

AJS Comments on July 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
October 2004

- AJS reiterates the proposals it made to the Joint Commission in March 2004 on the topics in the second partial draft submitted by the Joint Commission (using judicial office for private purposes, appearance before governmental bodies, civic or charitable activities, appointments to fiduciary positions, testifying as a character witness, financial activities, remunerative activities, and business activities). In particular, AJS notes its proposals to revise the code:
 - To clarify that the prohibition on appearing as a character witness applies to all adjudicative proceedings.
 - To explicitly prohibit a judge from using court staff, resources, stationery, equipment, or premises for non-judicial activities.
 - To prohibit a judge from soliciting attorneys to participate in specific pro bono programs or to accept particular cases but to permit a judge to encourage attorneys to participate generally in pro bono efforts.
 - To create an exception to the prohibition on personal solicitation of contributions for charitable organizations that would allow a judge to solicit funds from relatives or close personal friends.
 - To clarify on which government commissions it is appropriate for judges to serve.

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).

- AJS strongly disagrees with the proposed clause added in the Joint Commission draft that would allow use of judicial letterhead in a judge's personal business except when it is used "to gain an advantage" (Section 3.01, comment 2). There is no possible motive for using judicial letterhead except to gain an advantage. Any use of judicial letterhead inevitably creates at least an appearance of an attempt to gain an advantage, and keeping the prohibition explicit and unconditional (as in the current model) avoids the accusation of vagueness that has been leveled at the appearance of impropriety standard. The proposed change adds ambiguity to the code and,

therefore, is not helpful to judges or the public. Moreover, any use of public resources for personal business by a judge will undermine public confidence in the judiciary and cause understandable resentment by most taxpayers who no doubt are prohibited from using their employer's resources for personal activities.

- AJS disagrees with the proposed comment to Section 4.02 that gives as an example of permissible comment to an executive or legislative body a juvenile court judge advocating the creation of new athletic or other recreational opportunities that could lead to a decrease in delinquency among juveniles. While a judge, like many members of a community, may feel that such activities would be beneficial, a judge is not uniquely situated or qualified to comment on whether there is a cause and effect relationship between recreational opportunities for youth and delinquency, and such comment would inevitably embroil a judge in a debate on the best use of a community's limited resources (which is better, a raise for police officers or more athletic activities for teenagers?). A more appropriate example would allow a judge to comment on creating more options for judges in sentencing in criminal cases, for example, ordering treatment in cases involving substance abuse or mental illness or providing for services for children and juveniles involved in the court system although when making such comments a judge should take care to avoid lending the prestige of office to advance private interests.
- AJS supports the Joint Commission's proposal that judges be prohibited from being members of organizations that practice invidious discrimination on the basis of ethnicity and sexual orientation (as well as those that discriminate on other grounds) and that the prohibition be extended to significant use of facilities.
- AJS supports the limitation on use of a judge's letterhead for letters of reference. AJS proposed in March commentary that: "A judge may use official or chambers stationery when writing a letter of recommendation for someone the judge knows in an official capacity such as, for example, a current or former staff member but should not use official or chambers stationery if the basis for the reference is unrelated to the judge's office such as, for example, a neighbor or personal friend."
- AJS does not believe that it is necessary to prohibit a judge from participating in a fund-raising event by selling goods or similar items in which money actually changes hands, as distinguished from soliciting or accepting donations.
- AJS supports the Joint Commission's proposed revision that would allow a judge to "appear at, participate in, and permit the judge's title to be used in connection with an event of an organization devoted to the improvement of law, the legal system, or the administration of justice, even though the event may serve as a fundraising purpose." However, AJS believes additional commentary should be added to specifically remind judges that the permission to participate in law-related fund-raising events does not override the obligation to refrain from activities that cast reasonable doubt on the judge's capacity to act with impartiality, integrity, and independence.

- Finally, although not related to the provisions covered in the second partial draft submitted by the Joint Commission, AJS belatedly proposes the following language related to self-represented litigants (it probably belongs in the commentary to Canon 2.04)):

A judge may make procedural accommodations to provide diligent pro se litigants the opportunity to have their cases fully heard, and such an exercise of judicial discretion does not raise a reasonable question about the judge's impartiality. Reasonable accommodations include liberally construing pleadings, explaining the basis for a ruling, refraining from using legal jargon, questioning witnesses for clarification, freely allowing amendment of pleadings, and explaining general matters such as the burden of proof and what types of evidence may and may not be presented.

