

Canon 2A Comment
Judicial Conduct
Cynthia Gray, Director
American Judicature Society, Center for Judicial Ethics
October 15, 2003

Ms. Gray suggests the urges the Commission to revise the test in the comment of Canon 2 for appearance of impropriety. She recommends revisions for the following situations in which the “appearance of impropriety” standard arises:

- *When the judge has engaged in conduct not specifically covered by the code but clearly improper.* In this type of case, Ms. Gray suggests that the Commission consider a provision from the Oregon code of judicial conduct that states “A judge shall not engage in conduct that reflects adversely on the judge’s character, competence, temperament, or fitness to serve as a judge.”
- *When the judge has stopped just short of doing something obviously wrong.* Ms. Gray comments that state supreme courts have adopted different tests for this type of case, and offers examples from New York, and Louisiana for consideration.

Canon 2B Comment
Judicial Conduct
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Ms. Gray comments that letters of recommendation result in a many inquiries to advisory committees and communications to sentencing judges still result in a lot of judicial discipline, suggesting that the Commission may wish to clarify the restrictions addressed in the comment of Canon 2B.

Canon 3B Comment
Adjudicative Responsibilities
Cynthia Gray, Director
American Judicature Society, Center for Judicial Ethics
October 15, 2003

Ms. Gray suggests that the Commission include court staff and other judges in the list of the people judges are required to treat with patience, dignity, and courtesy either in Canon 3B or Canon 3C, as implied in the black letter of Canon 3B(4) (“other people with whom the judge deals in an official capacity”) She comments that number of cases in which judges have failed to treat staff and other judges with courtesy suggests a need for express recognition of the duty and offers comment from the Delaware and Ohio codes of judicial conduct for the Commission’s consideration.

Canon 3B(5)

Bias

Cynthia Gray, Director

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Ms. Gray recommends that the Commission include additional types of prohibited bias, such as marital status, parenthood, social status, color, language, and ethnicity. She also suggests that the Commission consider the different approaches taken by several states to the anti-bias provisions and gives examples from the Idaho and Kansas codes of judicial conduct.

As for the prohibition on sexual harassment, Ms. Gray recommends that the prohibition should use “shall” and should be moved from commentary to the text for emphasis.

Canon 3B(7)

Ex parte Communications

Cynthia Gray, Director

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Ms. Gray urges the Commission to consider a new provision of the Massachusetts Supreme Judicial Court, effective October 1, 2003, that includes a prohibition on ex parte communications and adds some clarifying language particularly with respect to the exceptions. She provides the following highlights of the new Massachusetts provision:

- requires a judge to “take all reasonable steps to avoid receiving from court personnel or other judges factual information concerning a case that is not part of the case record.”
- addresses communications with probation officers.
- clarifies that no judge “shall consult with another judge about a case pending before one of them when the judge initiating the consultation knows the other judge has a financial, personal or other interest which would preclude the other judge from hearing the case, and no judge shall engage in such a consultation when the judge knows he or she has such an interest.” Similarly, the Alaska code provides that the exception for consulting with other judges and court personnel “assumes that the other judge or member of the judge’s adjudicative staff is not disqualified from participating in the decision of the case.”

In addition, Ms. Gray believes the definition of pending and impending adopted by the ABA in 2003 for Canon 3B(9) should be made to apply to Canon 3B(7).

Canon 3B(9)

Public Comments

Cynthia Gray, Director

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Ms. Gray suggests that the 1990 changes to the Model Code's provisions about a judge's public comments about a pending or impending proceeding may have made the prohibition vague because it is difficult to assess the impact of public comment on an unknown audience. She advises the Commission of the attempts by several states to narrow the prohibition while giving judges a clear standard to follow, for example, by creating exceptions for discussions in legal education materials, explaining what may be learned from the public record in a case, and correcting factual misrepresentation in the reporting of a case, or limiting the prohibition to cases pending in the state.

Ms. Gray also suggests that the Commission consider adding text or commentary to emphasize that the canon prohibits a judge from discussing the rationale for a decision unless the judge is repeating what was already made part of the public record.

Canon 3C

Administrative Responsibilities

Cynthia Gray, Director

American Judicature Society, Center for Judicial Ethics

October 15, 2003

Ms. Gray suggests that the Commission consider several revisions of Canon 3C:

- Because numerous judicial discipline cases involve a judge's failure to discharge administrative responsibilities (possibly due to lack of training), the Commission should consider amending the comment to Canon 3C(1) to explain what "professional competence in judicial administration" means.
- Canon 3C(4) would be stronger if it provides that a judge "shall not engage in nepotism and favoritism," instead of "a judge shall avoid nepotism and favoritism."
- A provision should be added prohibiting a judge from using court resources and staff for personal or campaign purposes.
- A provision should be added requiring a judge to cooperate with the judicial disciplinary authority.

