 the existing language by substituting "the judge's legal or economic interests" for "the judge's interests," and by extending the exception to situations in which a judge is "acting in a fiduciary capacity."

1 **EXPLANATION OF COMMENTS**

2
3 [1] This new Comment simply explains the rationale of Rule 3.2(A) and, implicitly,
4 of Rule 3.2(B).

5
6 [2] This new Comment serves as a reminder that even when it is permissible under
7 Rules 3.2(A) or 3.2(B) for a judge voluntarily to consult with other branch personnel, the
8 judge remains subject to other restrictions of this Code, some of which are given as
9 examples.

10
11 [3] This new Comment more narrowly describes the types of interests judges may
12 address in their appearances before or consultations with government bodies. Under the
13 original language, the Commission believed, a judge might act pro se in connection with
14 any political or social matter that “interested” the judge, which would allow the exception
15 to swallow the rule. Without resorting to legalistic definitions of legally protected
16 interests sufficient to justify formal intervention, the Comment distinguishes between
17 matters that affect judges directly as private citizens and more general causes.

1 **RULE 3.3**

2 *Testifying as a Character Witness*

3
4 **A judge shall not testify as a character witness, or otherwise vouch for the character**
5 **of a person in a legal proceeding, except when duly summoned.**

6
7 **COMMENT**

8
9 [1] A judge who, without being subpoenaed, testifies as a character witness abuses
10 the prestige of judicial office to advance the interests of another. See Rule 1.3. Except in
11 unusual circumstances where the demands of justice require, a judge should discourage a
12 party from requiring the judge to testify as a character witness.

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RULE 3.3
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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.”

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.

EXPLANATION OF COMMENTS

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

Inasmuch as the Rule permits testifying as a character witness only upon receipt of a subpoena or other process, the Comment discourages testimony that is voluntary.

1 **RULE 3.4**

2 *Appointments to Governmental Positions*

3
4 **Except as required by law,* a judge shall not accept appointment to a governmental**
5 **committee, board, commission, or other governmental position, unless it is one that**
6 **concerns the law, the legal system, or the administration of justice.**

7
8 **COMMENT**

9
10 [1] Even with respect to governmental positions concerning the law, the legal system
11 or the administration of justice, a judge should assess the appropriateness of accepting an
12 appointment, paying particular attention to the subject matter of the appointment and the
13 availability and allocation of judicial resources, including the judge's time commitments,
14 and giving due regard to the requirements of the independence and impartiality of the
15 judiciary.

16
17 [2] A judge may represent his or her country, state, or locality on ceremonial
18 occasions or in connection with historical, educational, or cultural activities. Such
19 representation does not constitute acceptance of a government position.

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RULE 3.4
REPORTER’S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

Rule 3.4 is derived from the first sentence of Canon 4C(2). It has been recast and simplified. The introductory phrase “except as required or permitted by law” was also added.

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 lead-in: added the introductory phrase “except as required or permitted by law.”

In some situations, a judicial officer is required to serve ex officio on certain boards or commissions, and in others judges are permitted to do so. In both situations, it must be assumed that the law in question has survived constitutional challenge based upon separation of powers concerns.

2. 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.

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[2] This new Comment 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.

1 **RULE 3.5**

2 *Use of Nonpublic Information*

3
4 **A judge shall not intentionally disclose or use nonpublic information* acquired in a**
5 **judicial capacity for any purpose unrelated to the judge’s judicial duties.**

6
7 **COMMENT**

8
9 [1] In the course of performing judicial duties, a judge may acquire information of
10 commercial or other value that is unavailable to the public. The judge must not reveal or
11 use such information for personal gain or for any purpose unrelated to his or her judicial
12 duties.

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RULE 3.5
REPORTER’S EXPLANATION OF CHANGES

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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.

Comment [1] is new.

EXPLANATION OF BLACK LETTER

1. Rule 3.5: 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] This Comment is new, providing a link between using nonpublic information for personal advantage and abuse of judicial office.

1 **RULE 3.6**

2 *Affiliation with Discriminatory Organizations*

3
4 (A) A judge shall not hold membership in any organization that practices
5 invidious discrimination on the basis of race, sex, gender, religion, national
6 origin, ethnicity, or sexual orientation.

7
8 (B) A judge shall not use the benefits or facilities of an organization if the
9 judge knows* or should know that the organization practices invidious
10 discrimination on one or more of the bases identified in paragraph (A). A
11 judge's attendance at an event in a facility of an organization that the judge
12 is not permitted to join is not a violation of this Rule when the judge's
13 attendance is an isolated event that could not reasonably be perceived as an
14 endorsement of the organization's practices.

15
16 **COMMENT**

17
18 [1] A judge's public manifestation of approval of invidious discrimination on any
19 basis gives rise to the appearance of impropriety and diminishes public confidence in the
20 integrity and impartiality of the judiciary. A judge's membership in an organization that
21 practices invidious discrimination creates the perception that the judge's impartiality is
22 impaired.

23
24 [2] An organization is generally said to discriminate invidiously if it arbitrarily
25 excludes from membership on the basis of race, sex, gender, religion, national origin,
26 ethnicity, or sexual orientation persons who would otherwise be eligible for admission.
27 Whether an organization practices invidious discrimination is a complex question to
28 which judges should be attentive. The answer cannot be determined from a mere
29 examination of an organization's current membership rolls, but rather, depends upon how
30 the organization selects members, as well as other relevant factors, such as whether the
31 organization is dedicated to the preservation of religious, ethnic, or cultural values of
32 legitimate common interest to its members, or whether it is an intimate, purely private
33 organization whose membership limitations could not constitutionally be prohibited.

34
35 [3] When a judge learns that an organization to which the judge belongs engages in
36 invidious discrimination, the judge must resign immediately from the organization.

37
38 [4] A judge's membership in a religious organization as a lawful exercise of the
39 freedom of religion is not a violation of this Rule.

40
41 [5] This Rule does not apply to national or state military service.
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RULE 3.6
REPORTER'S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

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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).

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EXPLANATION OF BLACK LETTER

1. Rule 3.6(A) text is identical to Canon 2C of the 1990 Code, except that it expanded 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.

1 See Comment [3], which confirms that the lack of any black letter exception regarding
2 membership means that a judge must resign immediately upon learning of the
3 organization’s practices.
4

5 **EXPLANATION OF COMMENTS**

6
7 [1] This Comment blends the first sentence of the Commentary to Canon 2C of the
8 1990 Code with language found in the long second paragraph of that Commentary.
9 Revised in part for style and in part for more completeness, the new Comment stresses
10 that support for invidious discrimination generally, and especially through participation
11 in organizations engaging in it, calls into question a judge’s integrity and impartiality,
12 and creates an appearance of impropriety.
13

14 [2] Based closely upon the first paragraph of the Commentary to Canon 2C, this
15 Comment provides guidelines—but no hard-and-fast rules—to help determine when an
16 organization engages in invidious discrimination, thus falling under the ban of Rule
17 3.6(A). The key test is a functional one: whether an excluded applicant (not possessing
18 one of the listed characteristics) *would otherwise be eligible for admission to*
19 *membership*. In addition, the Comment explains that certain organizations practicing
20 some forms of discrimination cannot be said to be practicing *invidious* or *improper*
21 discrimination, either because the discrimination is based upon rationales that are not
22 socially harmful, or because the members of the organization have a constitutional right
23 to associate without governmental interference.
24

25 Although the Commission received a large number of submissions arguing that a
26 particular organization either did or did not practice invidious discrimination, it
27 determined not to cast any judgments in stone. Policies of an organization might change
28 over time, as might the constitutional standard for judging whether an organization is
29 sufficiently “private” to be immune from governmental regulation of its membership
30 policies.
31

32 [3] This is a new Comment, replacing Commentary in the 1990 Code suggesting that
33 as an alternative to resigning, a judge might instead remain with the organization for up
34 to one year, while attempting to effect change from within. The Joint Commission chose
35 not to add such language to the text of Rule 3.6. Thus, Comment [3] requires immediate
36 resignation to comply with Rule 3.6(A).
37

38 [4] This is a new Comment, but its tenor was implicit in the Commentary to Canon
39 2C of the 1990 Code. Comment [4] makes clear that while many religious organizations
40 engage in some forms of discrimination, and some religious organizations may engage in
41 some invidious discrimination, participation by a judge in any bona fide religious
42 organization cannot be prohibited or punished by governmental authorities because of the
43 constitutional guarantee of the free exercise of religion.
44

45 [5] This is a new Comment, adopted by the Commission after receiving considerable
46 commentary and after considerable debate. Like religious organizations, military
47 organizations often engage in discrimination and sometimes engage in discrimination that
48 would be found to be invidious in other contexts. The Commission concluded, however,

1 that the practical difficulties involved in enforcing a ban on holding membership in
2 military organizations, and the necessity for uniform rules across the military services,
3 justified an interpretation that service in state and national military organizations does not
4 violate this Rule.

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1 **RULE 3.7**

2 *Participation in Educational, Religious, Charitable, Fraternal, or Civic*
3 *Organizations and Activities*

4
5 (A) Subject to the requirements of Rule 3.1, a judge may participate in
6 activities sponsored by organizations or governmental entities concerned
7 with the law, the legal system, or the administration of justice, and those
8 sponsored by or on behalf of educational, religious, charitable, fraternal, or
9 civic organizations not conducted for profit, including but not limited to the
10 following activities:

11
12 (1) assisting such an organization or entity in planning related to
13 fund-raising, and participating in the management and investment of
14 the organization's or entity's funds;

15
16 (2) soliciting* contributions* for such an organization or entity,
17 but only from members of the judge's family,* or from judges over
18 whom the judge does not exercise supervisory or appellate authority;

19
20 (3) soliciting membership for such an organization or entity, even
21 though the membership dues or fees generated may be used to
22 support the objectives of the organization or entity, but only if the
23 organization or entity is concerned with the law, the legal system, or
24 the administration of justice;

25
26 (4) appearing or speaking at, receiving an award or other
27 recognition at, being featured on the program of, and permitting his
28 or her title to be used in connection with an event of such an
29 organization or entity, but if the event serves a fund-raising purpose,
30 the judge may participate only if the event concerns the law, the legal
31 system, or the administration of justice;

32
33 (5) making recommendations to such a public or private fund-
34 granting organization or entity in connection with its programs and
35 activities, but only if the organization or entity is concerned with the
36 law, the legal system, or the administration of justice; and

37
38 (6) serving as an officer, director, trustee, or nonlegal advisor of
39 such an organization or entity, unless it is likely that the organization
40 or entity:

41
42 (a) will be engaged in proceedings that would ordinarily
43 come before the judge; or

44
45 (b) will frequently be engaged in adversary proceedings in
46 the court of which the judge is a member, or in any court

1 **subject to the appellate jurisdiction of the court of which the**
2 **judge is a member.**

3
4 **(B) A judge may encourage lawyers to provide pro bono publico legal**
5 **services.**

6
7 **COMMENT**

8
9 [1] The activities permitted by paragraph (A) generally include those sponsored by or
10 undertaken on behalf of public or private not-for-profit educational institutions, and other
11 not-for-profit organizations, including law-related, charitable, and other organizations.

12
13 [2] Even for law-related organizations, a judge should consider whether the
14 membership and purposes of the organization, or the nature of the judge’s participation in
15 or association with the organization, would conflict with the judge’s obligation to refrain
16 from activities that reflect adversely upon a judge’s independence, integrity, and
17 impartiality.

18
19 [3] Mere attendance at an event, whether or not the event serves a fund-raising
20 purpose, does not constitute a violation of paragraph 4(A). It is also generally permissible
21 for a judge to serve as an usher or a food server or preparer, or to perform similar
22 functions, at fund-raising events sponsored by educational, religious, charitable, fraternal,
23 or civic organizations. Such activities are not solicitation and do not present an element
24 of coercion or abuse the prestige of judicial office.

25
26 [4] Identification of a judge’s position in educational, religious, charitable, fraternal,
27 or civic organizations on letterhead used for fund-raising or membership solicitation does
28 not violate this Rule. The letterhead may list the judge’s title or judicial office if
29 comparable designations are used for other persons.

30
31 [5] In addition to appointing lawyers to serve as counsel for indigent parties in
32 individual cases, a judge may promote broader access to justice by encouraging lawyers
33 to participate in pro bono publico legal services, if in doing so the judge does not employ
34 coercion, or abuse the prestige of judicial office. Such encouragement may take many
35 forms, including providing lists of available programs, training lawyers to do pro bono
36 publico legal work, and participating in events recognizing lawyers who have done pro
37 bono publico work.

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RULE 3.7

REPORTER'S EXPLANATION OF CHANGES

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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. Moreover, some aspects of Canon 4C(3) were moved to Rule 3.1 because of their general applicability.