CANON 3: PERSONAL CONDUCT: A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AFFAIRS TO PRESERVE THE INTEGRITY, IMPARTIALITY AND INDEPENDENCE OF THE JUDICIARY.

3.01 Using the Judicial Office for Private Purposes. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.

Commentary:

[1] Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities.

[2] It would be improper, for example, for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense or to use his or her judicial position to gain advantage in a civil suit involving a member of the judge's family. Similarly, a judge must not use judicial letterhead ~~to gain an advantage~~ in conducting his or her personal business.

[3] Special considerations arise when judges write or contribute to publications, whether related or unrelated to the law. A judge should not permit the publisher of such materials to exploit the judge's office by, for example, praising the judge's judicial accomplishments or, when the work is unrelated to the law, emphasizing the judge's position.

[4] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship.

[5] A judge may provide a reference or recommendation ~~for an individual~~ based upon the judge's personal knowledge for a person seeking employment, admission to an educational institute or the bar, or in similar situations. However, unless the recommendation is based upon information obtained through the judge's expertise or experience as a judge, the reference or recommendation should not be communicated on the judge's judicial letterhead.

[6] This rule does not apply to a judge's use of his or her name in endorsements of himself or herself, or of other judicial candidates as permitted in Canon 5.

[7] A judge must not testify voluntarily as a character witness because to do so ~~may~~ lends the prestige of the judicial office in support of the party for whom the judge testifies. See Rule 4.07.

3.02 Use of Non-Public Information. A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

[1] In the course of performing their judicial duties, judges may acquire information of commercial or other value that is otherwise unavailable to the public. Judges must not reveal or exploit such information for personal gain or for any purpose unrelated to their judicial duties.

3.03 Affiliation with Discriminatory Organizations. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, ethnicity, or sexual orientation, and shall not use the facilities of such an organization to any significant extent.

Commentary:

[1] Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Whether an organization's practices are invidiously discriminatory is often a complex question. An organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, national origin, ethnicity, or sexual orientation, individuals who would otherwise be admitted. Rule 3.03 does not prohibit a judge's membership in any United States military organization, an organization dedicated to the preservation of religious, ethnic or legitimate cultural values of common interest to its members, or one that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited.

[2] Public manifestation by a judge of the judge's approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 1 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Rule 1.01. Although Rule 3.03 relates only to organizations invidiously discriminating on the basis of race, sex, religion, national origin, ethnicity, or sexual orientation, a judge's membership in or significant use of organizations practicing invidious discrimination on any other basis prohibited by the applicable law creates the appearance of impropriety.

[3] Whether a judge's use of the facilities of a discriminatory organization is significant depends on whether the frequency or nature of that use is sufficient to create the impression that the judge approves of the organization and its practices. According, a judge must not arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, national origin, ethnicity, or sexual orientation in its membership or other policies, or to regularly attend events at or use other facilities of such a club.

[4] When a judge learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Rule 3.03 and Rule 1.01, the judge is permitted, in lieu of resigning, to make immediate efforts to have the

organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

CANON 4: EXTRA-JUDICIAL CONDUCT: A JUDGE SHALL CONDUCT THE JUDGE'S EXTRA-JUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL OBLIGATIONS

4.01 Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they:

- (a) do not interfere with the proper performance of judicial duties;
- (b) do not cast reasonable doubt on the judge's capacity to act with impartiality, integrity, and independence;
- (c) will not result in frequent disqualification of the judge;
- (~~e~~) do not demean the judicial office; and
- (~~d~~) comply with the requirements of this code.

Commentary:

[1] Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives.

[2] Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. See Rule 3.03 and accompanying Commentary.

[3] As a judicial officer and person specially learned in the law, a judge is in the unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of the justice system. Such contributions may take the form of speaking, writing, teaching or participating in other extrajudicial activities. In many instances, these activities may contribute significantly to the promotion of the fair administration of justice and to ensuring the integrity, independence and impartiality of the judiciary. To the extent that time permits, a judge is encouraged to understand such activities, either independently or through a bar association, judicial conference or other organization.

[4] As a private individual, a judge may also wish to engage in writing, speaking, teaching or being otherwise active in regard to non-legal subjects. To the extent that such activities is not in conflict with any of the judges' duties under the Code, it is permitted by the Rule.

