

**Suggestions sent for the Commission's consideration by Prof. Leslie Abramson (Jan. 14, 2004)**

1. In 37 Houston Law Review 1343, I proposed modifications to the ex parte communications section in Canon 3B(7), as follows:

(a) Where circumstances require, communications are authorized for either scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits, provided [1990 Code's proviso language remains same].

(b) If a judge affords the parties reasonable opportunity to respond, a judge may seek and obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge by

(i) Notifying the parties in writing both about the person who was consulted and the substance of the advice, or

(ii) Inviting the person to file a brief amicus curiae.

(c) A judge may consult with

(i) Law clerks and other court personnel on the judge's staff whose function is to aid the judge in carrying out the judge's adjudicative responsibilities, or

(ii) Other judges in the same jurisdiction and on the same court level. A copy of any written communication or the substance of any oral communication between judges in different jurisdictions or on different court levels must be provided to all parties to the proceedings that were the subject of the communication.

(d) A judge may, with the prior consent of all the parties and their lawyers, confer separately with the parties and/or their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate, permit, or consider any communications expressly authorized by law.

2. In 25 Hofstra Law Review 751, I proposed modification of the judge's duty to report misconduct under Canon 3D(1)-(2), as follows:

(1) A judge who receives credible information that another judge either is no longer fit to continue in office or has committed a violation of the Code shall inform the appropriate authority.

(2) A judge who receives credible information that a lawyer either is no longer fit to practice law or has committed a violation of the applicable rules of professional conduct shall inform the appropriate authority. The judge's obligation to inform does not preclude the judge from handling a lawyer's misconduct by taking additional disciplinary measures against the lawyer.

3. In 72 Nebraska Law Review 1046, I proposed modification of various parts of the federal disqualification statute, which of course is patterned after the 1972 ABA Code. Those suggestions follow, with appropriate changes to reflect where in the current CJC they belong. Canon 3E(1) should be amended, as follows:

(b) (1) Where in the private practice of law, the judge's connection with a matter in controversy was as (i) an attorney; (ii) an associate of the attorney serving during the association as counsel; or (iii) a material witness. A "matter in controversy" is the same transaction or course of events.

(2) Where as a government employee, the judge:

(i) as an attorney or a material witness participated personally and substantially in a proceeding; or (ii) expressed an opinion about the merits of a matter in controversy.

(c) Where the judge, the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

(i) Is a party (or officer, director, or trustee of a party) to the proceeding, unless the evidence shows either that such person has been named as a party merely to compel recusal or that such person has an interest in the case which is no different than any other person;

(ii) Is personally and substantially acting as an attorney in the proceeding; or

(iii) Is known by the judge to be a likely material witness in the proceeding.

(d) The judge knows about an interest which is more than de minimis which is:

(i) a personal or fiduciary financial interest in the subject of or a party to a proceeding, or

(ii) any other interest which could be substantially affected by the outcome of the proceeding, either of which type of interest is held by the judge, the judge's spouse, the judge's parent, or the judge's child, or the spouse of any of them.

I also proposed a new section for Canon 3E, requiring recusal when:

(e) The judge's law clerk:

(i) continues to work on a case where the clerk has accepted )or, has received an offer of a position of future employment and the clerk's future employer )or, the offeror is a party or attorney for a party in a case assigned to the judge; or

(ii) is the attorney of record or appears as a practicing attorney in a case assigned to the judge within \_\_\_ year(s) after terminating employment with the judge.

4. In 14 Georgetown Journal of Legal Ethics 55, I proposed amendments to the black-letter and commentary of Canon 3E. Canon 3E(2) should read:

(2) A judge should keep informed about any circumstance which could lead to disqualification, particularly the circumstances described in Canon 3E(1)(a)- (e) [or Canon 3C(1)(a)-(e)].

The Commentary to Canon 3E(1) needs the following expansion to assist judges in its

I:\USERS\LIBCPR\ETHICS\JUD-CODE\Code Revision 2003-2004\Comments\Code\  
Comm\_Code\_Abramson\_11404.wpd

application, due to the fact that many fact situations do not fit the the black-letter language, and must be resolved under the residuary clause of Canon 3E(1).

