

AJS Comments on May 2004 Partial Draft of Revisions to ABA Model Code of Judicial Conduct

Submitted to the ABA Joint Commission to Evaluate
the Model Code of Judicial Conduct
July 2004

- AJS reiterates the proposals it made to the Joint Commission in March 2004. The AJS proposals were primarily based on changes made by states in adopting the 1990 model code and advisory opinions applying the code and, therefore, reflected areas in which the states have repeatedly encountered questions about the interpretation of the model code, suggesting the need for amendments. The AJS proposals were intended to fill in some gaps and clarify many of the provisions while affirming the primary provisions and principles of the model code. If the Joint Commission has any questions about any of the specific AJS proposals, AJS would be happy to provide additional information. Attached is a marked-up version of the Joint Commission's draft that notes AJS's original proposals (in red) and additional proposals or disagreements with the draft described below (in blue).
- The current model code serves both as an inspiration for judges and a set of rules that can form the basis of discipline. Many of the changes in language proposed in the draft undermine the aspirational function of the code, a step that AJS believes is ill-advised. The draft suggests that judges should follow the rules and not worry about conduct that has not been captured in a specific rule even if it undermines public confidence in the judiciary. In the attached marked-up version, AJS has noted the language that needs to be retained to avoid weakening the code.
- As noted in its March proposals, AJS believes the appearance of impropriety standard should remain in the model code and that it is not so vague that judges cannot comprehend it or that conduct commissions can abuse it (nor does the case law suggest that the conduct commissions have been abusing the standard.). Because the standard is often used where there is a gap in the code, the remedy for any concerns about vagueness is to make the other provisions of the code as thorough and clear as possible. For this reason, AJS proposed the addition of several specific provisions (for example, covering sexual harassment, cooperating with disciplinary authorities, and using court resources for personal business) and language that "a judge shall not at any time engage in conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." That language clearly comprehends much of the conduct that has been found to violate the appearance of impropriety standard (for example, lying about having a medal of honor, drunken public behavior, and relationships with criminals) but focuses on the character traits necessary for a good judge rather than possible perception of the judge's conduct.

AJS was reassured that the appearance of impropriety standard was retained in the draft but considers the changes made in the draft comments unhelpful. The draft comment (Comment 2, Rule 1.01) that states “ordinarily, when a judge is disciplined for engaging in conduct that creates an appearance of impropriety, it will be in conjunction with charges that the judge violated some other specific rule under this or another canon” neither helps a judge interpret the standard prospectively nor appropriately limits what the conduct commissions can do.

The statement in the current code that “because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code” is completely accurate and should not be deleted from the comments as the draft proposes. The statement helps judges understand the standard and provides guidance in applying it.

Defining “impropriety,” as the draft does (Comment 7, Rule 1.01), as conduct that “compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality and competence” is less clear than the current definition (“actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code”). Using the term “ability” in the definitions of both impropriety and the appearance of impropriety suggests more of a disability definition than a misconduct definition. Most judges who are found guilty of misconduct are quite able to act with integrity but do not do so for other reasons. The current definition is clearer.

- In lieu of the draft’s proposed new language regarding the duty to sit (Comment 1, Rule 2.02), AJS proposes the following language:

A judge must not recuse or disqualify himself or herself to avoid cases that are complex, involve controversial issues or public figures, or are likely to give rise to public clamor and criticism and shall not engage in extra-judicial activities that will result in frequent disqualification.

- The permission the comment in the draft gives to judges to bring to light problems affecting the courts (Comment 5, Rule 1.01) should be qualified to require that such criticism be made “in an appropriate method and temperate manner.”
- Comment 2 to Rule 2.03 (which states that an error of law does not violate the rule requiring professional competence in the law unless the judge willfully disregards the law) does not accurately and completely reflect the case law. A better statement of the principle would be: “This section, like Rule 1.02, is not intended to make every error of law or fact or abuse of discretion the basis for discipline, but misconduct may be proven by a pattern of legal error or a decision evidencing bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty.”

- In March, AJS had proposed strengthening the prohibition on sexual harassment, a proposal supported by the National Judicial Education Program in the testimony of its director Lynn Hecht Schafran. Instead, the draft weakens it by removing the word “sexual” from the comment so that it now reads “a judge must refrain from speech, gestures or other conduct that could reasonably be perceived as harassment” (Comment 1, Rule 2.05). If the intent was to prohibit all harassment (for example, harassment based on race or sexual orientation), that might be appropriate, but would still merit moving the provision, as AJS proposed, from the comment to the text and changing “must” to “shall.” Moreover, a definition of “harassment” is necessary to include the inappropriate touching, vulgar language, and other conduct characteristic of sexual harassment. The Kansas Supreme Court took this approach. Its code provides:

A judge shall refrain from speech, gestures or other conduct that could be perceived by a reasonable person as harassment based upon race, color, religion, gender, national origin, age, disability, or sexual orientation, and shall require the same standard of conduct of others subject to the judge’s direction and control.