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) lead-in: 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.

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

3
4 The difference, however, as explained above in connection with the lead-in to Rule
5 3.7(A), is that the 1990 Code allowed these activities (assistance in planning fund-raising
6 and management and investment of an organization's funds) *only* in connection with
7 service as an officer, director, trustee, or nonlegal advisor, or the somewhat nebulous "as
8 a member or otherwise." In the proposed Code, these activities are permissible without
9 more, if participation in the activities of the organization or entity itself is permissible.

10
11 3. Rule 3.7(A)(2): substantially the same as the second clause of Canon 4C(3)(b)(i),
12 except added soliciting funds from family members as permissible activity.

13
14 The repositioning of this provision into one of the subparagraphs of Rule 3.7(A) has the
15 same significance as described above: it will apply to all judges who engage in this form
16 of extrajudicial activity, not just those who serve as officers, directors, and the like.
17 Judges were already permitted by the 1990 Code to solicit contributions for charities
18 from judges over whom they did not exercise supervisory or appellate authority, because
19 the element of coercion is largely missing, and there is little likelihood that the judge
20 making the contribution would be perceived as attempting to influence the judge making
21 the solicitation. The same rationales support extending permission to judges to solicit this
22 kind of contribution from their own family members.

23
24 4. Rule 3.7(A)(3): based upon some aspects of Canon 4C(3)(b)(iii), but with other
25 elements added or deleted or repositioned elsewhere in Canon 3.

26
27 The basic idea of prohibiting a judge from soliciting membership in an organization
28 where charging membership dues is essentially a fund-raising device is retained. The
29 rationale is essentially the same as that in the 1990 Code: the risk that persons contacted
30 will feel coerced into joining, or will attempt to curry favor with a sitting judge by
31 joining.

32
33 In the proposed Code, however, it is not necessary to advert specifically to the element of
34 coercion—that is covered by the cross-reference to Rule 3.1. Beyond this, the
35 Commission decided to limit the permission granted to solicit membership to
36 membership in law-related organizations—one of several places in Canon 3 where this
37 line is drawn. It was felt that solicitation of membership in a law-related organization,
38 such as a bar association or moot court society, would be perceived as more natural or
39 more appropriate than soliciting membership in a fine arts society or the American Red
40 Cross. This perception is related, at least indirectly, to the thematic requirement of
41 avoiding abuse of the prestige of judicial office. A person who loves opera or is a
42 dedicated member of an environmental protection organization, and who also happens to
43 be a judge, should not use that position as an added reason for someone else to join the
44 cause. On the other hand, it is not inappropriate for judges to use their positions as leaders
45 in the legal community to increase membership in law-related organizations.

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

1 The Code of Conduct for United States Judges provides that as a general matter, judges
2 may *not* participate in the fund-raising activities of charitable and other civic
3 organizations other than by attending, which is similar to Commentary in the 1990 Code.
4 In context, however, the federal provision appears to be limited to non-law-related
5 organizations and activities. The Commission adopted the same general stance in Rule
6 3.7(A)(4), but made the implicit exception explicit: a judge *is* permitted to be a featured
7 speaker or participant at an event that has a fund-raising purpose, *but only if the*
8 *organization or entity is a law-related one*. The rationale for making this distinction is the
9 same as that for Rule 3.7(A)(3).

10
11 6. Rule 3.7(A)(5): essentially the same as Canon 4C(3)(b)(ii) of the 1990 Code,
12 except that the authority to make recommendations to fund-granting organizations and
13 entities is not limited to officers, directors, and others directly associated with the
14 organization or entity.

15
16 This is consistent with the revised organization of Canon 3 generally, and Rule 3.7
17 specifically, as noted above in connection with the lead-in to Rule 3.7(A) and Rule
18 3.7(A)(1).

19
20 7. Rule 3.7(A)(6): essentially identical to Canon 4C(3)(a) of the 1990 Code.

21
22 In the 1990 Code, there was some redundancy between this provision and Canon 4C(3)
23 itself. The main paragraph already dealt generally with service as officer, director, and
24 the like, while subparagraph (a) dealt with restrictions on such service. Rule 3.7(A)(6)
25 makes no substantive change in the combined effect of those two provisions, but makes
26 explicit that service is allowed in both private organizations and public entities, *whether*
27 *or not they are law related*, as long as the two caveats are satisfied.

28
29 Unlike situations in which a judge is soliciting funds or members, participating as an
30 officer or a director does not present the dangers of coercion or abuse of the prestige of
31 judicial office; accordingly, neither the 1990 Code nor the proposed Code differentiate in
32 this area along that axis.

33
34 8. Rule 3.7(B): a new provision, encouraging judges to provide leadership in
35 increasing *pro bono publico* lawyering in their respective jurisdictions.

36
37 This provision is consistent with the thrust of Rule 3.7(A). It was placed in a separate
38 paragraph because paragraph (A) deals with a large variety of organizations and entities,
39 with varied goals and programs, whereas paragraph (B) refers to specific activities,
40 whether or not conducted in connection with a particular organization or entity.

41 42 43 **EXPLANATION OF COMMENTS**

44
45 [1] This new Comment clarifies that the restructuring of Rule 3.7(A) was intended to
46 make it applicable to all public and private not-for-profit organizations and entities.
47 Previously, there was some confusion about the status of public and private universities,
48 including their law schools (which are obviously law-related). Thus, it is permissible, for

1 example, for a judge to serve as a trustee of a private university (rather than merely its
2 law school), as long as it is not conducted for profit.

3
4 [2] This Comment is derived from Commentary to Canon 4C(3) of the 1990 Code,
5 but it has been thoroughly revised to provide more clarity. The revised Comment serves
6 as a reminder that participation in law-related activities is permitted more often than is
7 participation in non-law-related activities, *but that even in connection with the former*,
8 other requirements of the proposed Code may counsel caution or even abstention from
9 the activity. Obvious examples include participating in activities sponsored by
10 organizations that practice invidious discrimination, or serving as the president of a major
11 university (the time commitment associated with the latter making it impossible for a
12 judge to attend to judicial duties).

13
14 [3] This is a new Comment designed to provide a safe harbor for certain minor and
15 noncoercive activities undertaken in connection with an organization's or entity's fund-
16 raising efforts. When a judge donates time to serve food or serve as an usher or other
17 facilitator at an event, the dangers associated with direct solicitation of funds are not
18 present. It is not logical to assume that someone will make a larger donation, merely
19 because a judge is tending the barbeque pit at a charity picnic.

20
21 The Commission stopped short, however, of giving as specific examples situations
22 involving the handling of money, such as when a judge serves as ticket-taker or cashier
23 (at a charity bingo night, for example, or a charity auction). At the same time, these
24 activities were not specifically excluded, either. Whether such activities are appropriate
25 depends upon analysis of the overall event, and the significance of the judge's
26 participation. As long as there is no coercion—even subtle and unstated coercion—and as
27 long as the judge's position as a judge is not being exploited, the activity is permissible.

28
29 [4] This new Comment, responsive to new Rule 3.7(B), makes clear that judges may
30 encourage lawyers to engage in *pro bono publico* service generally, quite apart from
31 situations in which judges may appoint counsel for indigent parties in individual cases.
32 Although the Joint Commission assumed that participation in organizations that promote
33 *pro bono publico* legal services would generally be permissible under rule 3.7(A), it
34 wanted to stress the importance of such service by including a specific provision on this
35 topic.

36
37 [5] This Comment is based upon parts of the second paragraph of the Commentary to
38 Canon 4C(3)(b) of the 1990 Code, but simplified. Letterhead including a judge's name
39 and position, even when used for fund-raising or membership solicitation purposes, is not
40 coercive and does not abuse the prestige of judicial office, as long as the judge is
41 identified in the same way as other persons on the letterhead. It must be assumed, of
42 course, that the judge's service in some official position in the organization or entity is
43 itself appropriate under other provisions of Rules 3.7 and 3.1.

1 **RULE 3.8**

2 *Appointments to Fiduciary Positions*

3
4 (A) A judge shall not accept appointment to serve in a fiduciary* position,
5 such as executor, administrator, trustee, guardian, attorney in fact, or other
6 personal representative, except for the estate, trust, or person of a member of
7 the judge's family,* and then only if such service will not interfere with the
8 proper performance of judicial duties.

9
10 (B) A judge shall not serve in a fiduciary position if the judge as fiduciary
11 will likely be engaged in proceedings that would ordinarily come before the
12 judge, or if the estate, trust, or ward becomes involved in adversary
13 proceedings in the court on which the judge serves, or one under its appellate
14 jurisdiction.

15
16 (C) A judge acting in a fiduciary capacity shall be subject to the same
17 restrictions on engaging in financial activities that apply to a judge
18 personally.

19
20 **COMMENT**

21
22 [1] If a person who is serving in a fiduciary position becomes a judge, he or she must
23 comply with this Rule as soon as reasonably practicable, but in no event later than one
24 year after becoming a judge. See Application section, Part VI.

25
26 [2] A judge should recognize that other restrictions imposed by this Code may
27 conflict with a judge's obligations as a fiduciary; in such circumstances, a judge should
28 resign as fiduciary. For example, serving as a fiduciary might require frequent
29 disqualification of a judge under Rule 2.11 because a judge is deemed to have an
30 economic interest in shares of stock held by a trust if the amount of stock held is more
31 than de minimis.

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RULE 3.8
REPORTER'S EXPLANATION OF CHANGES

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The "Reporters' Explanations of Changes" have not been approved by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. They have been 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 prior to their being considered at the ABA 2007 Midyear Meeting. **THEY ARE NOT TO BE ADOPTED AS PART OF THE MODEL CODE.**

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1990 MODEL CODE COMPARISON

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

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

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

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Comment [1] is based upon the first paragraph of the Commentary to Canon 4E, modified only in relation to the timing of the applicability of the Rule.

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Comment [2] is similar to the second paragraph of Commentary to Canon 4E, but recast.

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EXPLANATION OF BLACK LETTER

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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 at 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.

1 **EXPLANATION OF COMMENTS**

2
3 [1] There is no significant change from the first paragraph of the 1990 Commentary.
4 The purpose in each case is to cross-reference the Application section, to determine when
5 a newly elected or appointed judge, who is *already* serving in a fiduciary capacity, must
6 comply with this Rule.

7
8 [2] This is a slight recasting of the second paragraph of the 1990 Commentary. The
9 Comment serves as a reminder that in addition to the restrictions set forth in Rule 3.8,
10 other provisions of the proposed Code may implicate the permissibility of serving in a
11 fiduciary capacity. For example, if serving as a fiduciary (even for a family member,
12 which is generally permitted) would cause the judge frequently to be disqualified under
13 Rule 2.11, the judge must resign as fiduciary to avoid violation of Rule 3.1(B).

1 **RULE 3.9**

2 *Service as Arbitrator or Mediator*

3
4 **A judge shall not act as an arbitrator or a mediator or perform other judicial**
5 **functions apart from the judge’s official duties unless expressly authorized by law.***

6
7 **COMMENT**

8
9 [1] This Rule does not prohibit a judge from participating in arbitration, mediation, or
10 settlement conferences performed as part of assigned judicial duties. Rendering dispute
11 resolution services apart from those duties, whether or not for economic gain, is
12 prohibited unless it is expressly authorized by law.

1 **RULE 3.9**

2 **REPORTER'S EXPLANATION OF CHANGES**

3
4 **The "Reporters' Explanations of Changes" have not been approved by the ABA**
5 **Joint Commission to Evaluate the Model Code of Judicial Conduct. They have been**
6 **drafted by the Commission's Reporters, based on the proceedings and record of the**
7 **Commission, solely to inform the ABA House of Delegates about each of the**
8 **proposed amendments to the Model Code prior to their being considered at the**
9 **ABA 2007 Midyear Meeting. THEY ARE NOT TO BE ADOPTED AS PART OF**
10 **THE MODEL CODE.**

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12 **1990 MODEL CODE COMPARISON**

13
14 Rule 3.9 is based upon Canon 4F, slightly recast.

15
16 Comment [1] is the same as the Commentary to Canon 4F, except that an additional
17 sentence was added.

18
19 **EXPLANATION OF BLACK LETTER**

20
21 1. Rule 3.9: changed the phrase "in a private capacity" to "apart from the judge's
22 official duties," and slightly revised the text in other respects.

23
24 The only substantive change was made in recognition of the fact that a judge could be
25 called upon to provide dispute resolution services *for another governmental entity*. Thus,
26 the phrase "in a private capacity" was deemed to be too narrow.

