AJS Comments on Preliminary Draft of Revisions to ABA Model Code of Judicial Conduct

Submitted to the ABA Joint Commission to
Evaluate the Model Code of Judicial Conduct
September 2005

Canon 2

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

IN GENERAL

RULE 2.01 GIVING PRECEDENCE TO THE DUTIES OF JUDICIAL OFFICE
A judge shall not allow other activities to take precedence over the duties of judicial office. The duties of judicial office include all the responsibilities of the judge's office prescribed by law.

COMMENT
~~[1] Although 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 the performance of administrative or reporting responsibilities, are of paramount significance.~~

[The rule is straightforward and requires no comment.]

ADJUDICATION

Rule 2.02: THE RESPONSIBILITY TO DECIDE
A judge shall hear and decide matters assigned to the judge except those in which disqualification is required by Rule 2.12, or other applicable law.

COMMENT
[1] ~~A fundamental obligation of the judicial office is to be available to decide the matters that come before the judge. To protect the rights of litigants and preserve public confidence in the integrity, impartiality and independence of the judiciary, there will be times when disqualification is necessary. On the other hand, u~~Unwarranted disqualification may bring public disfavor to the bench and to the judge personally. The dignity of the bench, the judge's respect for fulfillment of judicial duties and a proper concern for the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or distasteful issues.

~~[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify has been filed.~~

[Better placed with Rule 2.12]

[2~~3~~] To ensure that judges remain available to fulfill their judicial duties, a judge must conduct his or her extrajudicial activities to minimize the risk of conflicts that would result in frequent disqualification. See Canon 4.

RULE 2.03: COMPETENCE
A judge shall perform the duties of judicial office competently and shall comply with continuing judicial and legal education requirements.

COMMENT
~~[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness and preparation reasonably necessary to perform the judge's responsibilities of office.~~

[Not necessary.]

[1~~2~~] When applying and interpreting the law 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 Rule is not intended to make every error of law 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.

[AJS's proposed language is a more accurate reflection of the law than that proposed by the ABA Joint Commission. See, e.g., Oberholzer v. Commission on Judicial Performance, 975 P.2d 663 (California 1999) (a judge who commits legal error that clearly and convincingly reflects 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 is subject to investigation and discipline); In re Quirk, 705 So. 2d 172 (Louisiana 1997) (a judge may be found to have violated the code of judicial conduct by a legal ruling or action only if the ruling or action is contrary to clear and determined law about which there is no confusion or question as to its interpretation and where this legal error was egregious, made in bad faith, or made as part of a pattern or practice of legal error). See Cynthia Gray, The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability, 32 Hofstra L. Rev. 1245 (2004).]

[2] Maintaining judicial competence requires continuing education of judges in the application of legal principles and the art of judging in order to meet the needs of a changing society.

> *[In 2002, the Washington Supreme Court amended the state's code of judicial conduct to provide that "judges should be faithful to the law and maintain professional competence in it, and comply with the continuing judicial education requirements . . . ." At the same time, the court adopted a rule requiring judicial officers to complete 45 credit hours of judicial education every three years. The preamble to the Washington rule explains:*
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> > *The protection of the rights of free citizens depends upon the existence of an independent and competent judiciary. The challenge of maintaining judicial competence requires ongoing education of judges in the application of legal principles and the art of judging in order to meet the needs of a changing society. This rule establishes the minimum requirements for continuing education of judicial officers.*
>
> *Similarly, the Arizona code of judicial conduct provides that "a judge shall participate actively in judicial education programs and shall complete mandatory judicial education requirements." States without mandatory continuing education requirements that apply to judges may modify the Rule to provide that "a judge should participate in continuing judicial education."]*

[3] Judicial competence may be diminished and compromised when a judge is impaired by drugs, alcohol or other mental or physical impairments. See Rule 2.19.

RULE 2.04: IMPARTIALITY AND FAIRNESS
A Judge shall uphold and apply the law, and decide all cases with impartiality and fairness.