Canon 3D

Disciplinary Responsibilities

Cynthia Gray, Director

American Judicature Society, Center for Judicial Ethics

October 15, 2003

Ms. Gray suggests that the Commission consider revision of Canon 3D to clear up the current confusion about when a judge needs to report an attorney or another judge,

Canon 3E

Disqualification

Judicial Conduct

**Cynthia Gray, Director
American Judicature Society, Center for Judicial Ethics
October 15, 2003**

Ms. Gray suggests that the Commission consider:

- Professor Leslie Abramson’s recommended standards and criteria to address disqualification issues that frequently arise for judges but that are not specifically addressed in the model code and references his article entitled, “Appearance of Impropriety: Deciding When a Judge’s Impartiality ‘Might Reasonably Be Questioned,’” Georgetown Journal of Legal Ethics (Fall 2000).
- Specific grounds for disqualification added by some states, but not expressly included in the Model Code, including
 - ▶ if the judge or a relative has acted as a judge in the proceeding
 - ▶ if the judge conferred ex parte with the parties in an unsuccessful effort to mediate or settle the matter
 - ▶ if a judge or the judge’s spouse or relative is in the employ of or associated in the practice of law with, a lawyer in the proceeding
 - ▶ if the judge was associated in the practice of law with one of the attorneys
 - ▶ if the judge as a government attorney participated as counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.
- Adding comment to address suggestions that the so-called duty to sit in Canon 3B(1) may take precedence in circumstances not specifically covered by Canon 3E and that inconvenience to the court system is an appropriate consideration in considering whether the rule of necessity applies.
- Several states and the federal judiciary have not adopted the “de minimis” standard for disqualification for an economic interest, preferring the bright line “however small” standard. If the Commission does not wish to re-visit the “de minimis” standard, it should add comment to caution judges that disqualification may be required for only a de minimis interest.
- It would be appropriate for the Model Code to specify that a disqualified judge should have no other involvement in a case. Ms. Gray offers as an example the New Hampshire Supreme Court’s policy to requiring a justice disqualified from a case to leave the room when other members of the court are discussing the case.

**Canon 4A
Extra-judicial Activities
Cynthia Gray, Director
American Judicature Society, Center for Judicial Ethics
October 15, 2003**

With respect to the issue of a judge's participation in domestic violence task forces and similar groups, Ms. Gray points out the serious potential threat to judicial impartiality and independence that must be balanced against the laudable motivation for judicial involvement. Since this issue requires a very fact-specific inquiry, Ms. Gray suggests that changes in the black letter text of the code may be less appropriate than commentary identifying factors a judge should consider when asked to participate in such a group.

Canon 4C

Charitable Activities

Judicial Conduct

Cynthia Gray, Director

American Judicature Society, Center for Judicial Ethics

October 15, 2003

Ms. Gray suggests that the Commission consider several revisions of Canon 4C:

- Addition of an exception that allows judges to solicit family members on behalf of charitable organizations, as discussed in Massachusetts Advisory Opinion 00-4.
- Additional comment to Canon 4C(3)(ii) to explain that a judge may write a letter of endorsement to government agencies or private foundations in support of a non-profit organization seeking grant funds for a proposal that will affect the administration of justice if the judge or court administrator is knowledgeable about the organization, its purposes, and the use for which the funding is sought, as discussed in Arizona Advisory Opinion 97-1.
- Inclusion of a de minimis exception to the prohibition on personal participation in fund-raising, similar to that adopted by some states in their codes or advisory opinions.
- The phrases “reasonably be perceived as coercive” and “essentially a fund-raising mechanism” should be explained.

In addition, Ms. Gray notes issues related to revision of Canon 4C for the Committee's consideration:

- Judicial ethics committees have consistently advised that a judge may not ask attorneys to perform pro bono legal services for low income clients, require a contribution to a charitable organization as part of a sentence, or be a featured participant in a fund-raising event even if not as a speaker or guest of honor.
- Current issues being addressed by judicial ethics committees include:
 - ▶ may a judge participate in an image campaign for a not-for-profit organization?
 - ▶ may a judge be on a fund-raising committee and be identified as a member of the committee?
 - ▶ may a judge be an honorary member of a committee to plan a fund-raising event?

► may a judge be honored at a fund-raiser if the judge's participation is not announced before the event?