27
28 **EXPLANATION OF COMMENTS**

29
30
31 [1] The first sentence of this Comment is carried forward from the 1990
32 Commentary. The second sentence explains that the prohibition extends to judges going
33 outside their regular judicial duties to assist in dispute resolution, whether or not for
34 economic gain, unless doing so is expressly authorized by law, such as by court rule.

35
36 The Commission heard testimony and received comments on this issue. Some objected
37 that allowing judges to participate in private "rent-a-judge" programs for economic gain
38 would allow judges to trade on their status as judges, thus abusing the prestige of judicial
39 office. Others expressed concern that allowing judges to routinely perform extrajudicial
40 "judicial" services, even without compensation, could create public confusion about the
41 role of the judiciary as an independent branch of the government, thus diminishing
42 respect for the judicial system. Still others were concerned that extrajudicial participation
43 even in *pro bono publico* mediation and arbitration could distract judges from their
44 primary obligations.

45
46 Several judges stated their support for permitting judges to provide alternative dispute
47 resolution services to other court systems or to private parties, but without compensation.

1 In their view, this would provide an important public service to the community,
2 demystify the law, and integrate judges into the community as Canon 3 encourages.

3
4 The Commission continued the proscription of Canon 4F of the 1990 Code that all such
5 activities are prohibited, whether or not compensation is involved, but that courts or
6 jurisdictions could authorize such activities as conditions warrant.

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1 **RULE 3.10**

2 *Practice of Law*

3
4 **A judge shall not practice law. A judge may act pro se and may, without**
5 **compensation, give legal advice to and draft or review documents for a member of**
6 **the judge's family,* but is prohibited from serving as the family member's lawyer in**
7 **any forum.**

8
9 **COMMENT**

10
11 [1] A judge may act pro se in all legal matters, including matters involving litigation
12 and matters involving appearances before or other dealings with governmental bodies. A
13 judge must not use the prestige of office to advance the judge's personal or family
14 interests. See Rule 1.3.

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RULE 3.10
REPORTER’S EXPLANATION OF CHANGES

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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, replacing “notwithstanding” with “except that.”
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, where it is more appropriate. 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” was replaced with “A judge must not use the prestige of office to advance.” No substantive change is intended.

1 **RULE 3.11**

2 *Financial, Business, or Remunerative Activities*

3
4 (A) A judge may hold and manage investments of the judge and members
5 of the judge's family.*

6
7 (B) A judge shall not serve as an officer, director, manager, general
8 partner, advisor, or employee of any business entity except that a judge may
9 manage or participate in:

10
11 (1) a business closely held by the judge or members of the judge's
12 family; or

13
14 (2) a business entity primarily engaged in investment of the
15 financial resources of the judge or members of the judge's family.

16
17 (C) A judge shall not engage in financial activities permitted under
18 paragraphs (A) and (B) if they will:

19
20 (1) interfere with the proper performance of judicial duties;

21
22 (2) lead to frequent disqualification of the judge;

23
24 (3) involve the judge in frequent transactions or continuing
25 business relationships with lawyers or other persons likely to come
26 before the court on which the judge serves; or

27
28 (4) result in violation of other provisions of this Code.
29

30 **COMMENT**

31
32 [1] Judges are generally permitted to engage in financial activities, including
33 managing real estate and other investments for themselves or for members of their
34 families. Participation in these activities, like participation in other extrajudicial
35 activities, is subject to the requirements of this Code. For example, it would be improper
36 for a judge to spend so much time on business activities that it interferes with the
37 performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge
38 to use his or her official title or appear in judicial robes in business advertising, or to
39 conduct his or her business or financial affairs in such a way that disqualification is
40 frequently required. See Rules 1.3 and 2.11.

41
42 [2] As soon as practicable without serious financial detriment, the judge must divest
43 himself or herself of investments and other financial interests that might require frequent
44 disqualification or otherwise violate this Rule.
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RULE 3.11
REPORTER'S EXPLANATION OF CHANGES

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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.

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

6
7 Two alternatives were considered, but not adopted. First, it would have been possible to
8 allow judges broadly to engage in remunerative extrajudicial activities, as long as they
9 did not interfere with the performance of judicial duties, lead to frequent disqualification,
10 or otherwise violate the prohibitions found in Rule 3.11(C). The other possibility would
11 have been to eliminate the family business exception and to require all judges to divest
12 themselves of any interests in the family business when ascending the bench. The
13 Commission elected to maintain the status quo of the 1990 Code as a reasonable middle
14 ground.

15
16 3. Rule 3.11(C) is a new provision that gathers in one place some of the caveats
17 about extrajudicial financial activities found throughout Canon 4D of the 1990 Code,
18 while adding additional caveats. These caveats are meant to apply as restrictions on
19 otherwise permissible activities.

20
21 The specific language of Rule 3.11(C)(1) is taken from the fourth paragraph of the
22 Commentary to Canon 4D(1); the concept is also drawn in part from the second
23 paragraph of the Commentary to Canon 4D(3): otherwise appropriate business activities
24 (falling within the family business exception) would become improper if “participation
25 requires significant time away from judicial duties.”

26
27 Rule 3.11(C)(2) is a paraphrase of Canon 4D(4), which requires a judge to minimize the
28 number of cases in which the judge is disqualified. The phraseology used in the proposed
29 Code, “will lead to frequent disqualification of the judge,” is used elsewhere in the
30 Code—most significantly for present purposes in Rule 3.1(B).

31
32 Rule 3.11(C)(3) is taken from Canon 4D(1)(b), and Rule 3.11(C)(4) is a catchall that
33 makes some other caveats found in Canon 4D unnecessary. For example, the Canon
34 4D(1)(a) provision, “may reasonably be perceived to exploit the judge’s judicial
35 position,” was not retained in the proposed Code, because of the prohibition against
36 abusing the prestige of judicial office already found in Rule 1.3.

37 38 **EXPLANATION OF COMMENTS**

39
40 [1] This Comment is new, but restates the rationale of several of the provisions
41 gathered into Rule 3.11(C), giving some practical examples.

42 [2] This Comment is new, but is essentially the same as the black letter text of Canon
43 4D(4).

1 **RULE 3.12**

2 *Compensation for Extrajudicial Activities*

3
4 **A judge may accept reasonable compensation for extrajudicial activities permitted**
5 **by this Code or other law* unless such acceptance would appear to a reasonable**
6 **person to undermine the judge’s independence,* integrity,* or impartiality.***

7
8 **COMMENT**

9
10 [1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties,
11 or other compensation for speaking, teaching, writing, and other extrajudicial activities,
12 provided the compensation is reasonable and commensurate with the task performed. The
13 judge should be mindful, however, that judicial duties must take precedence over other
14 activities. See Rule 2.1.

15
16 [2] Compensation derived from extrajudicial activities may be subject to public
17 reporting. See Rule 3.15.

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RULE 3.12
REPORTER'S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

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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.)

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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.

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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

1 throughout Canon 3 of the proposed Code: “would appear to a reasonable person to
2 undermine the judge’s independence, integrity, or impartiality.”
3
4

5 **EXPLANATION OF COMMENTS**
6

7 [1] This Comment is new, but is based in part upon some of the language in Canon
8 4H of the 1990 Code and Rule 3.12 of the proposed Code.
9

10 [2] This Comment is new, and makes a cross-reference to the public reporting
11 requirement. Some aspects of public reporting were treated in Canon 4H(2), but now all
12 are treated in Rule 3.15.
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1 **RULE 3.13**

2 *Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other*
3 *Things of Value*

4
5 (A) A judge shall not accept any gifts, loans, bequests, benefits, or other
6 things of value, if acceptance is prohibited by law* or would appear to a
7 reasonable person to undermine the judge's independence,* integrity,* or
8 impartiality.*

9
10 (B) Unless otherwise prohibited by law, or by paragraph (A), a judge may
11 accept the following without publicly reporting such acceptance:

12
13 (1) items with little intrinsic value, such as plaques, certificates,
14 trophies, and greeting cards;

15
16 (2) gifts, loans, bequests, benefits, or other things of value from
17 friends, relatives, or other persons, including lawyers, whose
18 appearance or interest in a proceeding pending* or impending*
19 before the judge would in any event require disqualification of the
20 judge under Rule 2.11;

21
22 (3) ordinary social hospitality;

23
24 (4) commercial or financial opportunities and benefits, including
25 special pricing and discounts, and loans from lending institutions in
26 their regular course of business, if the same opportunities and benefits
27 or loans are made available on the same terms to similarly situated
28 persons who are not judges;

29
30 (5) rewards and prizes given to competitors or participants in
31 random drawings, contests, or other events that are open to persons
32 who are not judges;

33
34 (6) scholarships, fellowships, and similar benefits or awards, if
35 they are available to similarly situated persons who are not judges,
36 based upon the same terms and criteria;

37
38 (7) books, magazines, journals, audiovisual materials, and other
39 resource materials supplied by publishers on a complimentary basis
40 for official use; or

41
42 (8) gifts, awards, or benefits associated with the business,
43 profession, or other separate activity of a spouse, a domestic partner,*
44 or other family member of a judge residing in the judge's household,*
45 but that incidentally benefit the judge.

1 **(C) Unless otherwise prohibited by law or by paragraph (A), a judge may**
2 **accept the following items, and must report such acceptance to the extent**
3 **required by Rule 3.15:**

4
5 **(1) gifts incident to a public testimonial;**

6
7 **(2) invitations to the judge and the judge’s spouse, domestic**
8 **partner, or guest to attend without charge:**

9
10 **(a) an event associated with a bar-related function or other**
11 **activity relating to the law, the legal system, or the**
12 **administration of justice; or**

13
14 **(b) an event associated with any of the judge’s educational,**
15 **religious, charitable, fraternal or civic, activities permitted by**
16 **this Code, if the same invitation is offered to nonjudges who**
17 **are engaged in similar ways in the activity as is the judge; and**

18
19 **(3) gifts, loans, bequests, benefits, or other things of value, if the**
20 **source is a party or other person, including a lawyer, who has come or**
21 **is likely to come before the judge, or whose interests have come or are**
22 **likely to come before the judge.**

23
24 **(D) A judge shall urge a spouse, a domestic partner, or members of the**
25 **judge’s family residing in the judge’s household not to accept gifts or other**
26 **things of value that the judge is prohibited from accepting.**

27
28 **COMMENT**

29
30 [1] Whenever a judge accepts a gift or other thing of value without paying fair market
31 value, there is a risk that the benefit might be viewed as intended to influence the judge’s
32 decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits,
33 according to the magnitude of the risk. Paragraph (B) identifies circumstances in which
34 the risk that the acceptance would appear to undermine the judge’s independence,
35 integrity, or impartiality is low, and explicitly provides that such items need not be
36 publicly reported. As the value of the benefit or the likelihood that the source of the
37 benefit will appear before the judge increases, the judge is either prohibited under
38 paragraph (A) from accepting the gift, or required under paragraph (C) to publicly report
39 it.

40
41 [2] Gift-giving between friends and relatives is a common occurrence, and ordinarily
42 does not create an appearance of impropriety or cause reasonable persons to believe that
43 the judge’s independence, integrity, or impartiality has been compromised. In addition,
44 when the appearance of friends or relatives in a case would require the judge’s
45 disqualification under Rule 2.11, there would be no opportunity for a gift to influence the
46 judge’s decision making. Paragraph (B)(2) places no restrictions upon the ability of a

1 judge to accept gifts or other things of value from friends or relatives under these
2 circumstances, and does not require public reporting.

3
4 [3] Businesses and financial institutions frequently make available special pricing,
5 discounts, and other benefits, either in connection with a temporary promotion or for
6 preferred customers, based upon longevity of the relationship, volume of business
7 transacted, and other factors. A judge may freely accept such benefits if they are available
8 to the general public, or if the judge qualifies for the special price or discount according
9 to the same criteria as are applied to persons who are not judges. As an example, loans
10 provided at generally prevailing interest rates are not gifts, but a judge could not accept a
11 loan from a financial institution at below-market interest rates unless the same rate was
12 being made available to the general public for a certain period of time or only to
13 borrowers with specified qualifications that the judge also possesses.

14
15 [4] If a gift or other benefit is given to a judge's spouse, domestic partner, or member
16 of the judge's family residing in the judge's household, it might be viewed as an attempt
17 to evade the restrictions of Rule 3.13 and to influence the judge indirectly. Therefore, a
18 judge must inform these individuals of the ethical limitations placed upon the judge in
19 this regard and discourage them from accepting gifts or other benefits that the judge
20 cannot accept. The situation is different when the gift is being made primarily to the other
21 person, and the judge is merely an incidental beneficiary.

22
23 [5] Rule 3.13 does not apply to contributions to a judge's campaign for judicial
24 office. Such contributions are governed by other Rules of this Code, including Rules 4.3
25 and 4.4.