“Harassment” is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, disability, or sexual orientation, or that of his/her relatives, friends, or associates.

“Harassing conduct” includes, but is not limited to, the following: (i) Epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts that relate to race, color, religion, gender, national origin, age, disability, or sexual orientation, and (ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of gender and that is placed on walls, bulletin boards, or elsewhere on the premises, or circulated in the workplace, and (iii) sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that are unwelcome, regardless of gender.

- AJS was also surprised to see that the list of examples of manifestations of prohibited bias added by the Joint Commission did not include “insensitive statements about crimes against women” as AJS had proposed. There is a line of cases that demonstrates the necessity of emphasizing the inappropriateness of such comments. *In the Matter of Lehman*, 812 P.2d 992 (Arizona 1991) (among other misconduct, remarked to prosecutors and law enforcement officers in a case involving sex-related crimes that he did not think much of the charges because “everyone knows that the girls in Duncan are easy”); *In re Greene*, 403 S.E.2d 257 (North Carolina 1991) (in open court, told victim in an assault on female case she would ruin her children’s lives if she did not reconcile with her husband, referred to support group as one-sided, man-hating bunch of females and pack of she-dogs, and polled spectators as to how many had little spats during their marriages); *In the Matter of Bender*, Determination (New York Commission on Judicial Conduct February 7, 1992) (during arraignment, asked police office whether alleged assault was “just a Saturday night brawl where he smacks her

around and she wants him back in the morning” and advised defendant to “watch your back” because “women can set you up”); *In re Meyer*, Consent Order of Formal Remand and Suspension from Office (Tennessee Court of the Judiciary October 4, 1994) (stated that defendant found not guilty of aggravated rape by reason of insanity “needs a girlfriend” and suggested public defender should “arrange a dating service or something” for defendant); *In re Turco*, Stipulation and Written Admonishment (Washington Commission on Judicial Conduct December 1, 1995) (inappropriate statements in three domestic abuse cases; stated to one defendant “you didn’t need to bite her. Maybe you needed to boot her in the rear end, but you didn’t need to bite her;” in second case, after finding defendant guilty of assaulting his wife while forcibly removing her from an apartment where controlled substances were being used, stated “fifty years ago I suppose they would have given you an award rather than what we’re doing now;” in third case, stated, “my opinion is that the police do 95% of the work when they separate the parties, so that takes care of 95% of the problem. You know, all we’re doing is slapping someone after the police have remedied the situation. But, so be it. So I mean there’s nothing to get excited about in missing these cases”); *Inquiry Concerning Rohleder*, Order (Kansas Commission on Judicial Qualifications June 12, 1997) (comments about girls that were statutory rape victims; “When you get a victim like the [fourteen-year-old] victim involved in this case, hell, she doesn’t want to be protected, she wants to be -- you know, there’s too many women in this courtroom or I would use the word -- she wants to go to bed, she wants to have sex, she wants to screw everybody. That’s what she wants to do. And so I can’t feel any great compassion for her, that’s for sure;” “Well, the thing that’s unfortunate in this case are the two girls that are putting about four young men in the pen are still running around out on the damned streets, still doing the same thing to more men. That what’s unfortunate;” “She sat there like, you know, nothing ever happened to her. And she had been dicked by three or four different guys;” “And then I certainly agree with you that, you know, ten days in jail is too much for a blow job from a thirteen year old. Now, if it was coming from a 40-year old, that might be worth ten days, but from a thirteen year old it wouldn’t be worth you know a day in jail”); *In the Matter of Roberts*, 689 N.E.2d 911 (New York 1997) (among other misconduct, stated “[E]very woman needs a good pounding now and then” and orders of protection “were not worth anything because they are just a piece of paper,” are “a foolish and unnecessary thing,” and are “useless” and of “no value”); *In the Matter of Moore*, Determination (New York State Commission on Judicial Conduct November 19, 2001) (among other misconduct, stated he would have “slapped her around” himself in reference to harassment complainant and failed to issue order of protection).