4.02 Use of court resources. A judge shall not use court staff, resources, stationery, equipment, or premises for personal, business, family, or political activities except for incidental or de minimis use for non-political activities or for matters concerning the law, the legal system, or the administration of justice.

4.032 Appearances Before Governmental Bodies. A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except

(a) on matters concerning the law, the legal system, or the administration of justice;

(b) on other matters that might reasonably merit the attention and comment of the judge because of knowledge or expertise acquired in the course of the judge's judicial duties; or

(c) when acting pro se in a matter involving the judge or the judge's interests.

Commentary:

[1] Judges possess special expertise on matters of law, the legal system and the administration of justice, and may properly share that expertise with governmental bodies. In addition, judges may acquire information on issues before them that are not law-related but upon which they may be well qualified to comment from their unique vantage point as jurists who have presided over such matters in court. ~~For example, a juvenile court judge may be uniquely situated to comment to a public body on the potential benefits of proposed improvements in the community, such as the creation of new athletic or other recreational opportunities that could lead to a decrease in delinquency among juveniles.~~ For example, a judge may comment on the need to create more options for judges in sentencing in criminal cases, such as ordering treatment in cases involving substance abuse or mental illness or providing for services for children and juveniles involved the system although a judge should not promote any particular option or program to avoid lending the prestige of office to advance private interest and should avoid involvement in debates within the service-provider community and among executive agencies and between the legislative and the executive branches.

Judges must be mindful, however, that their appearance before governmental bodies remains subject to other provisions of this Code, such as Rule 2.11, governing public comment on pending and impending matters, and Rule 4.01(b), prohibiting judges from engaging in extra-judicial activities that cast reasonable doubt on the judge's impartiality, integrity and independence.

[2] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies on matters that are likely to have special effect upon them as private citizens, for example, proposals that will affect their real property or proposals having to do with the availability of local health services. The judge must exercise care, however, not to refer to his or her judicial position or otherwise lend the prestige of judicial office to advance general causes with respect to which the judge possesses no special judicial competence.

[3] See Rules 2.10 and 3.01 and Commentary regarding the obligation to avoid improper influence.

4.043 Appointments to Governmental Bodies. 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.

Commentary:

[1] A judge must assess the appropriateness of accepting extra-judicial assignments in light of the demands on judicial resources created by crowded dockets and should not accept governmental appointments that are likely to interfere with the effective operation of the courts. Judges must also avoid appointments that are likely to embroil the court in controversial issues or impair the impartiality, integrity and independence of the judiciary.

[2] Rules 4.01 and 4.03 read in conjunction require a judge to gather sufficient information to determine whether the work of a particular government commission concerns the improvement of the law, the legal system, or administration of justice and whether the judge's participation on the commission would cast reasonable doubt on a judge's capacity to act with impartiality, integrity, and independence. To come within the exception for improvement of the law, the legal system, or the administration of justice, the government commission must have a direct connection with how the court system meets its statutory and constitutional responsibilities, in other words, how the courts go about their business, and the commission should relate to matters a judge, by virtue of judicial experience, is uniquely qualified to address. Commissions designed to improve the operation of another branch of government, for example, law enforcement or prison reform, do not fall within the exception. Moreover, membership by a judge on a commission may create the appearance that the judge could not act impartially if the commission does not have a diverse membership that represents more than one point of view or the commission advocates the rights of specific types of participants in the justice system. Even if a judge may not be a member of a commission, a judge may educate and assist the commission by offering the judge's expertise on the law, the legal system, or administration of justice.

4.054 Civic or Charitable Activities. A judge may participate in civic or charitable activities that do not reflect adversely upon a judge's impartiality, integrity and independence or interfere with the performance of judicial duties subject to the following limitations and the other requirements of this Code.

(a) With respect to any activities in which a judge participates on behalf of a civic or charitable organization:

(1) A judge shall not

- i. use or permit the use of the prestige of judicial office for fund-raising or membership solicitation
- ii. personally solicit funds and in-kind donations for the organization
- ~~iii.~~ personally solicit attorneys to participate in specific pro bono programs or to accept particular cases;
- ~~iv.~~ personally participate in membership solicitation if the solicitation is primarily a fundraising mechanism, or if it might reasonably be perceived as coercive;
- vi. be a speaker, guest of honor, or other featured participant at an organization's fund-raising event, except as allowed by Section 4.04(a)(2)(iii).