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RULE 3.13
REPORTER'S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

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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.

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EXPLANATION OF BLACK LETTER

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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."

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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).

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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).

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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.

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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

1 requires judges to evaluate their conduct as would a “reasonable person” subject to later
2 oversight by disciplinary authorities.

3
4 2. Rule 3.13(B): established a “tier” of gifts and other things of value that may be
5 accepted without limitation and without public reporting, drawing several items from the
6 exceptions set forth in the subsections of Canon 5D(5), but with an eye toward
7 classifying them according to the proposed new organizational scheme.

8
9 In the 1990 Code, the exceptions to the basic rule were set out serially, without further
10 classification, and—except in the catchall provision of Canon 5D(5)(h)—without
11 advertent to whether public reporting was a condition of acceptance. The Commission
12 has now gathered in Rule 3.13(B) the items that are sufficiently non-threatening to the
13 integrity of the judicial system as to warrant no further regulation.

14
15 For example, subparagraphs (4), (5), and (6) deal with situations in which the listed
16 benefits are equally available to similarly situated persons who are not judges, thus
17 allaying any fears that the benefit is being extended to influence the judge’s decision-
18 making or to curry favor with the judge. Subparagraph (2) is similar to Canon 4D(5)(e),
19 but clarifies the category. If a person’s appearance or interest in a case pending or
20 impending before a particular judge would require the disqualification of the judge, then
21 any gift or favor from that person could not influence the judge—because by definition
22 the judge would no longer be sitting on the case.

23
24 3. Rule 3.13(C): establishes the third “tier” of items that may be accepted by a judge.
25 These items, while not causing a reasonable person to believe that the judge’s
26 independence, integrity, or impartiality would be undermined, are of sufficient concern
27 that public reporting is required.

28
29 Placement of these items in Rule 3.13(C) rather than paragraphs (A) or (B) represents the
30 Commission’s assessment of the level of concern that may attend the acceptance of
31 various benefits. In subparagraph (C)(2), for example, the judgment was made that the
32 gift of a free ticket to attend a law-related event must be reported, so that others might be
33 able to assess whether a particular judge had a particularly close association with a
34 particular bar association or organization. On the other hand, if a judge is invited to
35 attend, free of charge, an event sponsored by a non-law-related organization, the judge
36 cannot accept *at all* unless the additional condition of equal treatment is met. If that
37 condition is met, however, then public reporting should be sufficient to allay concerns
38 about possible lack of impartiality. (This distinction between events and organizations
39 that are or are not law-related is another theme that occurs throughout Canon 3.)

40
41 Rule 3.13(C)(3) addresses the same issue as Canon 4D(5)(h), but according to a more
42 discriminating analysis. Under the 1990 Code, a judge cannot accept any gift or favor
43 from a lawyer or party who has come or is likely to come before the judge. (The further
44 requirement of publicly reporting items over \$150 appears to apply to other gifts, not the
45 above.) If this means to impose a lifetime ban once a lawyer or the lawyer’s firm “has
46 appeared” before the judge, it appears to be more stringent than necessary, and
47 unworkable in practice, as a judge’s career lengthens.

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

8
9 4. Rule 3.13(D) is substantially similar to Canon 4D(5), except for the addition of
10 the terms “spouse” and “domestic partner,” and a new reference to “other things of
11 value.”

12
13 No significant substantive change is intended. These adjustments conform this Rule to
14 other usages.

15
16 **EXPLANATION OF COMMENTS**

17
18 [1] This is a new Comment, explaining the three-tiered approach and its rationale.

19
20 [2] This is a new Comment, explaining the classification in Rule 3.13 of gifts and
21 other things of value given to a judge. This subject was treated in both Canon 4D(5)(d)
22 (gifts for special occasions) and Canon 4D(5)(e) (judge would be disqualified in any
23 event), but without an explanation of the rationale. Rule 3.13(B)(2) does not distinguish
24 between different types of gifts from this category of donor, and Comment [2] provides
25 the common rationale.

26
27 [3] This is a new Comment, providing the rationale for and giving a concrete example
28 of the principle that acceptance of benefits and other things of value that are generally
29 available to non-judges on the same basis as they are available to judges causes no ethical
30 concerns; accordingly, these items may be accepted, without public reporting.

31
32 [4] This Comment builds on Canon 4D(5) and Rule 3.13(D), which replaced it. The
33 point in both instances is that while a code of judicial ethics cannot directly bind family
34 members and others close to a judge, it is still obligatory for a judge to urge such
35 individuals not to put the judge in a difficult position by accepting gifts and benefits that
36 the judge could not, because others might perceive the benefit as intended for the judge,
37 but given indirectly.

38
39 Comment [4] adds discussion of a contrasting scenario, however, which is new. Rule
40 3.13(B)(8) states that when a gift or other benefit is given to a family member, because of
41 the family member’s business or other activities, and the judge benefits merely
42 incidentally, concern that the judge is being influenced or importuned is no longer
43 reasonable, and those gifts need not be reported by the judge. Comment [4] explains the
44 rationale for this new provision.

45
46 [5] This Comment paraphrases the first paragraph of the Commentary following
47 Canon 4D(5). The Comment thus makes clear that gifts, donations, or contributions to a

1 judge's campaign for judicial office are governed entirely by Canon 4, which includes
2 regulation of campaign committees.

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1 **RULE 3.14**

2 *Reimbursement of Expenses and Waivers of Fees or Charges*

3
4 (A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law,* a
5 judge may accept reimbursement of necessary and reasonable expenses for
6 travel, food, lodging, or other incidental expenses, or a waiver or partial
7 waiver of fees or charges for registration, tuition, and similar items, from
8 sources other than the judge's employing entity, if the expenses or charges
9 are associated with the judge's participation in extrajudicial activities
10 permitted by this Code.

11
12 (B) Reimbursement of expenses for necessary travel, food, lodging, or
13 other incidental expenses shall be limited to the actual costs reasonably
14 incurred by the judge and, when appropriate to the occasion, by the judge's
15 spouse, domestic partner,* or guest.

16
17 (C) A judge who accepts reimbursement of expenses or waivers or partial
18 waivers of fees or charges on behalf of the judge or the judge's spouse,
19 domestic partner, or guest shall publicly report such acceptance as required
20 by Rule 3.15.

21
22 **COMMENT**

23
24 [1] Educational, civic, religious, fraternal, and charitable organizations often sponsor
25 meetings, seminars, symposia, dinners, awards ceremonies, and similar events. Judges are
26 encouraged to attend educational programs, as both teachers and participants, in law-
27 related and academic disciplines, in furtherance of their duty to remain competent in the
28 law. Participation in a variety of other extrajudicial activity is also permitted and
29 encouraged by this Code.

30
31 [2] Not infrequently, sponsoring organizations invite certain judges to attend
32 seminars or other events on a fee-waived or partial-fee-waived basis, and sometimes
33 include reimbursement for necessary travel, food, lodging, or other incidental expenses.
34 A judge's decision whether to accept reimbursement of expenses or a waiver or partial
35 waiver of fees or charges in connection with these or other extrajudicial activities must be
36 based upon an assessment of all the circumstances. The judge must undertake a
37 reasonable inquiry to obtain the information necessary to make an informed judgment
38 about whether acceptance would be consistent with the requirements of this Code.

39
40 [3] A judge must assure himself or herself that acceptance of reimbursement or fee
41 waivers would not appear to a reasonable person to undermine the judge's independence,
42 integrity, or impartiality. The factors that a judge should consider when deciding whether
43 to accept reimbursement or a fee waiver for attendance at a particular activity include:

44
45 (a) whether the sponsor is an accredited educational institution or bar
46 association rather than a trade association or a for-profit entity;

- 1 (b) whether the funding comes largely from numerous contributors rather than
2 from a single entity and is earmarked for programs with specific content;
- 3 (c) whether the content is related or unrelated to the subject matter of
4 litigation pending or impending before the judge, or to matters that are likely to
5 come before the judge;
- 6 (d) whether the activity is primarily educational rather than recreational, and
7 whether the costs of the event are reasonable and comparable to those associated
8 with similar events sponsored by the judiciary, bar associations, or similar groups;
- 9 (e) whether information concerning the activity and its funding sources is
10 available upon inquiry;
- 11 (f) whether the sponsor or source of funding is generally associated with
12 particular parties or interests currently appearing or likely to appear in the judge's
13 court, thus possibly requiring disqualification of the judge under Rule 2.11;
- 14 (g) whether differing viewpoints are presented; and
- 15 (h) whether a broad range of judicial and nonjudicial participants are invited,
16 whether a large number of participants are invited, and whether the program is
17 designed specifically for judges.
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RULE 3.14
REPORTER'S EXPLANATION OF CHANGES

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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 5(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

1 Commission concluded that separating reimbursement and waivers for treatment in this
2 way makes Canon 3 more readable and easier to follow. Moreover, treatment in a
3 separate Rule allows more careful attention to be paid to whether the invitation to attend
4 should be accepted at all.
5

6 Although Rule 3.14 applies to events other than privately funded educational seminars,
7 much of the testimony and comments received by the Commission focused upon that
8 subject. In the Commission’s view, judicial education of all kinds is of great value; it
9 helps keep judges current on recent developments, alerts them to future trends, and
10 exposes them to new ways of thinking about the law. Moreover, there was recognition
11 that judicial budgets may not always be adequate to support educational opportunities for
12 judges. For that reason, Rule 3.14—like Canon 4H(1)—permits judges to accept
13 reimbursement for reasonably necessary expenses associated with otherwise permissible
14 extrajudicial activities, and further permits acceptance of waivers of otherwise applicable
15 fees or charges.
16

17 A critical aspect of Canon 4H(1) is that permission to accept benefits in connection with
18 extrajudicial activities is conditioned upon the acceptance not giving the appearance of
19 influencing the judge in the performance of judicial duties and not otherwise creating the
20 appearance of impropriety. Rule 3.14 carries this condition forward, for both
21 reimbursements and waivers of fees and charges, but uses language more in harmony
22 with other parts of Canon 3 and the rest of the Model Code. Thus, by cross-referencing
23 Rules 3.1 and 3.13(A), Rule 3.14(A) makes clear that a judge may not accept the
24 proffered benefits if doing so would appear to a reasonable person to undermine the
25 judge’s independence, integrity, or impartiality, or if accepting would, for example, lead
26 to frequent disqualification or otherwise interfere with the proper performance of the
27 judge’s judicial duties.
28

29 2. Rule 3.14(B) is substantially the same as Canon 4H(1)(b) of the 1990 Code,
30 except that it applies to both reimbursements and waivers of fees and charges, and applies
31 to an accompanying domestic partner as well as to a spouse or guest.
32

33 3. Rule 3.14(C) is similar to the public reporting requirement set out in Canon
34 4H(2), except that it applies to reimbursements and waivers rather than compensation. In
35 addition, the actual mechanism for reporting is not contained in Rule 3.14(C) itself; the
36 Rule instead cross-references Rule 3.15, which describes all the public reporting required
37 by various Rules in Canon 3.
38

39 **EXPLANATION OF COMMENTS**

40

41 [1] This is a new Comment, stating the rationale for allowing judges to accept these
42 two forms of benefits, and also making clear that Rule 3.14 can apply to any permissible
43 extrajudicial activity, not just privately funded educational programs.
44

45 [2] This is a new Comment focusing attention upon educational programs
46 specifically. Not only must a judge consider whether accepting an invitation to attend on
47 an expenses-paid or fee-waived basis would be proper (under Rules 3.1, 3.13(A), and

1 3.14(A)), but the judge also has an affirmative duty to make reasonable inquiry into the
2 factors that should inform that decision.

3
4 Near the end of its deliberations, the Commission became aware of guidelines newly
5 issued by the Judicial Conference of the United States on this subject. The Guidelines
6 delineate a process for helping judges make the inquiry just noted. Any program that
7 wishes to invite judges to attend on a cost-free basis is required to provide considerable
8 information about funding, sponsorship, and program content in advance, and have this
9 information available to judges receiving an invitation. The Commission thought this
10 “pre-registration” approach had merit, but considered the possibility that it would be
11 more difficult to implement throughout all the state jurisdictions, as opposed to in the
12 single federal jurisdiction for which it was designed. Thus the Commission thought it
13 more prudent to wait until the operation of the federal program could be assessed.

14
15 [3] This is a new Comment that provides guidance to judges in making the
16 determination required by Rule 3.14(A), as explained in Comment [2]. It is founded on
17 revised Advisory Opinion 67 of the Committee on Codes of Conduct of the Judicial
18 Conference of the United States. The factors identified in Opinion 67 can usefully be
19 employed by each judge who has been issued an invitation to attend a cost-free event and
20 is considering whether to accept.