- The Joint Commission has asked for input on the practice of debriefing jurors, which is permitted in Comment 3 to Rule 2.07 in the draft (“Where not otherwise prohibited by law, judges may take the opportunity to debrief jurors on their jury experience, after their jury service is concluded”). AJS proposes the following substitute language:

If a judge exercises caution and if not otherwise prohibited by law, a judge may meet with jurors after trial to answer questions about and discuss ways to

improve the process but should not engage in any substantive discussion of the case. At such a meeting, a judge should not, for example, suggest or imply in any way to a jury that he or she agrees or disagrees with the verdict, reveal evidence that had been suppressed or the subject of a motion in limine, evaluate the performance of counsel or witnesses, discuss the rulings on objections made at trial, or review any proceedings that took place outside the presence of the jury.

- The Joint Commission has asked whether the rule authorizing judges to consult ex parte with other judges should address the possibility of disqualifying interests that might be attributed to “consulted” judges (Rule 2.09(a)(3)). AJS believes the exception for ex parte consultations with other judges and with court staff should indicate that the consulted individual must not have a disqualifying interest, and one of the AJS proposals in March was to restrict the exception to the prohibition on ex parte communications for consulting with staff and other judges to persons who do not have a disqualifying or are not in a subordinate or appellate court that may hear the matter.
- AJS repeats its proposal that the exception to the prohibition on ex parte communications that allow communications with experts be eliminated. The alternative of asking experts to file amicus briefs is sufficient.
- The Joint Commission has asked whether the rule regarding ex parte communications should “address directly the newly expanded range of information available to judges through the use of the Internet, or other electronic research methods.” The draft includes a comment (Comment 8, Rule 2.09) that “the prohibition against a judge investigating the facts of a case independently or through a member of the judge’s staff, extends to information available in all mediums including electronic access.” AJS agrees with the inclusion of a comment indicating that the prohibition on independent investigations includes electronic mediums. The comment does not affect a judge’s ability to take judicial notice, which is done on the record and applies only to facts generally known with certainty by all the reasonably intelligent people in the community or facts capable of accurate and ready determination by resort to sources of indisputable accuracy.
-
- The Joint Commission has asked for comment on whether the present draft sufficiently addresses “certain types of communications that are encouraged or required of a judge in the course of his or her service on ‘specialized courts.’” AJS suggests the issue could be addressed by a comment explaining that “the exception for ex parte communications ‘expressly authorized by law’ includes communications specifically permitted by the special procedures adopted for problem-solving courts for judges sitting in those courts, but a judge should avoid communications that in substance, extent, or type exceed what a defendant may reasonably be considered to have consented to when agreeing to participate in the specialized court.”

- AJS supports the de minimis standard for disqualification for economic interest retained in the draft. AJS notes that in at least one state (South Dakota) a judge is required to “disclose [a] de minimis interest to the parties.”
- The Joint Commission has asked whether disclosure (Comment 2, Rule 2.12) is necessary and whether it creates a difficult situation for at least one of the lawyers in the proceeding. AJS believes the current provision that “a judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification” should remain in the model code of judicial conduct. Disclosure ensures that everyone involved in the proceeding has the same information about the judge’s possible connection to the case and ensures the candor and transparency in court proceedings that is a prerequisite for public confidence. Avoiding difficult situations for lawyers should not be a guiding principle for the code, and most attorneys would prefer to have information that may put them in a difficult situation than remain ignorant of a possibly relevant fact.

For example, a typical situation in which a judge is required to disclose but not to disqualify (at least absent a motion) arises if the judge’s daughter is one of the assistant prosecutors in the prosecutor’s office that is prosecuting a criminal case before the judge. While one side of the case obviously already knows this, by disclosing the information, the judge ensures that the other side, or new attorneys, out-of-town attorneys, self-represented litigants, and the public all are also aware. It also gives the judge an opportunity to reaffirm that the judge’s daughter has had nothing to do with the case and to explain the steps the prosecutor’s office has taken to isolate the judge’s daughter from cases before the judge (assuming this has been done, as it should be). The disclosure demonstrates to the participants and public the judge’s sensitivity to possible conflicts but does not place anyone in a difficult position. On the other hand, if no disclosure is made, when a person who may be in the dark subsequently learns of the relationship after the case has progressed (which is almost inevitable), he or she could, rightfully, feel resentment about the judge’s “secret” relationship to the case and attribute any adverse decisions to that bias, resentment that would have been unlikely if the relationship had been disclosed in the first place.