(2) Notwithstanding paragraph (1) above, a judge may:

- i. personally solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority and from relatives or close personal friends whose appearance or interest in a case would in any event require the judge's disqualification under Section 3E;
- ii. assist the organization in planning fund-raising and participate in the management and investment of the organization's funds;
- iii. appear at, participate in, and permit the judge's title to be used in connection with an event of an organization devoted to the improvement of law, the legal system, or the administration of justice, even though the event may serve as a fundraising purpose.
- iv. make recommendations to public and private fund-granting organizations on programs and activities concerning the law, the legal system or the administration of justice;
- v. encourage attorneys to participate generally in pro bono efforts, including referring to a list of pro bono programs;
- vi. donate to an organization's fund-raising activity; and
- vii. participate in de minimis fund-raising activities.

b. A judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental entity devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, ~~fraternal~~ or civic organization not conducted for profit, unless it is likely that the organization or governmental entity:

(1) Will be engaged in proceedings that would ordinarily come before the judge, or

(2) 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.

Commentary:

[1] A judge should be permitted to participate in civic, ~~fraternal~~ or charitable activities for the benefit of the community of which the judge is a part, provided that such participation

does not take inappropriate advantage of the judge's judicial position, or otherwise interfere with the performance of the judge's judicial duties.

[2] Solicitation of funds for an organization involves the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. For that reason, a judge is not permitted to solicit funds in person, in writing or by telephone, unless the person being solicited is another judge over whom the judge exercises no appellate or supervisory control or is a family member or close personal friend. Similarly, a judge is not permitted to personally solicit membership in an organization if the solicitation is primarily a fundraising mechanism. A judge may, however, participate in fundraising activities by performing tasks other than soliciting or accepting donations at fundraising events, without the attendant risk of coercion that makes personal solicitation of funds problematic.

[3] To prevent the prestige of the judge's office from being used in fund-raising, a judge must inform all organizations in which the judge is involved of the limitations on the judge's participation in fund-raising and the use of the judge's name, require those organizations to comply with Canon 4C(3)(b), and review and approve the content of materials used in fund-raising that include the judge's name.

[43] Solicitation of membership poses potential problems similar to those associated with the solicitation of funds. For that reason, a judge must not personally solicit membership or endorse or encourage membership efforts for civic or charitable organizations if the solicitation could reasonably be perceived as coercive. For example, a judge must not solicit memberships from other judges over whom the judge exercises supervisory or appellate authority or from persons or those affiliated with persons who are likely ever to appear before the court on which the judge serves.

[5] "De minimis" fund-raising refers to insignificant, incidental, or behind-the-scenes activities that do not use the judge's name or title and where the judge's role is no more active nor visible than that of other participants.

[6] A judge should not require a defendant to contribute to a charity as part of a sentence even if no specific charity is identified and even if the defendant has agreed to the requirement as part of a plea bargain.

[7] To prevent the prestige of office judge's office from being used in fund-raising, a judge should not serve as an honorary member of a committee where the sole purpose is to allow honorary committee member's names to be used on an invitation to solicit attendance at a fund-raising event and should not allow his or her title to be used in an image campaign for a charitable organization.

[48] Notwithstanding the foregoing limitations, no comparable risk of coercion arises when a judge who is an officer of such an organization sends a general membership solicitation mailing over the judge's signature. In addition, lawyer and judicial organizations with diverse memberships, whose members are balanced in representing all

parties in litigation often include judges in their leadership. Judges may be involved in member recruitment for such organizations even though the dues or fees associated with membership may be used, in part, as fundraising to support the objectives of those organizations.

[5] Judges are an integral part of the legal community and may participate as judges in the activities of organizations within the legal community without inappropriately lending the prestige of office to those activities, even when they serve as a fundraising purpose. Therefore, a judge may, for example, accept an invitation to speak at or be recognized or honored at an event hosted by a legal organization, law school, or other entity devoted to improving the law, the legal system or the administration of justice, even if such an event raises funds for the benefit of the sponsoring organization. However, even for law-related organizations, a judge must consider whether the membership and purpose of the organization or the nature of the event would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's impartiality, integrity, and independence. For example, it may be inappropriate for a judge to speak at a fund-raising event for a bar association comprised of lawyers that primarily represent a particular class of clients or an organization that has taken a public stand on issues to be litigated in a case before the court on which the judge sits or to accept an award that honors the judge for decisions the judge has made in a particular case or cases.