1 **RULE 3.15**

2 ***Reporting Requirements***

3
4 (A) A judge shall publicly report the amount or value of:

5
6 (1) compensation received for extrajudicial activities as permitted
7 by Rule 3.12;

8
9 (2) gifts and other things of value as permitted by Rule 3.13(C),
10 unless the value of such items, alone or in the aggregate with other
11 items received from the same source in the same calendar year, does
12 not exceed \$[insert amount]; and

13
14 (3) reimbursement of expenses and waiver of fees or charges
15 permitted by Rule 3.14(A), unless the amount of reimbursement or
16 waiver, alone or in the aggregate with other reimbursements or
17 waivers received from the same source in the same calendar year,
18 does not exceed \$[insert amount].

19
20 (B) When public reporting is required by paragraph (A), a judge shall
21 report the date, place, and nature of the activity for which the judge received
22 any compensation; the description of any gift, loan, bequest, benefit, or other
23 thing of value accepted; and the source of reimbursement of expenses or
24 waiver or partial waiver of fees or charges.

25
26 (C) The public report required by paragraph (A) shall be made at least
27 annually, except that for reimbursement of expenses and waiver or partial
28 waiver of fees or charges, the report shall be made within thirty days
29 following the conclusion of the event or program.

30
31 (D) Reports made in compliance with this Rule shall be filed as public
32 documents in the office of the clerk of the court on which the judge serves or
33 other office designated by law,* and, when technically feasible, posted on the
34 website of that court or office.

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RULE 3.15
REPORTER'S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

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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.

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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.

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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.

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

5
6 2. Rule 3.15(B) provides a list of what must be reported when reporting is required
7 under paragraph (A).

8
9 3. Rule 3.15(C) addresses the frequency of mandatory public reporting.

10
11 The requirement of reporting no less frequently than annually is consistent with Canon
12 4H(2) of the 1990 Code. Reporting in connection with reimbursements and waivers of
13 fees or charges, however, is required within thirty days of the underlying event, not on a
14 calendar-based schedule.

15
16 The Commission borrowed this special reporting requirement from the guidelines
17 recently issued by the Judicial Conference of the United States. Such a requirement can
18 be implemented immediately, is responsive to the need for transparency, and should not
19 be overly burdensome to judges. In situations involving reimbursement in particular, a
20 judge will have to gather receipts for submission to the reimbursing entity, which can be
21 used to satisfy the public reporting requirement. With respect to fee waivers, a judge
22 should be able to obtain a statement of what the fees or charges would have been for a
23 person who was not being offered a waiver. As this requirement becomes better known, it
24 is likely that the sponsoring entity granting the waiver will develop this information and
25 provide the requisite statement as a matter of course.

26
27 4. Rule 3.15(D) directs that the reports required by Rule 3.15 be located in a central
28 place and made accessible to the public to ensure transparency. It tracks Canon 4H(2),
29 except that it calls for posting on the appropriate website when feasible, to facilitate
30 public access.

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CANON 4

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**A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR
CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR
IMPARTIALITY OF THE JUDICIARY.**

CANON 4
REPORTER'S EXPLANATION OF CHANGES

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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 *Minnesota Republican Party 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.

1 **RULE 4.1**

2 *Political and Campaign Activities of Judges and Judicial Candidates in*
3 *General*

4
5 (A) Except as permitted by law,* or by Rules 4.2, 4.3, and 4.4, a judge or a
6 judicial candidate* shall not:

- 7
8 (1) act as a leader in, or hold an office in, a political organization;*
- 9
10 (2) make speeches on behalf of a political organization;
- 11
12 (3) publicly endorse or oppose a candidate for any public office;
- 13
14 (4) solicit funds for, pay an assessment to, or make a contribution*
15 to a political organization or a candidate for public office;
- 16
17 (5) attend or purchase tickets for dinners or other events
18 sponsored by a political organization or a candidate for public office;
- 19
20 (6) publicly identify himself or herself as a candidate of a political
21 organization;
- 22
23 (7) seek, accept, or use endorsements from a political
24 organization;
- 25
26 (8) personally solicit* or accept campaign contributions other than
27 through a campaign committee authorized by Rule 4.4;
- 28
29 (9) use or permit the use of campaign contributions for the private
30 benefit of the judge, the candidate, or others;
- 31
32 (10) use court staff, facilities, or other court resources in a
33 campaign for judicial office;
- 34
35 (11) knowingly,* or with reckless disregard for the truth, make any
36 false or misleading statement;
- 37
38 (12) make any statement that would reasonably be expected to
39 affect the outcome or impair the fairness of a matter pending* or
40 impending* in any court; or
- 41
42 (13) in connection with cases, controversies, or issues that are likely
43 to come before the court, make pledges, promises, or commitments
44 that are inconsistent with the impartial* performance of the
45 adjudicative duties of judicial office.
- 46

1 **(B) A judge or judicial candidate shall take reasonable measures to**
2 **ensure that other persons do not undertake, on behalf of the judge or judicial**
3 **candidate, any activities prohibited under paragraph (A).**
4

5 **COMMENT**

6
7 GENERAL CONSIDERATIONS

8
9 [1] Even when subject to public election, a judge plays a role different from that of a
10 legislator or executive branch official. Rather than making decisions based upon the
11 expressed views or preferences of the electorate, a judge makes decisions based upon the
12 law and the facts of every case. Therefore, in furtherance of this interest, judges and
13 judicial candidates must, to the greatest extent possible, be free and appear to be free
14 from political influence and political pressure. This Canon imposes narrowly tailored
15 restrictions upon the political and campaign activities of all judges and judicial
16 candidates, taking into account the various methods of selecting judges.

17
18 [2] When a person becomes a judicial candidate, this Canon becomes applicable to
19 his or her conduct.

20
21 PARTICIPATION IN POLITICAL ACTIVITIES

22
23 [3] Public confidence in the independence and impartiality of the judiciary is eroded
24 if judges or judicial candidates are perceived to be subject to political influence. Although
25 judges and judicial candidates may register to vote as members of a political party, they
26 are prohibited by paragraph (A)(1) from assuming leadership roles in political
27 organizations.

28
29 [4] Paragraphs (A)(2) and (A)(3) prohibit judges and judicial candidates from making
30 speeches on behalf of political organizations or publicly endorsing or opposing
31 candidates for public office, respectively, to prevent them from abusing the prestige of
32 judicial office to advance the interests of others. See Rule 1.3. These Rules do not
33 prohibit candidates from campaigning on their own behalf, or from endorsing or
34 opposing candidates for the same judicial office for which they are running. See Rules
35 4.2(B)(2) and 4.2(B)(3).

36
37 [5] Although members of the families of judges and judicial candidates are free to
38 engage in their own political activity, including running for public office, there is no
39 “family exception” to the prohibition in paragraph (A)(3) against a judge or candidate
40 publicly endorsing candidates for public office. A judge or judicial candidate must not
41 become involved in, or publicly associated with, a family member’s political activity or
42 campaign for public office. To avoid public misunderstanding, judges and judicial
43 candidates should take, and should urge members of their families to take, reasonable
44 steps to avoid any implication that they endorse any family member’s candidacy or other
45 political activity.

46

1 [6] Judges and judicial candidates retain the right to participate in the political
2 process as voters in both primary and general elections. For purposes of this Canon,
3 participation in a caucus-type election procedure does not constitute public support for or
4 endorsement of a political organization or candidate, and is not prohibited by paragraphs
5 (A)(2) or (A)(3).

6
7 STATEMENTS AND COMMENTS MADE DURING A CAMPAIGN FOR JUDICIAL OFFICE
8

9 [7] Judicial candidates must be scrupulously fair and accurate in all statements made
10 by them and by their campaign committees. Paragraph (A)(11) obligates candidates and
11 their committees to refrain from making statements that are false or misleading, or that
12 omit facts necessary to make the communication considered as a whole not materially
13 misleading.

14
15 [8] Judicial candidates are sometimes the subject of false, misleading, or unfair
16 allegations made by opposing candidates, third parties, or the media. For example, false
17 or misleading statements might be made regarding the identity, present position,
18 experience, qualifications, or judicial rulings of a candidate. In other situations, false or
19 misleading allegations may be made that bear upon a candidate's integrity or fitness for
20 judicial office. As long as the candidate does not violate paragraphs (A)(11), (A)(12), or
21 (A)(13), the candidate may make a factually accurate public response. In addition, when
22 an independent third party has made unwarranted attacks on a candidate's opponent, the
23 candidate may disavow the attacks, and request the third party to cease and desist.

24
25 [9] Subject to paragraph (A)(12), a judicial candidate is permitted to respond directly
26 to false, misleading, or unfair allegations made against him or her during a campaign,
27 although it is preferable for someone else to respond if the allegations relate to a pending
28 case.

29
30 [10] Paragraph (A)(12) prohibits judicial candidates from making comments that
31 might impair the fairness of pending or impending judicial proceedings. This provision
32 does not restrict arguments or statements to the court or jury by a lawyer who is a judicial
33 candidate, or rulings, statements, or instructions by a judge that may appropriately affect
34 the outcome of a matter.

35
36 PLEDGES, PROMISES, OR COMMITMENTS INCONSISTENT WITH IMPARTIAL PERFORMANCE
37 OF THE ADJUDICATIVE DUTIES OF JUDICIAL OFFICE
38

39 [11] The role of a judge is different from that of a legislator or executive branch
40 official, even when the judge is subject to public election. Campaigns for judicial office
41 must be conducted differently from campaigns for other offices. The narrowly drafted
42 restrictions upon political and campaign activities of judicial candidates provided in
43 Canon 4 allow candidates to conduct campaigns that provide voters with sufficient
44 information to permit them to distinguish between candidates and make informed
45 electoral choices.

46
47 [12] Paragraph (A)(13) makes applicable to both judges and judicial candidates the
48 prohibition that applies to judges in Rule 2.10(B), relating to pledges, promises, or

1 commitments that are inconsistent with the impartial performance of the adjudicative
2 duties of judicial office.

3
4 [13] The making of a pledge, promise, or commitment is not dependent upon, or
5 limited to, the use of any specific words or phrases; instead, the totality of the statement
6 must be examined to determine if a reasonable person would believe that the candidate
7 for judicial office has specifically undertaken to reach a particular result. Pledges,
8 promises, or commitments must be contrasted with statements or announcements of
9 personal views on legal, political, or other issues, which are not prohibited. When making
10 such statements, a judge should acknowledge the overarching judicial obligation to apply
11 and uphold the law, without regard to his or her personal views.

12
13 [14] A judicial candidate may make campaign promises related to judicial
14 organization, administration, and court management, such as a promise to dispose of a
15 backlog of cases, start court sessions on time, or avoid favoritism in appointments and
16 hiring. A candidate may also pledge to take action outside the courtroom, such as
17 working toward an improved jury selection system, or lobbying for more funds to
18 improve the physical plant and amenities of the courthouse.

19
20 [15] Judicial candidates may receive questionnaires or requests for interviews from the
21 media and from issue advocacy or other community organizations that seek to learn their
22 views on disputed or controversial legal or political issues. Paragraph (A)(13) does not
23 specifically address judicial responses to such inquiries. Depending upon the wording and
24 format of such questionnaires, candidates' responses might be viewed as pledges,
25 promises, or commitments to perform the adjudicative duties of office other than in an
26 impartial way. To avoid violating paragraph (A)(13), therefore, candidates who respond
27 to media and other inquiries should also give assurances that they will keep an open mind
28 and will carry out their adjudicative duties faithfully and impartially if elected.
29 Candidates who do not respond may state their reasons for not responding, such as the
30 danger that answering might be perceived by a reasonable person as undermining a
31 successful candidate's independence or impartiality, or that it might lead to frequent
32 disqualification. See Rule 2.11.

1 **RULE 4.1**

2 **REPORTER'S EXPLANATION OF CHANGES**

3
4 **The "Reporters' Explanations of Changes" have not been approved by the ABA**
5 **Joint Commission to Evaluate the Model Code of Judicial Conduct. They have been**
6 **drafted by the Commission's Reporters, based on the proceedings and record of the**
7 **Commission, solely to inform the ABA House of Delegates about each of the**
8 **proposed amendments to the Model Code prior to their being considered at the**
9 **ABA 2007 Midyear Meeting. THEY ARE NOT TO BE ADOPTED AS PART OF**
10 **THE MODEL CODE.**

11
12 **1990 MODEL CODE COMPARISON**

13
14 Rule 4.1(A)(1) is virtually identical to Canon 5A(1)(a).

15
16 Rule 4.1(A)(2) is identical to Canon 5A(1)(c).

17
18 Rule 4.1(A)(3) is essentially the same as Canon 5A(1)(b).

