

National Council of Juvenile and Family Court Judges
Recommends Modification of Canons of Judicial Ethics

In response to an increasing demand to provide judicial leadership to improve the legal system and the administration of justice relating to juvenile and family court issues in their communities, states and the nation, the membership of the National Council of Juvenile and Family Court Judges (NCJFCJ) at its annual conference in San Antonio, on July 23, 2003, endorsed the NCJFCJ Recommendations for Modification of the ABA Canons of Judicial Ethics.

The NCJFCJ Recommendations for Modification of the ABA Canons of Judicial Ethics (hereinafter referred to as “the NCJFCJ Canons”) is an initiative in response to the Chief Justices’ resolution passed at their annual meeting in August 2000 recognizing and encouraging judges to become involved in their communities to improve the quality of justice. The NCJFCJ Canons are positive in nature and will enable judges to act in leadership roles without fear of disciplinary proceedings.

The increasing demand for judicial leadership is exemplified by Utah Supreme Court Justice Michael Zimmerman’s call for action, where he stated that as the public and legislatures, not to mention the federal government, increasingly demand more participation and coordination by the judiciary in addressing social problems that are presented in the courts, the judiciary is going to face a new cultural reality. The model of detached magistrates from the days of law school will no longer be the preferred model in the trial courts. Trial judges are going to have to become more adept at managing social

problems and coordinating social services to address those problems. And more judiciary resources are going to have to be committed to supervising and providing social services—a fact that has large implications for the ability of judges to handle their more traditional work in the old, somewhat hands-off manner.¹ In a recent *Florida Supreme Court Judiciary Advisory Committee Opinion*, No. 98026 (Nov. 10 1998), wherein the committee opined that a judge could serve on The Mayor’s Victims’ Assistance Advisory Council “since the VAAC is concerned with the improvement of the law, the legal system or the administration of justice,” one member of the committee in support of the decision, reasoned “that in light of the Supreme Court’s announced desires that judges become more active in areas of enhancing the image of the judiciary, it would appear that participation in the VAAC program is encouraged within the bounds of the Canons.” In *In the Future of Children*, published by the David and Lucille Packard Foundation, Vol. 6, Number 3, Winter 1996, *Executive Summary*, several recommendations are made reflecting the need for judicial leadership. For example, Recommendation 11 states: “Every juvenile court in the country should work with local child welfare agencies to improve their effectiveness in providing abused and neglected children safe and permanent homes in a timely manner as specified by law”; Recommendation 12 states: “Juvenile court judges should be educators and spokespersons in their communities on behalf of abused and neglected children. Judges should advocate for adequate court

¹ Comments by Justice Michael D. Zimmerman, Utah Supreme Court, in *Judicature*, 82(3) (Nov.-Dec. 1998).

resources and community systems to respond promptly and appropriately to child abuse and neglect.”

The NCJFCJ Canons initiative officially commenced in Boston, Massachusetts, on July 17th, 2002, when NCJFCJ passed the following RESOLUTION IN SUPPORT OF

THE MODIFICATION OF CANONS OF JUDICIAL ETHICS:

WHEREAS, the National Council of Juvenile and Family Court Judges has a long established policy of encouraging the judiciary to engage in community outreach to foster the effective administration of justice; and

WHEREAS, the Conference of Chief Justices, at their Annual Meeting in August 2000, passed a resolution recognizing and encouraging judges to become involved in their communities to improve the quality of justice; and

WHEREAS, the role of juvenile and family court judges involves much more than factfinding and adjudication; and

WHEREAS, judges are increasingly expected to take on the role of case management, overseeing the successful implementation of comprehensive court-ordered services plans; and

WHEREAS, to serve the public effectively, judges must be aware of services in the community and must educate the public about issues coming before the courts to encourage community support of the work of juvenile and family court judges; and

WHEREAS, judges taking on such roles still experience conflicting response and confusion as to the propriety of their activities; and

WHEREAS, The Canons of Judicial Ethics vary from state to state, and may not reflect the realities of being an effective juvenile and family court judge; and

WHEREAS, judges would benefit from a comprehensive set of appropriate guidelines and model rules, in efforts to bring about change and clarity regarding their roles as juvenile and family court judges both on and off the bench; and

WHEREAS, the National Council of Juvenile and Family Court Judges should take a leadership role in modifying canons of judicial ethics to assure that juvenile and family court judges can actively work toward the improvement of outcomes for children, individuals, and families who appear in our courts, without unreasonable fear of censure.

