

**Canon 1**  
**Conduct in General**  
**Professor Andrew Kaufman**  
**Harvard Law School**  
**June 9, 2004**

Professor Kaufman's experience teaches that codes of judicial ethics serve three purposes:

- to set appropriate standards of conduct for judges in a way that is reassuring to the general public;
- to aid judges who are trying to decide whether conduct they are contemplating is appropriate for a sitting judge; and
- to provide a text that serves as a basis for the decision on disqualification or discipline of a judge.

Viewed against the backdrop of these purpose, avoiding impropriety and the impropriety are what a code of judicial conduct is all about, and all remaining canons are a subtext of that theme. Canon 1 should be read to cover conduct about which there is a general consensus that it encompasses the sort of behavior in which judges should not behave. This is a manageable standard for individual judges, courts and disciplinary bodies to understand.

**Rule 1.01, Comment 2**  
**Observing Standards of Judicial Conduct**  
**Professor Andrew Kaufman**  
**Harvard Law School**  
**June 9, 2004**

Professor Kaufman believes it is not possible to list all specific instances of possible violations of the Code and suggests that the Commission eliminate the second sentence of Comment 2 to Rule 1.01. The "ordinarily" language may tend to suggest that there is no violation of the code if there is not specific prohibition of the conduct in question or it may lead to those charged with advising or enforcing to try to jam improper conduct into the language of another general provision.

**Rule 2.03**  
**Competence in the Law**  
**Professor Andrew Kaufman**  
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**June 9, 2004**

Professor Kaufman comments that "maintaining" profession competence implies keeping up on the substantive law and observes that the Commentary goes beyond that notion. He suggests the following wording for the black letter. (Additions underlined; deletions struck through.)

“A judge shall perform judicial duties with ~~maintain~~ professional competence ~~in the law.~~”

**Rule 2.04**  
**Impartiality and Fairness**  
**Professor Andrew Kaufman**  
**Harvard Law School**  
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Professor Kaufman would eliminate Rule 2.04. Its text is too broad and ambiguous, and the Commentary may be read to alter, rather than explain, the text. Moreover, it doesn't give clear advice to individual judges, courts or disciplinary bodies about the nature of the prohibited conduct. In Professor Kaufman's view, legislating about the extent to which personal views may play a role in decision-making seems to involve subtle points of jurisprudence that are not appropriate to a code of judicial conduct.

**Rule 2.09(a)(2)**  
**Ex Parte Communications**  
**Professor Andrew Kaufman**  
**Harvard Law School**  
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Professor Kaufman offers the experience of the committee that redrafted the present Code of Judicial Conduct for adoption in Massachusetts and suggests removal of Rule 2.09(a)(2). In view of objections by various segments of the bar about a judge's receipt of exparte advice in secret, the Massachusetts committee removed this provision and concluded that a judge who wanted an expert advice could appoint an adviser or master in accordance with the usual provisions of procedural law.

**Rule 2.09(a)(3)**  
**Ex Parte Communications**  
**Professor Andrew Kaufman**  
**Harvard Law School**  
**June 9, 2004**

Professor Kaufman suggests that, to protect the rights of litigants and address issues of impartiality and the appearance of impartiality, the Commission consider adding language to Rule 2.09(a)(3) used by the committee that redrafted the present Code of Judicial Conduct for adoption in Massachusetts. (Additions underlined; deletions struck through.)

(3) A judge may consult with court personnel\* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges, subject to the following: ~~and~~

i. the judge does not abrogate the responsibility to personally decide the case and takes all reasonable steps to avoid receiving factual information

that is not part of the record. If court personnel\* or another judge nevertheless bring non-record information about a case to the judge's attention, the judge may not base a decision on it without giving the parties notice of that information and a reasonable opportunity to respond. Consultation is permitted between a judge, clerk-magistrate or other appropriate court personnel and a judge taking over the same case or session in which the case is pending with regard to information learned from prior proceedings in the case that may assist in maintaining continuity in handling the case;

ii. when a judge consults with a probation officer about a party in a pending or impending criminal or juvenile case, the consultation shall take place in the presence of the parties who have availed themselves of the opportunity to appear and respond.

iii. a judge shall not consult with an appellate judge, or a judge in a different trial court department, about a case that the judge being consulted might review on appeal; and

iv. 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.

Professor Kaufman recommend Commentary added by the Massachusetts committee, but does not include the Commentary in his submission to the Commission because of its length.

**Rule 2.11**  
**Judicial Statements on Pending and Future Cases**  
**Professor Andrew Kaufman**  
**Harvard Law School**  
**June 9, 2004**

As a strong believer of the notion that judges should not make comments on pending or impending cases, Professor Kaufman observes that the Commission's proposal cuts the heart of the prohibition. He observes that rarely will it be apparent that a judge's comment "might reasonably be expected to affect [a case's] outcome or impair its fairness." Professor Kaufman speculates that the Commission's purpose in refraining from an absolute prohibition relates to a judge's free speech rights or accommodation of some judges' desire for a public forum to discourse about the law. His view is that the right to comment freely about matters pending before another judge is not of the essence of the free speech rights that should be preserved for judges.

**Rule 2.12 C.2.**

**Disqualification**

**Professor Andrew Kaufman**

**Harvard Law School**

**June 9, 2004**

Professor Kaufman questions the language of Rule 2.12 C.2. that disqualifies a judge when the judge “is acting as a lawyer in the proceeding” since he cannot envision a situation when a judge would act as a lawyer in the proceeding. He believes the correct reference should be to a judge who has acted as a lawyer in the proceeding and notes that resort to remittal in such a situation is unwise. The committee that redrafted the present Code of Judicial Conduct for adoption in Massachusetts used the following cautionary language that the Commission may wish to consider: “There are circumstances when other provisions, such as Section 2A, may override the remittal procedure of Section 3F. An example would be where a judge’s close relative has supervisory responsibility over attorneys prosecuting criminal cases in the county where the judge is sitting.”

**Rules 2.17 and 2.18**

**Judicial Misconduct and Lawyer Misconduct**

**Professor Andrew Kaufman**

**Harvard Law School**

**June 9, 2004**

Professor Kaufman observes that the requirements for a judge’s reporting judicial and lawyer misconduct cause significant anxiety within the judiciary and require a good deal of explanation as to specific requirements and the reasons for the requirements to assure compliance. He offers in his submission to the Commission both the black letter Massachusetts rules and their lengthy commentary as one way of providing guidance to judges about the extent of their responsibilities with respect to reporting lawyers and fellow judges.