19
20 Rule 4.1(A)(4) is virtually identical to the first clause of Canon 5A(1)(e).

21
22 Rule 4.1(A)(5) is closely patterned on the second clause of Canon 5A(1)(e), and includes
23 the concept embodied in Canon 5A(1)(d), which was eliminated.

24
25 Rule 4.1(A)(6) is new, but the prohibition it establishes is removed by later Rules in
26 Canon 4 in some situations.

27
28 Rule 4.1(A)(7) is new, and is similar to Rule 4.1(A)(6) in terms of its relationship to other
29 Rules in Canon 4.

30
31 Rule 4.1(A)(8) is derived from the first two sentences of Canon 5C(2), but employs
32 different terminology and applies only to solicitation of campaign contributions, not
33 "publicly stated support."

34
35 Rule 4.1(A)(9) is essentially identical to the last sentence of Canon 5C(2).

36
37 Rule 4.1(A)(10) is new, but is a corollary of one aspect of Canon 2B: lending the
38 prestige—here the trappings—of judicial office to advance a judge's interests.

39
40 Rule 4.1(A)(11) is based upon Canon 5A(3)(d)(ii), but substantially revised.

41
42 Rule 4.1(A)(12) is new to the Canon on political and campaign activity, but is
43 substantially similar to the first sentence of Canon 3B(9).

44
45 Rule 4.1(A)(13) is essentially identical to Canon 5A(3)(d)(i).

46
47 Rule 4.1 (B) is based upon elements of Canon 5A(3)(a) and Canon 5A(3)(b), which have
48 been combined and recast.

1 Comment [1] is new.
2
3 Comment [2] is based upon Canon 5E, which has been removed from the black letter
4 text.
5
6 Comment [3] is new, but includes a principle taken from the first sentence of the
7 Commentary following Canon 5A(1). See also Comment [6].
8
9 Comment [4] is new, but includes reference to the principles embodied in Canon
10 5C(1)(b), substantially reworded.
11
12 Comment [5] is new, but is tangentially related to the Commentary following Canon
13 5A(3)(a).
14
15 Comment [6] is based upon the first sentence of the Commentary following Canon 5A(1),
16 but includes fuller treatment.
17
18 Comment [7] is a new Comment, but is based upon Canon 5A(3)(d)(ii), which is now
19 embodied in Rule 4.1(A)(11).
20
21 Comment [8] is based upon Canon 5A(3)(e), which has been removed from the black
22 letter text; the new Comment is more detailed and covers slightly more ground.
23
24 Comment [9] is new, but also is based upon Canon 5A(3)(e).
25
26 Comment [10] is new, but is derived from aspects of Canon 3B(9) and following
27 Commentary.
28
29 Comment [11] is new.
30
31 Comment [12] is new.
32
33 Comment [13] is new.
34
35 Comment [14] is based upon the fourth sentence of the Commentary following Canon
36 5A(3)(d), but provides more detailed treatment, with examples.
37
38 Comment [15] is loosely based upon the last paragraph of the Commentary following
39 Canon 5C(2), but provides far more detailed discussion.
40

41 **EXPLANATION OF BLACK LETTER**

42
43 1. Rule 4.1(A)'s lead-in added cross-references to specific Rules in Canon 4.
44

45 This formulation is critical to the reorganization of Canon 4. Rule 4.1(A) sets out a
46 generally applicable set of prohibitions that apply to all sitting judges and to all judicial
47 candidates (including sitting judges seeking to retain current office or to achieve other
48 judicial office). Rule 4.2 (various forms of public elections), Rule 4.3 (appointment to

1 judicial office), and Rule 4.4 (campaign committees) then selectively eliminate these
2 prohibitions, as appropriate to the specific situation.

3
4 2. Rule 4.1(A)(4) replaced “political organization or candidate” with “political
5 organization or a candidate for public office.”

6
7 No substantive change is intended. The Commission wanted to make clear that the
8 prohibition against soliciting funds or making contributions applies to all candidates for
9 public office, not just candidates for judicial office (as is clear in other provisions of both
10 the 1990 Code and the proposed Code).

11
12 3. Rule 4.1(A)(5): made several stylistic revisions in the course of blending Canon
13 5A(1)(d) and the second clause of Canon 5A(1)(e).

14
15 No substantive change is intended. The earlier “attend political gatherings” was
16 eliminated, but the word “attend” was added to the blended Rule. “[D]inners or other
17 events” was substituted for “political party dinners or other functions.”

18
19 4. Rule 4.1(A)(6) adds a prohibition against a candidate self-identifying as a
20 “candidate of” a political organization.

21
22 Canon 5C(1)(a)(ii) of the 1990 Code specifically permitted judges subject to public
23 election to identify themselves at any time as political party *members*. This provision has
24 been eliminated in the proposed Code as unnecessary.

25
26 The purpose of Rule 4.1(A)(6) is a different one, however. In the organizational scheme
27 of Canon 4, it is necessary first to prohibit for all judges and judicial candidates what is to
28 be prohibited for any. In the later Rules, exceptions are made as appropriate, leaving in
29 place the general prohibitions that are not singled out for exception. For example, in
30 connection with Rule 4.1(A)(6), see Rule 4.2(C)(1): a candidate running in a partisan
31 public election for judicial office must be permitted to communicate to voters the fact that
32 a particular political organization or party nominated him or her. Thus, because an
33 exception to Rule 4.1(A)(6) appears only in Rule 4.2(C)(1), a candidate running in
34 another type of judicial election is still subject to Rule 4.1(A)(6).

35
36 5. Rule 4.1(A)(7): added this provision, which broadly prohibits judicial candidates
37 from seeking, accepting, or using endorsements from political organizations.

38
39 As with Rule 4.1(A)(6), the full impact of this new Rule can be judged only by
40 ascertaining the situations in which later Rules in Canon 4 make an exception to it.

41
42 6. Rule 4.1(A)(8): retained the language “personally solicit . . . campaign
43 contributions,” now defined in the Terminology section; deleted the prohibition against
44 personally soliciting “publicly stated support,” and retained the provision permitting
45 contributions to be accepted only through a duly established campaign committee.

46
47 The prohibition against seeking “support”—at least from political organizations—is
48 covered (and more broadly) in Rule 4.1(A)(7), and was no longer needed in this Rule.

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

9
10 The Commission considered the two possibilities through long debate over many
11 meetings. The Commission was aware that several courts have struck down provisions
12 forbidding “personal solicitation” of campaign funds—often in broad language.
13 Ultimately, the Commission adopted the broader prohibition on the theory that the
14 solicitation of campaign funds in the judicial election context could justify restrictions
15 greater than are permitted for lawyer advertising.

16
17 7. Rule 4.1(A)(9) replaces “for the private benefit of the candidate or others” (in
18 Canon 5C(2)) with “for the private benefit of the judge, the candidate, or others.”

19
20 No substantive change is intended. Rule 4.1(A) applies to both judges who are *not*
21 currently candidates and to all current judicial candidates.

22
23 8. Rule 4.1(A)(10), which prohibits use of official resources for a judge’s campaign,
24 breaks little new ground.

25
26 Although new to the Canon on political and campaign activity, this provision breaks little
27 new ground. Compare Rule 1.3 (abusing the prestige of judicial office) and Rule 3.1(E)
28 (using official resources in connection with extrajudicial activity).

29
30 9. Rule 4.1(A)(11) replaces “knowingly misrepresent the identity, qualifications,
31 present position or other fact” (in Canon 5A(3)(d)(ii)) with “knowingly, or with reckless
32 disregard for the truth, make any false or misleading statement.”

33
34 Although the 1990 Code language was specific, its precise reach was unclear. The new
35 language used in the proposed Code is established in the law of libel and slander.

36
37 10. Rule 4.1(A)(12): added this provision that is new material for Canon 4 on political
38 and campaign activity, but that is a reiteration for emphasis of Rule 2.10(A).
39 This reiteration is helpful because Rule 2.10(A) can apply only to sitting judges.

40
41 11. Rule 4.1(A)(13): replaced “with respect to” (in Canon 5(A)(3)(d)(i)) with “in
42 connection with.”

43
44 This is a stylistic change only. The language is otherwise identical to policy adopted in
45 2003 in the wake of the decision in *Republican Party of Minnesota v. White*.

46
47 To encourage adoption of an appropriately narrow interpretation of the pledges and
48 promises clause, by disciplinary authorities and by judges and candidates assessing their

1 own conduct, the Commission has included several Comments describing the intended
2 reach of Rule 4.1(A)(13). See Comments [11] through [15]. A judge or candidate who
3 announces his or her personal views on a matter that is likely to come before the court
4 does not compromise impartiality unless the announcement demonstrates a closed mind
5 on the subject, or includes a pledge or a promise to rule in a particular way if the matter
6 comes before the court.

7
8 12. Rule 4.1(B) combines in a single Rule, and greatly simplifies, most provisions of
9 Canon 5A(3)(a) and Canon 5A(3)(b). First, it changes the separate treatment of actions of
10 members of a candidate’s family and actions of employees and others who are under the
11 control of a candidate to unitary treatment of actions of “other persons”; second, it
12 explains that the judge or candidate is required to take “reasonable measures” to ensure
13 that these other persons do not undertake action on behalf of the judge or candidate that
14 would otherwise be prohibited; and third, it eliminates the injunction to maintain the
15 dignity appropriate to the judicial office during a judicial campaign.

16
17 The Commission concluded that “maintaining appropriate dignity” was too subjective a
18 standard for use in a Rule with potential disciplinary consequences.

19
20 No significant substantive changes are intended by other adjustments in the Rule. What
21 constitutes a “reasonable measure” will obviously depend upon whether the person who
22 is attempting to act improperly *on behalf of* the judge or candidate is a family member, an
23 employee, or an appointee.

24 25 **EXPLANATION OF COMMENTS**

26
27 [1] This new Comment in effect serves as a preamble to Canon 4. Two key points are
28 involved: that states have a compelling interest in the quality of their judiciary and in the
29 regularity of the selection process; and that restrictions on political and campaign-related
30 speech must be narrowly tailored and the least restrictive possible, even when serving
31 such a compelling state interest.

32
33 [2] The jurisdictional point of this Comment was originally placed in Canon 5E of the
34 1990 Code. The Commission concluded that treatment in the black letter text was not
35 required, given that this provision does not establish independent standards of conduct. In
36 transferring this material to a Comment, the Commission also significantly reduced its
37 level of detail. Prior references to the jurisdictional situation when a candidate is
38 successful or unsuccessful in obtaining judicial office were eliminated as not properly
39 within the scope of this Code.

40
41 [3] This new Comment explains how restrictions on political participation of judges
42 and judicial candidates were drawn: mere participation in electoral politics does not
43 warrant a restriction, but assuming a leadership role would call into question the judge’s
44 or candidate’s independence.

45
46 [4] This new Comment gathers in one place several provisions of Canon 5C(1) of the
47 1990 Code, and substantially revises the language. Although judicial candidates generally
48 are not permitted to endorse *other* candidates, to avoid abusing the prestige of judicial

1 office, they are nevertheless permitted to campaign on their own behalf. Moreover,
2 although the pros and cons as a matter of policy seemed to be evenly balanced, the
3 Commission elected to retain the traditional exception that permits campaigning for other
4 *judicial candidates* who are effectively running in the same race.

5
6 [5] This new Comment serves as a reminder that judges and judicial candidates must
7 avoid abusing the prestige of office when their own family members are involved in
8 politics. Thus, while family members are not and cannot be subject to this Code, the
9 people who *are* subject to it must take reasonable steps to ensure that the public does not
10 receive the impression that a judge or judicial candidate is endorsing a family member's
11 candidacy.

12
13 [6] This Comment carries forward Commentary from the 1990 Code, noting that
14 judges and judicial candidates do not forfeit the right to vote, and adds a reminder that
15 this principle applies in both general and primary elections. For jurisdictions that employ
16 caucuses rather than secret ballot voting in primary elections, the Commission ultimately
17 concluded that even though a caucus participant may take a public stand in favor of a
18 particular candidate, this should not be counted as a prohibited endorsement, because
19 there is no other way to vote or express a preference in such situations.

20
21 [8] This Comment carries forward and expands upon the “right to reply” provision
22 originally found in Canon 5A(3)(e) of the 1990 Code. The last sentence, an aspirational
23 standard, was added to stem increased use of negative campaign ads run by independent
24 groups not controlled by a candidate or the candidate's campaign committee.

25
26 [10] This new Comment is a reminder that Rule 4.1(A)(12) has brought into the
27 political and electoral context the traditional prohibition against making statements that
28 will improperly influence a trial. Compare Rule 2.10(A). The last sentence of Comment
29 [10] serves as an additional reminder that some statements are *designed* to affect the
30 outcome of a trial, and properly so. A lawyer making a closing argument to a jury and a
31 judge instructing that jury are prime examples.