NOW THEREFORE, BE IT RESOLVED that the Board of Trustees directs the development, in collaboration with other interested organizations, of a committee to draft specific canons for the affirmative ethical implementation of the aforementioned resolution;

FURTHERMORE, that the proposed canons be presented to the National Council of Juvenile and Family Court Judges and the Conference of Chief Justices for review and approval at their 2003 annual conferences, and other appropriate bodies as may be helpful in implementing these new canons.

The NCJFCJ's Judicial Ethics Committee, co-chaired by Judge Thomas E. Hornsby (ret.) and Judge Patricia Macias, was given the charge to review the ABA Model Code of Judicial Conduct, State Codes of Judicial Conduct, and other relevant materials and make recommendations to the NCJFCJ for review and approval at the 2003 annual conference. The final draft of those proposed revisions was completed and endorsed by the entire NCJFCJ membership at the General Membership Meeting in San Antonio, Texas, on July 23, 2003.

The following are NCJFCJ Canons with commentary. We have not included for the purposes of these revisions the ABA Commentaries on the Model Code (2000). Only included are the commentaries from the Committee, setting forth the reasons for the changes.

CANON 1

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

- A An independent and honorable judiciary is indispensable to justice in our society. A judge ~~should~~ *shall* participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

Commentary:

The language *should* was changed to *shall* to explicitly mandate an element of leadership within judicial conduct matters. Its use here is intended to introduce a broader concept of judicial leadership in the interests of society within the following

Canons, as well as the need for all judges to be actively involved in shaping and applying the Canons to their respective roles.

CANON 2

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE’S ACTIVITIES

- A A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary *and the judicial system*.
- B A judge shall not allow family, social, political or other relationships to ~~influence the judge’s judicial conduct or judgment~~ *affect the judge’s objectivity*. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.
- C A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

Commentary:

Canon 2(A):

Not only is it necessary that judges be held to this standard, but all participants in the judicial system are held to this standard. The judiciary is to act impartially (for example, see Canon 3(b)(5)).

CANON 3

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

A Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law*. In the performance of these duties, the following standards apply.

B Adjudicative Responsibilities

- 1 A judge shall hear and decide matters assigned to the judge except those in which the judge is in fact disqualified.
- 2 A judge shall be faithful to the law* and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.
- 3 A judge shall require* order and decorum in proceedings before the judge.
- 4 A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.
- 5 A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.
- 6 A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.
- 7 A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law*. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

- a Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
 - i the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
 - ii the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.
 - b A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.
 - c 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.
 - d A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.
 - e A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so.
- 8 A judge shall dispose of all judicial matters promptly, efficiently and fairly.
- 9 A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require* similar abstention on the part of court personnel* subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.
- 10 A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

- 11 A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information* acquired in a judicial capacity.

C Administrative Responsibilities

- 1 A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.
- 2 A judge shall require* staff, court, officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.
- 3 A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.
- 4 A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.
- 5 A judge shall not appoint a lawyer to a position if the judge either knows that the lawyer has contributed more than [\$] within the prior [] years to the judge's election campaign, or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter, unless
 - a the position is substantially uncompensated;
 - b the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or
 - c the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent and able to accept the position.
- 6 A judge should seek the necessary time, staff, expertise and resources to discharge all judicial and administrative responsibilities.

D Civic Responsibilities

- 1 Subject to the requirements of this Code, a Judge should provide leadership in:
 - a identifying and resolving issues of access to justice;
 - b developing public legal education programs;
 - c engaging in community outreach activities to promote the fair administration of justice;
 - d convening, participating or assisting in advisory committees and community collaboratives devoted to the improvement of the law, the legal system, the provision of services and/or the administration of justice
- 2 A judge may publicly or individually endorse project goals concerning the law, the legal system, the provision of services or the administration of justice, in principle, and actively support the need for funding of such an organization or governmental agency.

E Disciplinary Responsibilities.

- 1 A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority*.
- 2 A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] should take appropriate action. A judge having knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct [substitute correct title if the applicable rules of lawyer conduct have a different title] that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority*.
- 3 Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

F Disqualification

- 1 A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:
 - a The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceeding. Official communications received in the course of performing a judicial responsibility and knowledge acquired by training programs or from experience not do create per se a basis for disqualification.
 - b The judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
 - c The judge knows* that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household*, has an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis* interest that could be substantially affected by the proceeding;
 - d The judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person:
 - i is a party to the proceeding, or an officer, director or trustee of a party;
 - ii is acting as a lawyer in the proceeding;
 - iii is known* by the judge to have a more than de minimis* interest that could be substantially affected by the proceeding;
 - iv is to the judge's knowledge* likely to be a material witness in the proceeding;
 - e The judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [] year[s] made aggregate* contributions to the judge's campaign in an amount that is greater than [[[\$

] for an individual or [\$] for an entity]]] [[is reasonable and appropriate for an individual or an entity]].