- A number of recent cases involving judges’ failure to adequately administer their courts has suggested to AJS that the issue needs to be addressed more thoroughly in the code of judicial conduct. Therefore, AJS proposes additional changes to Rule 2.13.
- One of the original proposals AJS made to the Joint Commission was to add a requirement that judges cooperate with the conduct commission while being investigated and prosecuted. A recent New York case indicates that a prohibition on retaliation should also be part of the code. Thus, AJS reiterates its earlier proposal and proposes adding a prohibition on a judge retaliating “directly or indirectly by words or conduct at any time against a complainant, courthouse employee, witness, or

any person known or suspected to have assisted or cooperated with an investigation of the judge.”

- The Joint Commission has asked for comment on whether a “Rule [Rule 2.26] that purports to establish legal immunity [for exercise of disciplinary responsibilities] is appropriately placed in an ethics code, or whether it may be more appropriately placed in applicable laws for judicial disciplinary enforcement.” AJS agrees that the code of judicial conduct is not the appropriate place to establish legal immunity but that immunity should be defined in the applicable laws for judicial and attorney disciplinary enforcement.

MAY 2004 DRAFT

CANON 1

CONDUCT IN GENERAL: A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL THE JUDGE'S ACTIVITIES ~~AND SHALL SO AS TO~~ UPHOLD THE INTEGRITY, INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY

1.01 Observing Standards of Judicial Conduct. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards ~~shall observe the high standards of conduct embodied in these Rules~~ so that the integrity, independence and impartiality of the judiciary, and the public's confidence therein, are promoted and preserved. A judge shall not at any time engage in conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Commentary:

[1] An independent judiciary is indispensable to justice in our society. High standards of judicial conduct promote the integrity and impartiality of the judiciary and foster public confidence in the administration of justice.

[2] Avoiding impropriety and its appearance is an overarching principle of judicial conduct embodied in this Canon itself. ~~Ordinarily, when a judge is disciplined for engaging in conduct that creates an appearance of impropriety, it will be in conjunction with charges that the judge violated some other specific rule under this or another canon.~~

[3] In addition to complying with the high standards of judicial conduct, a judge is encouraged to participate in activities that promote ethical conduct generally among judges and lawyers, including efforts to study, develop, maintain, implement and enforce codes of conduct, encourage pro bono representation, and support professionalism within the judiciary and the legal profession.

[4] Deference to the judgments and rulings of courts depends upon public confidence in the integrity, independence, and impartiality of judges. The integrity, independence and impartiality of judges depends in turn upon their acting without fear or favor. A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness, and soundness of character. An independent judiciary is one free of inappropriate outside influences. Public confidence in the impartiality, integrity and independence of the judiciary is maintained by judges acting in a manner free from favoritism, self-interest or bias. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

[5] The duty to act in a manner that promotes public confidence in the integrity of the judiciary does not imply that judges have an obligation to refrain from appropriate criticism. To the contrary, judges are in a unique position to identify and address problems affecting the courts, and should be encouraged to bring those matters to light in an appropriate method and temperate manner as a means to promote the effective administration of justice.

[6] Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. The prohibition against acting with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Rule 2.11 that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

~~[7] Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this code or engaged in conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge. Impropriety occurs when the conduct compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality and competence. An appearance of impropriety occurs when the conduct could create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. See also Commentary under Section 3.04.~~

1.02 Complying with the Law. 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, independence, and impartiality of the judiciary.

Commentary:

[1] A judge's obligation to respect and comply with the law includes compliance with the law, court rules and the provisions of this Code.

CANON 2
JUDICIAL CONDUCT : A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL
OFFICE IMPARTIALLY AND DILIGENTLY

A. In General

2.01 Giving Precedence to the Duties of Judicial Office. The duties of judicial office shall take precedence over all the other activities of the judge. The duties of judicial office include all the responsibilities of the judge's office prescribed bylaw.

Commentary:

[1] While judges engage in a variety of activities, the defining feature of their judicial role is the interpretation and application of the law. For that reason, those official duties that further the judicial function directly, though adjudication, or indirectly, through administration or discipline, are of primary importance relative to the judge's other activities.