32
33 [11] This new Comment and new Comment [12] introduce the series of Comments
34 explicating “pledges and promises clause,” which is carried forward from Canon
35 5A(3)(d)(i) of the 1990 Code essentially unchanged.

36
37 [13] This new Comment describes the fundamental difference between “pledges” and
38 “promises,” which are prohibited, and “statements or announcements of personal views,”
39 which are permitted and constitutionally protected. The key distinction is between
40 personal statements that are truly personal and that *will not interfere with future decision*
41 *making*, and improper pledges and promises that commit a judge or judicial candidate to
42 decide a future case in a particular way. A prohibited pledge or promise concerns future
43 decision making.

44
45 [14] This Comment is based upon Commentary following Canon 5D(3)(d), but is more
46 complete. It makes the important point that pledges and promises regarding
47 *administration* of the judicial system, as opposed to *decision making in actual cases*, is
48 not prohibited.

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

8
9 First, citizens are not subject to the Code of Judicial Conduct, and may inquire of judicial
10 candidates their position on issues. Each citizen is entitled to decide what qualities in a
11 judicial candidate will earn that citizen's vote, and all citizens are entitled to applaud or
12 criticize the answers given, or to comment on a candidate's failure or refusal to answer.

13
14 Second, judicial candidates who choose to answer the questionnaires cannot be prevented
15 from doing so, as long as their answers take the form of constitutionally protected
16 statements and announcements of personal views, and do not constitute pledges and
17 promises about future decision making.

18
19 Third, and critically important, judicial candidates have the right to refuse to answer, with
20 or without giving reasons, or to answer only in formats that are agreeable to them
21 (assuming they comply with Rule 4.1(A)(13)).

22
23 Thus, the Commission took no firm stand on the best response to questionnaires of this
24 kind (and explicitly noted in Comment [15] that the black letter text of Rule 4.1(A)(13)
25 does not provide a clear answer, either). But the principles set forth in this Comment and
26 the previous Comments should assist judicial candidates in formulating their positions on
27 judicial campaign speech.

1 **RULE 4.2**

2 *Political and Campaign Activities of Judicial Candidates in Public*
3 *Elections*

4
5 (A) A judicial candidate* in a partisan, nonpartisan, or retention public
6 election* shall:

7
8 (1) act at all times in a manner consistent with the independence,*
9 integrity,* and impartiality* of the judiciary;

10
11 (2) comply with all applicable election, election campaign, and
12 election campaign fund-raising laws and regulations of this
13 jurisdiction;

14
15 (3) review and approve the content of all campaign statements and
16 materials produced by the candidate or his or her campaign
17 committee, as authorized by Rule 4.4, before their dissemination; and

18
19 (4) take reasonable measures to ensure that other persons do not
20 undertake on behalf of the candidate activities, other than those
21 described in Rule 4.4, that the candidate is prohibited from doing by
22 Rule 4.1.

23
24 (B) A candidate for elective judicial office may, unless prohibited by law,*
25 and not earlier than [insert amount of time] before the first applicable
26 primary election, caucus, or general or retention election:

27
28 (1) establish a campaign committee pursuant to the provisions of
29 Rule 4.4;

30
31 (2) speak on behalf of his or her candidacy through any medium,
32 including but not limited to advertisements, websites, or other
33 campaign literature;

34
35 (3) publicly endorse or oppose candidates for the same judicial
36 office for which he or she is running;

37
38 (4) attend or purchase tickets for dinners or other events
39 sponsored by a political organization* or a candidate for public office;

40
41 (5) seek, accept, or use endorsements from any person or
42 organization other than a partisan political organization; and

43
44 (6) contribute to a political organization or candidate for public
45 office, but not more than \$[insert amount] to any one organization or
46 candidate.
47

1 **(C) A judicial candidate in a partisan public election may, unless**
2 **prohibited by law, and not earlier than [insert amount of time] before the**
3 **first applicable primary election, caucus, or general election:**

4
5 **(1) identify himself or herself as a candidate of a political**
6 **organization; and**

7
8 **(2) seek, accept, and use endorsements of a political organization.**

9
10 **COMMENT**

11
12 [1] Paragraphs (B) and (C) permit judicial candidates in public elections to engage in
13 some political and campaign activities otherwise prohibited by Rule 4.1. Candidates may
14 not engage in these activities earlier than [insert amount of time] before the first
15 applicable electoral event, such as a caucus or a primary election.

16
17 [2] Despite paragraphs (B) and (C), judicial candidates for public election remain
18 subject to many of the provisions of Rule 4.1. For example, a candidate continues to be
19 prohibited from soliciting funds for a political organization, knowingly making false or
20 misleading statements during a campaign, or making certain promises, pledges, or
21 commitments related to future adjudicative duties. See Rule 4.1(A), paragraphs (4), (11),
22 and (13).

23
24 [3] In partisan public elections for judicial office, a candidate may be nominated by,
25 affiliated with, or otherwise publicly identified or associated with a political organization,
26 including a political party. This relationship may be maintained throughout the period of
27 the public campaign, and may include use of political party or similar designations on
28 campaign literature and on the ballot.

29
30 [4] In nonpartisan public elections or retention elections, paragraph (B)(5) prohibits a
31 candidate from seeking, accepting, or using nominations or endorsements from a partisan
32 political organization.

33
34 [5] Judicial candidates are permitted to attend or purchase tickets for dinners and
35 other events sponsored by political organizations.

36
37 [6] For purposes of paragraph (B)(3), candidates are considered to be running for the
38 same judicial office if they are competing for a single judgeship or if several judgeships
39 on the same court are to be filled as a result of the election. In endorsing or opposing
40 another candidate for a position on the same court, a judicial candidate must abide by the
41 same rules governing campaign conduct and speech as apply to the candidate's own
42 campaign.

43
44 [7] Although judicial candidates in nonpartisan public elections are prohibited from
45 running on a ticket or slate associated with a political organization, they may group
46 themselves into slates or other alliances to conduct their campaigns more effectively.

1 Candidates who have grouped themselves together are considered to be running for the
2 same judicial office if they satisfy the conditions described in Comment [6].
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RULE 4.2
REPORTER'S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

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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.

1 The lead-in to Rule 4.2(B) is based upon Canon 5C(1), but with a different disposition of
2 the *timing* of the activities that are permitted for judicial candidates. In addition, Rule
3 4.2(B), like the rest of Rule 4.2, applies only to candidates, whereas Canon 5C(1) applies
4 to sitting judges as well.

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

8
9 Rule 4.2(B)(2) combines and rewords Canons 5C(1)(b)(i)–(b)(iii).

10
11 Rule 4.2(B)(3) is virtually identical to Canon 5C(1)(b)(iv).

12
13 Rule 4.2(B)(4) is based upon Canon 5C(1)(a)(i), but reworded for consistency with other
14 Rules in Canon 4 of the proposed Code.

15
16 Rule 4.2(B)(5) takes the opposite stance from that found in Canon 5C(2), but with an
17 important caveat. The 1990 Code allows judicial candidates to solicit endorsements—
18 “publicly stated support”—only through campaign committees. The proposed Code
19 permits candidates to solicit such support on their own, but not from partisan political
20 organizations.

21
22 Rule 4.2(B)(6) is similar to Canon 5C(1)(iii), but establishes dollar limitations (to be
23 supplied by each jurisdiction) on the contributions that can be made.

24
25 Rule 4.2(C) and its two subparagraphs are new. The 1990 Code did not advert to the
26 distinction between partisan and nonpartisan or retention elections. In furtherance of the
27 organizational scheme of the proposed Code, Rule 4.2(C) states the additional activities
28 that are permitted *only* for candidates in partisan public elections.

29
30 Comments [1] and [2] are new; they explain the relationship of Rule 4.2 to Rule 4.1,
31 which is the core of the new organizational scheme. They also explain that a person
32 becomes a judicial candidate according to the definition in the Terminology section, but
33 that the additional activities in which a candidate may engage depend upon the timing
34 counting back from the primary or election in question.

35
36 Comments [3] and [4] are new; the 1990 Code did not distinguish between partisan,
37 nonpartisan, and retention public elections for judicial office.

38
39 Comment [5] is similar to Canon 5C(1)(a), but with the important difference that the
40 provision applies *only* to judicial candidates, *while* they are candidates.

41
42 Comments [6] and [7] clarify the intended meaning of Rule 4.2(B)(3), which is based
43 upon Canon 5C(1)(b)(iv), and has some similarity to Canon 5C(5). In both instances, the
44 key is to determine when candidates are running for the *same* judicial office.

1 **EXPLANATION OF BLACK LETTER**

2
3 1. Rule 4.2(A) lead-in: substituted “a judicial candidate in a partisan, nonpartisan, or
4 retention public election” for “a [judge or] candidate subject to public election.”

5
6 This is an important element of the reorganization of Canon 4 of the proposed Code. By
7 distinguishing between the three modes of public elections, Rule 4.2(A) sets up the
8 possibility of applying further restrictions and permissive provisions to all three modes or
9 to some designated subset, as required. In Rule 4.2(A), for example, obligations *in*
10 *addition to those already imposed by Rule 4.1* are imposed upon all three types of
11 candidates.

12
13 2. Rule 4.2(A)(1): substituted “act at all times in a manner” for “act in a manner,”
14 and deleted the requirement that a candidate “shall maintain the dignity appropriate to
15 judicial office.”

16
17 The first change is stylistic only. The mandatory duty to “maintain dignity” was deleted
18 because it is too subjective.

19
20 3. Rule 4.2(A)(2): added this new broad provision that is consistent with the
21 overarching principle that candidates for judicial office must obey applicable laws and
22 regulations.

23
24 Some of the specific regulations regarding campaign finance are separately referenced in
25 Rule 4.4, but Rule 4.2(A)(2) might well apply to restrictions on ballot insignia applicable
26 to nonpartisan elections, for example. Thus, although a candidate in a nonpartisan
27 election is not prevented from stating he or she is a member of a particular party, the
28 candidate is prohibited from stating he or she is “the candidate” of that party, if the
29 election laws do not allow party designations on the ballot. Compare Rule 4.1(A)(6),
30 which prohibits all judges and judicial candidates from such self-designation, and Rule
31 4.2(C)(1), which allows candidates in *partisan* elections to do so.

32
33 4. Rule 4.2(A)(3): added the requirement that judicial candidates personally approve
34 the contents of campaign literature and other materials.

35
36 The requirement is implicit in several other provisions of Canon 4. For example, if a
37 candidate is prohibited by Rule 4.1(A)(11) from making false or misleading statements in
38 a campaign, it is almost inevitable that the candidate will have a duty to review campaign
39 materials before they are disseminated under his or her name.

40
41 5. Rule 4.2(A)(4): substituted “take reasonable measures to ensure” for “shall
42 prohibit,” “shall discourage,” and “shall encourage to adhere.”

43 The language of the 1990 Code variously applied to employees and officials serving at
44 the pleasure of the candidate (who can be prohibited), others under the direction and
45 control of the candidate (who can be discouraged), and family members (who can be
46 encouraged to assist the candidate in complying with the Rules). What constitutes a
47 “reasonable measure” depends upon circumstances such as those noted above. Rule

1 4.2(A)(4), which applies only to judicial candidates, is already covered by Rule 4.1(B),
2 which applies to all judges *and* candidates.

3
4 6. Rule 4.2(B) lead-in identifies a time period prior to the relevant primary or
5 election, during which certain activities that would or might otherwise be prohibited by
6 Rule 4.1(A) are permitted.

7
8 Although the creation of this time period is not new, its use in this Rule to disconnect the
9 status of *being* a judicial candidate from being permitted to engage in the *activities* of a
10 candidate is an important feature of the reorganization of Canon 4. During its
11 deliberations, the Commission was mindful of the need to establish a time period to
12 ensure that a judge elected to a ten-year term could not immediately announce plans to
13 run for reelection, establish a campaign committee, and raise campaign funds for almost
14 ten full years. With the time period in place, the judge can continue to call himself or
15 herself a candidate for ten years, but can raise campaign funds only after the time period
16 has been satisfied, typically one year before the first primary.

17
18 7. Rules 4.2(B)(1), 4.2(B)(2), and 4.2(B)(3): retained provisions allowing
19 candidates to establish campaign committees, speak on their own behalf through various
20 communications media, and endorse (or oppose) candidates running for *the same* judicial
21 office. These activities have traditionally been allowed, and the Commission did not
22 modify these provisions in any substantive ways.

23
24 It is important to note that permission is granted to all three types of judicial election
25 candidates to engage in these activities, but only during the stated time period.