[6] Use of an organization's letterhead for fund-raising or membership solicitation does not violate Rule 4.04 provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

[7] This Rule does not prohibit a judge's service in a governmental position associated with the improvement of the law, the legal system or the administration of justice; see Rule 4.03.

[8] In this and other Rules in Canon 4, the phrase "subject to the requirements of this Code" is used, to remind judges that the use of permissive language in various Rules of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct. As an example of the meaning of the phrase, a judge permitted by this Rule to serve on the board of a fraternal institution may be prohibited from such service by Rules 3.03 or 4.01 if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

[9] Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 4 in addition to Rules 4.02, 4.03 and 4.04. For example, a judge is prohibited by Rule 4.07 from serving as a legal advisor to a civic or charitable organization.

[10] The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is associated to determine if it is proper for the judge to continue the affiliation.

[11] This Rule, not Rule 4.03, governs a judge's service in a nongovernmental position. This rule permits service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. Service on the board of a public educational institution, unless it were a law school, would be prohibited under Rule 4.03, but service on the board of a public law school or any private legal institution would generally be permitted under this Rule.

4.065 Appointments to Fiduciary Positions.

(a) 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.

(b) A judge shall not serve as a fiduciary if it is likely that the judge as a 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.

(c) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

Commentary:

[1] The Time for Compliance provision of this Code (Application, Section F) postpones the time for compliance with certain provisions of this Rule in some cases.

[2] The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Rule 4.11 or require frequent disqualification.

4.056 Service as Arbitrator or Mediator. A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law.

Commentary:

[1] Judges regularly participate in arbitration, mediation or settlement conferences, either as part of their regular duties or as specially authorized by court rule or other law. The

integrity of the judiciary is undermined, however, when judges take financial advantage of their offices by rendering private dispute resolution services for pecuniary gain as an extra-judicial activity. In such circumstances, the prestige of the judicial office would be used to advance the personal financial gain of the judge.

[2] Rule 4.06 does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties.

4.067 Testifying as a Character Witness. A judge shall not testify as a character witness, except when properly summoned.

Commentary:

[1] When a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. In addition, a judge who testifies voluntarily as a character witness lends the prestige of judicial office to advance the interests of another. See Rule 3.01. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

[2] This prohibition applies to all adjudicative proceedings including disciplinary matters and includes communication of character information through any method to a sentencing judge or a probation, parole, or corrections officer although a judge may provide to such persons other information for the record in response to a formal request.

4.08 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.

Commentary:

[1] This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Rule 3.01.

[2] The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

4.09 Financial Activities. 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.

Commentary:

[1] When a judge acquires in a judicial capacity information, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Rule 3.01; see also Rule 3.02.

[2] A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge’s court. In addition, a judge should discourage members of the judge’s family from engaging in dealings that would reasonably appear to exploit the judge’s judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of judge with law firms appearing before the judge, see Commentary to Rule 2.12 relating to disqualification.

[3] Participation by a judge in financial and business dealings is subject to the general prohibitions in Rule 4.01 against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 1 against activities involving impropriety or the appearance of impropriety and the prohibition in Rule 3.01 against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge’s activities, as set forth in Canon 1.

4.10 Remunerative Activities. 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.

Commentary:

[1] This Rule provides that, subject to the requirements of this Code, a judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge’s family, and investments owned jointly by the judge and members of the judge’s family. See Commentary for Rule 4.04 regarding use of the phrase “subject to the requirements of this Code.”

4.11 Management and Divestiture of Investments. 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.

Commentary

[1] Judges should not allow their financial activities to interfere with their duty to preside over cases that come before them. Although some disqualifications will be unavoidable, judges must reduce unnecessary conflicts of interest that arise when they retain financial interests in organizations and other entities that appear regularly in their courts, by divesting themselves of such interests.

[2] Financial interests, within the meaning of this rule, include the interests of others whom the judge serves as a fiduciary under Rule 4.05.

4.12 Business Activities. 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.

Commentary:

[1] Although participation by a judge in a closely-held family business might otherwise be permitted by Rule 4.12, a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge's participation would involve misuse of the prestige of judicial office.