B. Adjudication

2.02 The Duty to Decide. A judge shall hear and decide matters assigned to the judge except those in which ~~the judge's impartiality might reasonably be questioned~~ ~~disqualification is required or recusal is appropriate~~ under Canon 2.2

Commentary:

[1] To protect the rights of litigants and preserve public confidence in the integrity, independence and impartiality of the judiciary, there will be times when disqualification or recusal is required or appropriate. A judge must be mindful, however, that a fundamental obligation of the judicial office is to be available to decide the matters that come before the court or tribunal. A judge must not ~~use recusal or disqualification to avoid difficult or controversial issues~~ ~~recuse or disqualify himself or herself to avoid cases that are complex, involve controversial issues or public figures, or are likely to give rise to public clamor and criticism and shall not engage in extra-judicial activities that will result in frequent disqualification.~~

2.03 Competence in the Law. A judge shall maintain professional competence in the law.

Commentary:

[1] In order to uphold the law, a judge must possess the legal knowledge, skills, and preparation necessary for the effective administration of justice.

[2] When applying and upholding the law in the course of judicial decision-making, a judge may on occasion make a mistake of fact or law. ~~An error of this kind does not violate this rule. Willful disregard of the law, however, is another matter and in appropriate circumstances may constitute misconduct by the judge. This section, like Rule 1.02, is not intended to make every error of law or fact or abuse of discretion the basis for discipline, but misconduct may be proven by a pattern of legal error or a decision evidencing bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty.~~

[3] Judicial competence may be diminished and compromised when a judge is impaired by drugs, alcohol or other mental or physical impairments.

2.04 Impartiality and Fairness A judge shall apply the law without regard to the judge's personal views and shall decide all cases with impartiality and fairness.

Commentary

[1] A judge must be objective and free of favoritism to ensure impartiality and fairness to all parties. While a judge's background and philosophy may influence the way in which the judge analyzes, interprets and applies the law, the judge's personal views, by themselves, should not be controlling. Thus, a judge must uphold the law without regard to whether the judge personally approves or disapproves of the law in question.

2.05 Bias and Discrimination.

(a) 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, marital status, parenthood, language, ethnicity, or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. This rule does not preclude legitimate references to those factors when relevant to an issue in a proceeding.

(b) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation marital status, parenthood, language, ethnicity, or socioeconomic status, against parties, witnesses, counsel or others. This Section 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.

(c) A judge shall not engage in sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control.

Commentary:

~~[1] A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as harassment and must require the same standard of conduct of others subject to the judge's direction and control.~~

[12] A judge must perform judicial duties impartially and fairly. A judge who manifests bias in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Even facial expression and body language can convey to parties or lawyers in the proceeding, jurors, the media and others an appearance of bias. A judge must avoid conduct that may be perceived as prejudicial or biased.

[23] Examples of manifestations of bias include but are not limited to epithets, slurs, demeaning nicknames, negative stereotyping, attempted humor based on stereotypes, threatening, intimidating or hostile acts, suggesting a connection between race or nationality and crime, ~~and~~ irrelevant references to personal characteristics and insensitive statements about crimes against women.

[3] "Sexual harassment" includes but is not limited to sexual advances, requests for sexual favors, comments about physical attributes, repeated and unwanted attempts at a romantic relationship, sexual gestures, offensive or suggestive remarks, sexually explicit questions, improper touching, lewd and vulgar language, suggestive or explicit pictures or images, and other verbal or physical conduct of a sexual nature that is unwelcome, regardless of gender.

2.06 Diligence. A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary:

[1] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

[2] In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but should not coerce parties into surrendering the right to have their controversy resolved by the courts.

2.07 Demeanor and Decorum.

(a) A judge shall require order and decorum in proceedings before the judge.

(b) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, court staff, other judges, 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.

(c) 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.

Commentary:

[1] The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

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

[3] ~~Where not otherwise prohibited by law, judges may take the opportunity to debrief jurors on their jury experience, after their jury service is concluded. If a judge exercises caution and if not otherwise prohibited by law, a judge may meet with jurors after trial to answer questions about and discuss ways to improve the process but should not engage in any substantive discussion of the case. At such a meeting, a judge should not, for example, suggest or imply in any way to a jury that he or she agrees or disagrees with the verdict, reveal evidence that had been suppressed or the subject of a motion in limine, evaluate the performance of counsel or witnesses, discuss the rulings on objections made at trial, or review any proceedings that took place outside the presence of the jury.~~

2.08 Ensuring the Right to be Heard. 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.

Commentary:

[1] Ensuring the right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are respected.

[2] The judge has an important role to play in overseeing the settlement of disputes, but should be careful that efforts to further settlement not undermine a party's right to be heard according to law. A judge may therefore encourage parties to a proceeding and their lawyers to settle matters in dispute but should not act in a manner that coerces a party into settlement.