- 2 A judge shall keep informed about the judge's personal and fiduciary* economic interests*, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

G. Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary

Canon 3(C)(6): This new sub-section sets forth the express need for time, staff expertise, and resources to perform the necessary administrative functions. It gives juvenile and family court judges a defense if the budget is not adequate to perform judicial functions.

Canon 3(D)(1): As a result of the evolving interpretation of the judicial canons and the increased demands and encouragement on the judiciary to provide leadership in their communities (local, state and nationwide), this Canon was created to encourage judges to provide leadership in exercising their civic responsibilities and to validate their efforts.

Canon 3(D)(2): This Canon permits judges to endorse, consistent with other provisions of the canons, the need for funding without personally participating. The

public has an interest in hearing the ideas of its judiciary within the public forum on matters concerning the administration of justice. Consistent with these provisions, a judge may exercise the constitutional right of free speech and association on such matters.

Canon 3(F)(1)(a): The inclusion of this language is intended to encourage judges to obtain additional knowledge in the course of performing a judicial responsibility (i.e.—training, expertise) to assist in administering justice.

CANON 4

A JUDGE SHALL SO CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES AS TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS

- A Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:
- 1 cast reasonable doubt on the judge's capacity to act impartially as a judge;
 - 2 demean the judicial office; or
 - 3 interfere with the proper performance of judicial duties.
- B Avocational Activities. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law*, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.
- C Governmental, Civic or Charitable Activities
- 1 A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law*, *the provision of services*, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

- 2 A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law*, the legal system or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.
- 3 A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to *or assisting in* the improvement of the law*, *the provision of services*, the legal system, or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.
 - a A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization
 - i will be engaged in proceedings that would ordinarily come before the judge, or
 - ii will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.
 - b A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise;
 - i may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds from other judges over whom the judge does not exercise supervisory or appellate authority;
 - ii may make recommendations to public and private fund-granting organizations on projects and programs concerning the law*, *the provision of services*, the legal system or the administration of justice;
 - iii shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

- iv shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

D Financial Activities

- 1 A judge shall not engage in financial and business dealings that:
 - a may reasonably be perceived to exploit the judge's judicial position, or
 - b involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.
- 2 A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family*, including real estate, and engage in other remunerative activity.
- 3 A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:
 - a A business closely held by the judge or members of the judge's family*, or
 - b A business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family*.
- 4 A judge shall manage the judge's investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as the judge can do so without serious financial detriment, the judge shall divest himself or herself of investments and other financial interests that might require frequent disqualification.
- 5 A judge shall not accept, and shall urge members of the judge's family residing in the judge's household* not to accept, a gift, bequest, favor or loan from anyone except for:
 - a a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of of the law*, the legal system or the administration of justice;

- b a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;
- c ordinary social hospitality;
- d a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;
- e a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Section 3E;
- f a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;
- g a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or
- h any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value exceeds \$150.00, the judge reports it in the same manner as the judge reports compensation in Section 4H.

E Fiduciary Activities

- 1 A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary*, except for the estate, trust or person of a member of the judge's family*, and then only if such service will not interfere with the proper performance of judicial duties.
- 2 A judge shall not serve as a fiduciary* if it is likely that the judge as fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

- 3 The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary* capacity.
- F Service as Arbitrator or Mediator. A judge shall not act as arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law*.
- G Practice of Law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family*.
- H Compensation, Reimbursement and Reporting.
- 1 Compensation and Reimbursement. A judge may receive compensation and reimbursement of expenses for the extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge's performance of judicial duties or otherwise give the appearance of impropriety.
 - a Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.
 - b Expense reimbursement shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any payment in excess of such an amount is compensation.
 - 2 Public Reports. A judge shall report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least annually and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law*.
- I Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law*.

Commentary

Canon 4(C)(1): The phrase “provision of services” means the services necessary to properly fulfill the court’s legal responsibilities. The need for such services and a judge’s ability to exert leadership in support of their position by public agencies is particularly acute within most juvenile and family court jurisdictions.

Canon 4(C)(3): See above commentary. This sentence is revised to clarify that a judge may assist such an organization or agency in the above manner, and participate in management and investment, but not personally solicit funds for such programs.

Canon 4(C)(3)(b)(ii): By adding “provision of services” here and elsewhere in the Canons, the judge of such courts requiring such services is assured that judicial leadership on their behalf is according to the provisions of Canon 4 as revised.

CANON 5

[No changes recommended to Canon 5]