26
27 8. Rule 4.2(B)(4): specifically permitted what Rule 4.1(A)(5) prohibits for both
28 judges and candidates; the permission applies to all candidates, including candidates
29 running in nonpartisan and retention elections.

30
31 This is approximately the same result as would be obtained under the 1990 Code, but in a
32 reorganized format. Under Canon 5A(1), judicial candidates are prohibited from
33 attending events of political organizations, unless otherwise permitted. But Canon 5C(1)
34 permits a candidate to “attend political gatherings” *at any time*, which negates the
35 prescription.

36
37 In the proposed Code, Rule 4.1(A)(5) generally prohibits attending such political
38 organization functions—as the first layer. Rule 4.2(B)(4) permits an exception, but only
39 during a candidate’s candidacy *and after a specific time*.

40
41 9. Rule 4.2(B)(5) provides an important distinction between judicial candidates
42 running in partisan and other types of public judicial elections; the full impact of this
43 paragraph depends on other parts of Rule 4.2, especially Rule 4.2(C).

44
45 This provision showcases the tiered approach of the proposed Code. According to Rule
46 4.1(A)(7), judges and candidates may not seek, accept, or use endorsements from a
47 political organization. Rule 4.2(B)(5) continues this prohibition for *all* public election

1 judicial candidates during the time period, because all are permitted to accept
2 endorsements *only* from organizations that are *not* political organizations.

3
4 It is only in Rule 4.2(C)(2) that this restriction is finally removed—but for judicial
5 candidates running in partisan elections *only*.

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

10
11 Under the Canon 5 (1)(a) of the 1990 Code, a judge who was subject to public election at
12 some later time (perhaps ten years away, as in the previous example) and any candidate
13 running in a public election could make such contributions *at any time*. This included
14 candidates running in nonpartisan and retention elections, because the 1990 Code did not
15 distinguish between different modes of public election. Under Rule 4.2(B)(6), all
16 candidates (including sitting judges who become candidates) may make contributions,
17 even to political organizations, but only during the time period.

18
19 11. Rule 4.2(C): stated the two exceptions to the earlier prohibitions that apply *only* to
20 judicial candidates in partisan public elections, which permits identification as a
21 candidate of a political organization and acceptance of endorsements from a political
22 organization.

23 24 **EXPLANATION OF COMMENTS**

25
26 Comments [1] through [7] are all new, and help explain the relationships between the
27 several paragraphs of Rule 4.2, as well as the relationship of this Rule to other Rules in
28 Canon 4, especially Rule 4.1.

1 **RULE 4.3**

2 *Activities of Candidates for Appointive Judicial Office*

3
4 **A candidate for appointment to judicial office may:**

5
6 **(A) communicate with the appointing or confirming authority, including**
7 **any selection, screening, or nominating commission or similar agency; and**

8
9 **(B) seek endorsements for the appointment from any person or**
10 **organization.**

11
12 **COMMENT**

13
14 [1] When seeking support or endorsement, or when communicating directly with an
15 appointing or confirming authority, a candidate for appointive judicial office must not
16 make any pledges, promises, or commitments that are inconsistent with the impartial
17 performance of the adjudicative duties of the office. See Rule 4.1(A)(13).
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RULE 4.3
REPORTER’S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

Rule 4.3(A) is essentially the same as Canon 5B(2)(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)(ii), but it allows candidates to seek more endorsements for the appointment.

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): eliminated 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.

1 The inability of a candidate to identify his or her own sponsors recognizes the realities in
2 today’s world, in which candidates almost universally seek the affirmative support of
3 friends and allies with the appointing authority.
4

5 **EXPLANATION OF COMMENTS**
6

7 [1] This new Comment serves as a reminder that although candidates for appointive
8 judicial office are not submitting themselves to the voting public, they are submitting
9 themselves to a much smaller “electorate,” an appointing authority. It is just as improper
10 in the appointment system to make pledges and promises that are inconsistent with the
11 impartial performance of judicial duties as it is in a campaign for elected office.
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1 **RULE 4.4**

2 *Campaign Committees*

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(A) A judicial candidate* subject to public election* may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.*

(B) A judicial candidate subject to public election shall direct his or her campaign committee:

(1) to solicit and accept only such campaign contributions* as are reasonable, in any event not to exceed, in the aggregate,* \$[insert amount] from any individual or \$[insert amount] from any entity or organization;

(2) not to solicit or accept contributions for a candidate’s current campaign more than [insert amount of time] before the applicable primary election, caucus, or general or retention election, nor more than [insert number] days after the last election in which the candidate participated; and

(3) to comply with all applicable statutory requirements for disclosure and divestiture of campaign contributions, and to file with [name of appropriate regulatory authority] a report stating the name, address, occupation, and employer of each person who has made campaign contributions to the committee in an aggregate value exceeding \$[insert amount]. The report must be filed within [insert number] days following an election, or within such other period as is provided by law.

34 **COMMENT**

35
36 [1] Judicial candidates are prohibited from personally soliciting campaign contributions or personally accepting campaign contributions. See Rule 4.1(A)(8). This Rule recognizes that in many jurisdictions, judicial candidates must raise campaign funds to support their candidacies, and permits candidates, other than candidates for appointive judicial office, to establish campaign committees to solicit and accept reasonable financial contributions or in-kind contributions.

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43 [2] Campaign committees may solicit and accept campaign contributions, manage the expenditure of campaign funds, and generally conduct campaigns. Candidates are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their campaign committees.

1 [3] At the start of a campaign, the candidate must instruct the campaign committee to
2 solicit or accept only such contributions as are reasonable in amount, appropriate under
3 the circumstances, and in conformity with applicable law. Although lawyers and others
4 who might appear before a successful candidate for judicial office are permitted to make
5 campaign contributions, the candidate should instruct his or her campaign committee to
6 be especially cautious in connection with such contributions, so they do not create
7 grounds for disqualification if the candidate is elected to judicial office. See Rule 2.11.

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RULE 4.4
REPORTER'S EXPLANATION OF CHANGES

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1990 MODEL CODE COMPARISON

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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 5D(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.

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

5
6 2. Rule 4.4(B)(1) combines and recasts material from both Canon 5C(2) and Canon
7 5C(3) of the 1990 Code.

8
9 No substantive change is intended. This provision establishes that campaign contributions
10 must be “reasonable” in amount (to avoid a suggestion of undue influence) and in
11 addition are subject to aggregate limits (per campaign) for individuals and organizations,
12 limits which each jurisdiction will set according to its conditions and policy choices.

13
14 3. Rule 4.4(B)(2) adds the word “current” before the word “campaign,” and leaves
15 the post-election time period for ending campaign solicitation open for variation in each
16 jurisdiction.

17
18 These are minor adjustments, but could become significant in some settings. The Joint
19 Commission wanted to make it even clearer than in the 1990 Code that the time window
20 for a campaign committee to solicit funds applies to *each* campaign separately. Thus,
21 Rule 4.4(B)(2) specifies that it applies always to a candidate’s *current* campaign. More
22 significantly, to prevent the early buildup of campaign funds, the Commission specified
23 that a specific time restriction should be enacted (to be chosen by each jurisdiction)
24 establishing the point at which contributions may be solicited and accepted. The time for
25 continuing to raise campaign funds after the election to pay off debts of the campaign
26 was left to each state to decide.

27
28 4. Rule 4.4(B)(3) adds “or within such other period as is provided by law.”

29
30 Only a minor substantive change is intended. The Commission, aware that many
31 jurisdictions already have laws regulating elections, including the reporting of campaign
32 contributions and divestiture of the contributions subsequent to a campaign, did not want
33 to interfere with the operation of these laws. In the 1990 Code, possible obligations under
34 law to divest a campaign of its funds were not addressed.

35
36 5. This paragraph recognizes that many jurisdictions already have provisions in their
37 general election and campaign finance laws regarding disclosure and divestiture of
38 campaign funds, and defers to local choices and existing law (if applicable) in setting the
39 specific details.

1 **EXPLANATION OF COMMENT**

2
3 [1]–[3] Comments [1]–[3] explain the operation and rationale for the black letter text of
4 Rule 4.4, borrowing from and recasting both black letter text and Commentary from the
5 1990 Code.

6
7 The treatment of contributions from *lawyers* in Comment [3] builds upon the treatment
8 given in Canon 5C(2) of the 1990 Code, but goes a step further. Canon 5C(2) merely
9 states that solicitation (by a campaign committee) of such contributions is not prohibited
10 whereas Comment [3] to Rule 4.4 urges special caution in light of the enhanced
11 possibility that significant contributions from lawyers (and parties) who might later come
12 before the judge would be a cause for disqualification of the judge under Rule 2.11.

1 **RULE 4.5**

2 *Activities of Judges Who Become Candidates for Nonjudicial Office*

3
4 (A) Upon becoming a candidate for a nonjudicial elective office, a judge
5 shall resign from judicial office, unless permitted by law* to continue to hold
6 judicial office.

7
8 (B) Upon becoming a candidate for a nonjudicial appointive office, a
9 judge is not required to resign from judicial office, provided that the judge
10 complies with the other provisions of this Code.

11
12 **COMMENT**

13
14 [1] In campaigns for nonjudicial elective public office, candidates may make pledges,
15 promises, or commitments related to positions they would take and ways they would act
16 if elected to office. Although appropriate in nonjudicial campaigns, this manner of
17 campaigning is inconsistent with the role of a judge, who must remain fair and impartial
18 to all who come before him or her. The potential for misuse of the judicial office, and the
19 political promises that the judge would be compelled to make in the course of
20 campaigning for nonjudicial elective office, together dictate that a judge who wishes to
21 run for such an office must resign upon becoming a candidate.

22
23 [2] The “resign to run” rule set forth in paragraph (A) ensures that a judge cannot use
24 the judicial office to promote his or her candidacy, and prevents post-campaign
25 retaliation from the judge in the event the judge is defeated in the election. When a judge
26 is seeking appointive nonjudicial office, however, the dangers are not sufficient to
27 warrant imposing the “resign to run” rule.

1 **RULE 4.5**
2 **REPORTER'S EXPLANATION OF CHANGES**
3

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5 **Joint Commission to Evaluate the Model Code of Judicial Conduct. They have been**
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8 **proposed amendments to the Model Code prior to their being considered at the**
9 **ABA 2007 Midyear Meeting. THEY ARE NOT TO BE ADOPTED AS PART OF**
10 **THE MODEL CODE.**

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12 **1990 MODEL CODE COMPARISON**
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14 Rule 4.5(A) is derived from Canon 5A(2), but has been simplified and reworded.
15

16 Rule 4.5(B) is new, but is implicit in and derived from Canon 5A(2).
17

18 Comments [1] and [2] are new.
19

20 **EXPLANATION OF BLACK LETTER**
21

22 1. Rule 4.5(A) recasts text, substituting “nonjudicial elective office” for “in a
23 primary or in a general election,” and deleting the specific exception for state
24 constitutional conventions.
25

26 The Commission retained the “resign-to-run” rule with only minor revisions for style and
27 clarity. Canon 5A(2) of the 1990 Code has always been interpreted to apply to elective
28 nonjudicial offices only; the proposed Rule makes that explicit. The Commission also
29 removed the special exception for judges who campaign for election to a state
30 constitutional convention because of the rarity with which such a situation occurs. The
31 remaining language, “unless permitted by law to continue to hold judicial office” should
32 address such situations.
33

34 2. Rule 4.5(B) add a paragraph to clarify what seemed implicit in Canon 5A(2)—
35 that if a judge becomes a candidate for appointment to a nonjudicial office, the judge is
36 not required to resign from judicial office as a general proposition.
37

38 The Commission decided to make explicit that the “resign-to-run” rule applies only to
39 nonjudicial elective offices, because it is only there that the dangers justifying the rule (as
40 explained in Comments [1] and [2]) are at their height. In addition, because a sitting
41 judge may become a “candidate” for an appointive non-judicial office—an undefined
42 term in the proposed Code—merely by being considered by an executive branch officer
43 for appointment, the Commission decided it was unwarranted to require automatic
44 resignation. This consideration is especially strong when the executive branch may be

1 considering several nominees for the same position, and when the confirmation process,
2 if any, is both lengthy and of uncertain outcome.

3
4 As a fail-safe, the Commission added the reminder that a judge who remains on
5 the bench while a candidate for appointive nonjudicial office must continue to abide by
6 the other provisions of this Code (such as maintaining independence, integrity, and
7 impartiality).

8
9 **EXPLANATION OF COMMENTS**

10
11 [1]–[2] Comments [1] and [2] are new, and explain the rationale for applying the “resign-
12 to-run” rule to elective nonjudicial offices, but not to appointive ones. The rationale is
13 based chiefly upon the federal decisional law.