2.09 Ex Parte Communications

(a) 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:

(1) 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, substantive, or tactical advantage as a result of the ex parte communication, and (ii) the judge promptly gives notice to all other parties of the substance of the ex parte communication and allows an opportunity to respond.

~~(2) A judge may obtain information and opinions from a disinterested expert in a proceeding before the judge if, before the record is closed, the judge gives notice to the parties of the person consulted and the substance of the advice obtained, and affords the parties reasonable opportunity to respond.~~

~~(23)~~ A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities ~~or with other judges as long as the person consulted does not have a disqualifying interest in the proceeding or is not in a subordinate or appellate court that may hear the matter~~ and 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.

~~(34)~~ A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.

~~(45)~~ A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(b) A judge shall not independently investigate facts in a case.

(c) A judge shall make reasonable efforts, including the provision of appropriate training and supervision, to ensure that Section 2.09 is not violated through law clerks or other personnel on the judge's staff.

(d) If a judge inadvertently receives an unauthorized ex parte communication, the judge shall disclose the communication on the record and give the parties a reasonable opportunity to respond.

Commentary:

[1] An “ex parte communication” is any communication about a case (including communications not on the merits) without notice to or participation by all parties or lawyers for all parties between a judge (or by court staff on behalf of a judge) and any other person regardless whether that person is a participant in the proceeding.

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

[23] Whenever the presence of a party or notice to a party is required by Section 2.09, it is the party’s lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

[34] The proscription against communications concerning a proceeding includes communications with lawyers, law professors, and other persons who are not participants in the proceeding, except to the limited extent permitted by this rule.

[45] Although certain ex parte communications ~~is approved~~ are allowed by Section 2.09 to facilitate scheduling and other administrative purposes and to accommodate emergencies, in general, ~~however,~~ a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 2.09 are clearly met. ~~A judge must disclose to all parties, in a manner that ensures notice, all ex parte communications described in Sections 2.09(a) and 2.09(b) regarding a proceeding pending or impending before the judge.~~

[56] An appropriate and often desirable method of obtaining the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

[67] A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are simultaneously apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

[78] If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

[89] The prohibition against a judge investigating the facts of a case independently or through a member of the judge’s staff extends to information available in all mediums including electronic access.

[9] Even when an ex parte request is authorized by law, a judge should scrupulously examine the facts and the principles of law upon which it is based, granting the request only when fully satisfied that the law permits it.

[10] The exception for ex parte communications “expressly authorized by law” includes communications specifically permitted by the special procedures adopted for problem-solving courts for judges sitting in those courts, but a judge should avoid communications that in substance, extent, or type exceed what a defendant may reasonably be considered to have consented to when agreeing to participate in the specialized court.

[11] An ex parte communication with other judges and court personnel is not appropriate under Rule 2.09 if the judge knows the other judge or member of court staff has a disqualifying interest in the proceeding. Similarly, a judge should not consult with a member of a subordinate or appellate court that may hear the matter. The exception for consultation with court personnel is not intended to authorize ex parte consultation with court staff whose function is to provide evidence or act as an advocate in a proceeding.

2.10 External Influences on Judicial Conduct.

- (a) A judge shall not be swayed by partisan interests, public clamor or fear of criticism.
- (b) A judge shall not allow family, social, political or other relationships to influence the judge’s judicial conduct or judgment.
- (c) A judge shall not convey or permit others persons to convey the impression that such persons are in a special position to influence the judge.

Commentary:

[1] An independent judiciary requires that judges decide cases according to law without regard to whether the law or the litigants are popular or unpopular with the media, the public, government officials, or the judge’s own friends or family.

[2] Confidence in the judiciary is eroded if judicial decision-making is perceived to be subject to inappropriate outside influences, thus giving rise to an appearance of impropriety (see Rule 1.02/03) It is therefore essential to judicial independence and impartiality that judges create no perception that their decision-making could be colored by such influences.

2.11 Judicial Statements on Pending and Future Cases.

- (a) A judge shall not, while a proceeding is pending or impending in any court, make any public comment except in the course of official duties, to explain the procedures of the

court for public information, or as part of a legal education program 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. A judge shall require similar abstention from public comment on the part of staff, court officers, and others subject to the judge's direction and control. A judge shall not discuss the rationale for a decision outside the record unless the judge is repeating what was already made part of the public record.

(b) A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

Commentary:

[1] Section 2.11 restrictions on judicial speech are essential to the maintenance of the integrity, independence impartiality of the judiciary.