When an allegation is made that a judge's remarks require disqualification or discipline, the following are some of the factors which should be evaluated: (1) the content and timing of the remarks; (2) whether the remarks indicate prejudgment of a party, lawyer, witness, or an issue in the proceeding; (3) whether the remarks were made on the record during a proceeding; (4) whether the media published the remarks; and (5) whether the remarks were consistent with rulings made by the judge as part of the proceedings.

When an allegation is made that a judge is presiding over a prior related or unrelated case, as to require disqualification or discipline, some of the factors to be evaluated include: (1) the similarity of parties, witnesses, and issues in the proceedings; (2) whether rulings on similar issues from the prior case have been adjudged to be erroneous; (3) the amount of time between the prior proceeding and the instant case; and (4) whether the judge is reviewing the correctness of his or her own ruling, such as the correctness of the issuance of a search warrant, and, if so, whether the judge is aware that he or she is reviewing an earlier ruling.

When an allegation is made that a judge is presiding over the case of a prior client (or the case of a person who was the former client's adversary at the time of the representation) as to require disqualification or discipline, some of the factors to be evaluated include: (1) the relationship between the two proceedings; (2) the amount of time between the past proceeding and the instant case; (3) whether the past proceeding is relevant to the current case; (4) the number of cases in which the judge represented the former client; and (5) the compensation received by the judge for the prior representation

When an allegation is made that a judge is presiding over the case in which a former law partner, associate or co-counsel of the judge began the current representation after the termination of the professional relation with the judge, as to require disqualification or discipline, some of the factors to be evaluated include: (1) the nature and extent of the prior association; (2) the length of time since the association terminated; (3) whether the judge continues to benefit from the relationship; and (4) whether personal or social relationships derived from the professional relationship.

In deciding whether such a complaint or lawsuit against the judge presents a disqualifying appearance of partiality, important factors for consideration include: (1) whether the litigant is using the claim as a means to judge shop or some other improper purpose; (2) the timing of the motion to recuse or the filing of the lawsuit; and (3) whether there was a legitimate reason for bringing the lawsuit.

Whenever the judge is presiding in a case in which his or her attorney, or an attorney opposing the judge in an unrelated case, the judge shall consider recusal, giving

appropriate significance to the following factors: (1) whether the matter is current or complete; (2) whether the matter relates to the judge as a public official or a private citizen, and, if the former, whether the judge is a nominal party in a proceeding seeking an extraordinary relief such as mandamus; (3) whether the judge is one of a large group of named plaintiffs or defendants; and (4) whether the attorney has represented or opposed the judge more than once.

When a judge presides in a proceeding in which the judge (or the judge's close relative) and an attorney, party, victim, or witness (or their close relative) have a social or business relationship or contact, the judge shall consider recusal, giving appropriate significance to the following factors: (1) the duration of the relationship or contact; (2) the content of any conversation during the relationship or contact; (3) the nature and circumstances of the relationship or contact; (4) the frequency of meetings or conversations; (5) the personal dependence of either on the relationship; (6) whether the relationship was connected with the subject matter of the proceeding; (7) in a business relationship, whether the judge receives preferential treatment not granted to others; (8) whether the relationship has been the subject of media publicity; and (9) statements attributable to the judge or any other person about the relationship.

5. In an upcoming symposium issue of the Hofstra Law Review, I propose the following black-letter and Commentary provisions to Canon 3E(1), requiring recusal when a judge's relative is not counsel of record, but is affiliated with the law firm of record.

(f) When the judge knows that a lawyer in a proceeding is affiliated with a law firm in which a relative of the judge is a partner or has an ownership interest in the law firm.

#### Commentary

Under appropriate circumstances, when the judge knows that the relative is affiliated with a law firm of record in a proceeding disqualification also may be required, because "the judge's impartiality might reasonably be questioned." The relevant factors for making a decision about recusal include consideration of (1) the size of the lawyer-relative's law firm, the nature and notoriety of the proceeding, (2) the fee arrangement between the law firm and the client, (3) whether the lawyer-relative is working for a private law firm or a public agency, (4) whether the lawyer-relative's reputation or goodwill will be significantly enhanced by a successful result in the proceeding, (5) the nature and degree of the relationship between the judge and the lawyer-relative, (6) the prospect of an imminent decision regarding promotion or retention for the lawyer-relative, and (7) whether the law firm's compensation plan includes a bonus or other reward system.