[2] This prohibition applies even to cases not currently pending before the commenting judge. A pending proceeding is one that has commenced and continues during any appellate process and until final disposition. An impending proceeding is one that is anticipated but not yet commenced. A proceeding is impending where there is reason to believe a case may be filed, for example, if a crime is being investigated but no charges have been brought, or if someone has been arrested but not yet charged, or if legislation has been passed that will probably be challenged in the courts.

[3] This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. ~~The conduct of lawyers relating to trial publicity is governed by [Rule 3.6 of the ABA Model Rules of Professional Conduct]. (Each jurisdiction should substitute an appropriate reference to its rule.)~~

~~[4] This Section does not prohibit judges from making public statements in the course of their official duties or from explaining the procedures of the court to the public. Nor does it prohibit judges from responding directly, or through a third party, to allegations in the media or elsewhere concerning the judge's conduct in a matter, provided that any such response meets the requirements of 2.11(a) and (b).~~

[5] By refraining from public comment, judges reassure the public that cases are being tried, not in the press, but in the public forum devoted to that purpose. This prohibition does not preclude a judge from making a public comment reiterating without elaboration what is set forth in the public record in a case, including pleadings, documentary evidence, and the transcript of proceedings held in open court. Speaking to a journalist is public comment even where it is agreed that the statements are "off the record." Even in

legal education programs and materials, a judge should not discuss a pending case in which the judge is personally participating or has participated.

* * *

2.12 Disqualification.

A. General Rule. In addition to disqualifying himself or herself in any of the circumstances in paragraphs (B) through (F) below, a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

B. Personal Bias or Knowledge. A judge shall disqualify himself or herself when 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.

C. Roles in a Proceeding. A judge shall disqualify himself or herself when the judge, the judge's spouse or domestic partner, a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is a party to the proceeding, or an officer, director, or trustee of a party; is acting as a lawyer in the proceeding; ~~or~~ is to the judge's knowledge likely to be a material witness in the proceeding; or presided as a judge before whom the proceeding was heard or tried in a lower court.

D. Economic and other Personal Interests. A judge shall disqualify himself or herself when the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner or child, 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; or a person within the third degree of relationship to the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such a person, has a more than de minimis interest that could be substantially affected by the proceeding.

E. Campaign Contributions. A judge shall disqualify himself or herself when the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [1 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]].

F. Public Statements. A judge shall disqualify himself or herself if the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to an issue in the proceeding or the controversy in the proceeding.

G. Prior Affiliations. A judge shall disqualify himself or herself where the judge

1. 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;
2. served as a material witness concerning the matter; ~~or~~
3. served in governmental employment and in such capacity participated as lawyer, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy; or
4. within the preceding three years, was associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy or represented any party to the controversy while the judge was an attorney engaged in the private practice of law.

H. Monitoring Economic Interests. 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 or domestic partner, and minor children residing in the judge's household.

I. Remittal of Disqualification. A judge subject to disqualification by the terms of this Section, other than paragraph B, 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 the parties and lawyers, without participation by the judge, agree that the judge should not be disqualified, the judge may participate in the proceeding. Such a remittal agreement shall be written and shall be incorporated in the record of the proceeding.

J. Unless the rule of necessity applies, a judge who is disqualified from a case shall take no further judicial action except whatever ministerial actions are necessary to remove the case from the judge's docket and shall not communicate about the case with the succeeding judge. Appellate court judges who are disqualified shall take steps to ensure that they do not receive the briefs, draft opinions, and other materials distributed to the other judges and shall not participate in or be present for any discussion of the case.

Commentary:

[1] Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of Section 2.12(a) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

[2] A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

[3] By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters such as these latter two, that require immediate action, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 2.12(a)(2); a judge formerly employed by a government agency, however, shall disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

[5] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. If however, the judge's impartiality might reasonably be questioned" under Section 2.12(a) or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the proceeding" under Section 2.12(a)(4)(iii) the judge's disqualification may be required.

[6] A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

C. Administration

2.13 Administrative Competence and Diligence. A judge shall discharge the judge's administrative responsibilities diligently, competently, and 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.

Commentary:

~~[1] The judge's obligation to perform adjudicative responsibilities diligently, competently and without bias or prejudice, applies equally to the judge's administrative responsibilities.~~

2.14 Supervision of Staff. A judge shall provide adequate supervision, review, and instruction to ensure that ~~require court~~ staff and ~~court-officials and others subject to the judge's direction and control to~~ exercise their responsibilities diligently, competently, and ~~act~~ in a manner consistent with the high standards of conduct expressed in this code. A judge shall supervise court staff to ensure proper accounting of funds deposited in the court, timely preparation of court transcripts are timely prepared, and compliance with all record-keeping and other administrative requirements.

Commentary:

[1] The first contact that members of the public have with the judicial system is often with court staff. It is therefore especially important that judges take responsibility for ensuring that the conduct of personnel ~~subject to their direction and control~~ is consistent with the high standards of conduct embodied in this code. Although a judge necessarily delegates some of the court's responsibilities to staff, the judge retains the obligation to ensure that staff fulfill the responsibilities delegated. Adequate supervision under this Section includes taking steps to ensure that court staff exercise diligence in exercising administrative responsibilities and treat the public in a patient, dignified, courteous, and unbiased manner. When supervising staff, judge should also ensure compliance with rules governing personal use of court resources and use of the prestige of judicial office to advance private interests, and should prohibit involvement in a case in which impartiality might reasonable be questioned.

[2] The judge's duty to adequately supervise court staff extends to staff members the judge does not have the authority to hire or fire and may require the judge to monitor staff and report inadequate performance to the court official or other supervisor who does have direction and ability to discipline court staff.

2.15 Supervision of Other Judges. A judge with supervisory authority for other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other administrative responsibilities.

Commentary:

[1] Public confidence in the courts depends on justice not being unduly delayed. To promote the efficient administration of justice, judges with supervisory authority must take the steps needed to ensure that judges under their supervision administer the workload of their courts expeditiously.

2.16 Administrative Appointments.

(a) A judge shall exercise the power of appointment impartially, ~~and~~ on the basis of merit and without favoritism based on family, social, political, or other relationships. A judge shall ~~not engage in avoid~~ nepotism, ~~favoritism and~~ or make unnecessary appointments. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(b) 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 (1) the position is substantially uncompensated; (2) 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 (3) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent and able to accept the position.

Commentary:

[1] Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation to only approve compensation that matches the fair value of services rendered prescribed by Section 2.16 (a).

[2] This rule applies to the appointment, hiring, or voting for the appointment or hiring of a member of the judge's staff, the staff of court of which the judge is a member, or an appointee in a judicial proceeding. The prohibition on nepotism applies to any relative within the degree of relationship established by statute or rule or, in the absence of a definition under state law, to a an individual who is a relative within the third degree of relationship of either the judge or the judge's spouse or the spouse of such a person.

D. Reporting

2.17 Judicial Misconduct A judge having knowledge or reliable information that another judge has committed a violation of this Code that raises a question as to the other judge's integrity, temperament, diligence, or fitness for office shall inform the appropriate authority. A judge who receives information indicating a ~~substantial~~ likelihood that another judge has committed a violation of this Code ~~should~~ shall take appropriate action.

Commentary:

[1] Appropriate action may include direct communication with the judge who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.

2.18 Lawyer Misconduct. 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. A judge who ~~receives~~ has knowledge or reliable 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~~ shall take appropriate action.

Commentary:

[1] Appropriate action may include direct communication with the lawyer who has committed the violation, and reporting the violation to the appropriate authority or other agency or body.

2.19 Disability and Impairment. A judge who has reliable information having knowledge that the performance of a lawyer or another judge is impaired by drugs, alcohol, or other mental, emotional or physical condition shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

Commentary:

[1] Taking or initiating corrective action by way of referral to an assistance program can fulfill several laudable purposes. For example, a resulting intervention can be the first step toward a successful recovery program. That action alone may satisfy the mandates expressed in this section. Depending on the gravity of the conduct, however (i.e., the conduct in response to which action is necessary), a judge having knowledge of such conduct may be required to take action in addition to or in lieu of a referral to the relevant assistance program.

2.20 A judge, including a respondent judge, shall cooperate and be candid with the judicial conduct commission or attorney disciplinary board, shall not intentionally misrepresent a material fact or engage in willful concealment during disciplinary proceedings, and shall not retaliate directly or indirectly by words or conduct at any time against a complainant, courthouse employee, witness, or any person known or suspected to have assisted or cooperated with an investigation of the judge.

2.20 Immunity for Discharge of Duties – Acts of a judge, in responding to judicial misconduct, lawyer misconduct, or disability and impairment under Rules 2.17, 2.18, and

~~2.19 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.~~

~~Commentary:~~

~~[1] To encourage judges to report or otherwise act on evidence of lawyer and judicial misconduct as required by these Rules, it is important that judges be insulated from threats of civil action when they attempt to comply with their obligations under such rules.~~