COMMENT
[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded, and must not demonstrate favoritism toward anyone.

[2] Although a judge's background and personal philosophy may influence the way in which the judge analyzes and interprets a legal issue, a judge must interpret and apply the law without regard to whether the judge personally approves or disapproves of the law in question.

[3] A judge may make procedural accommodations to provide 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 or constitute

inappropriate legal advice. 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. Similar accommodations are also permissible in cases in which the parties are represented in the interests of justice if counsel's representation is obviously inadequate.

[Many judges otherwise sympathetic to the plight of self-represented litigants are reluctant to deviate from their usual procedures out of concern that they will compromise their impartiality or make represented litigants feel the judge is helping the other side. The concept of judicial impartiality, however, does not require an inflexible approach to courtroom procedures that sacrifices fairness, courtesy, and effectiveness. Providing reasonable accommodations for pro se litigants is consistent with the discretion judges have to control parties and proceedings and with the role of a judge as more than a mere functionary who preserves order and lends ceremonial dignity. Moreover, the principles that the rules of procedure do not require sacrifice of the rules of fundamental justice and that cases should be decided on the merits support judicial intervention to ensure that a pro se litigant gets at least a fair chance to present his or her case. The suggested language uses "may" instead of "shall" or even "should," is drafted in terms of judicial discretion, and is in comment; therefore, the clause could not be used to discipline judges for failure to make accommodations and does not create an entitlement for pro se litigants. The inclusion of such a provision in the code of judicial conduct does not encourage pro se litigation; the number of litigants representing themselves has increased significantly over the last decade even in the absence of such a provision. The provision simply encourages judges to take steps to make the courts more accessible and less intimidating for those who for whatever reason (often economical) have appeared in court without an attorney. Inclusion of such a provision in the code is a response to a trend that is caused by factors beyond the courts' control and that the courts cannot pretend is not happening or will go away. The AJS Center for Judicial Ethics is completing a project, funded by the State Justice Institute, that includes a lengthy paper on this issue, which AJS would be happy to provide to the Joint Commission.]

RULE 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, gender, religion, national origin, ethnicity, disability, age, marital status, parenthood, language, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so. This Rule does not preclude legitimate references to those factors when relevant to an issue in a proceeding.

[AJS proposed adding several biases to the list in the model code because it believes that the list should be as inclusive as possible even with the "included but not limited to" phrasing. The AJS proposal to add marital status was based on the action of the supreme courts in Alaska and New Jersey, which had included those grounds in their codes; AJS proposed adding parenthood based on similar language in the Alaska, New Jersey, New Mexico, and New York codes and adding language based on the New Jersey code. Other grounds added by states in adopting the 1990 model code provision include pregnancy (Alaska), personal characteristics (Indiana), color (Kansas, New Jersey, New York), and creed (New York).]

(b) A judge shall require lawyers in proceedings before the judge to refrain from manifesting bias or prejudice based upon race, gender, sex, religion, national origin, ethnicity, disability, age, marital status, parenthood, language, sexual orientation, or socioeconomic status, against parties, witnesses, counsel or others. This Rule does not preclude legitimate advocacy when these or other similar factors, are issues in the proceeding.

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

[Sexual harassment is a serious problem in the judiciary, resulting in numerous discipline cases every year. A failure to recognize this problem and explicitly, clearly, and forcefully address it in the text of the code is a major defect in the preliminary draft. The California Supreme Court recently amended its code of judicial conduct based on the conclusion of its advisory committee that the reference to sexual harassment in the commentary was not sufficiently explicit and the prohibition should "be strengthened by replacing the language in the Commentary and adding specific language to the Canon itself." The California code now reads: "A judge shall not engage in speech, gestures, or other conduct that could reasonably be perceived as sexual harassment."

In March, AJS proposed strengthening the prohibition on sexual harassment, a proposal supported by the National Judicial Education Program and the National Association of Women Judges. Instead, the preliminary report 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." (Unlike "shall," "must" is not defined in the preamble.) Moreover, a definition of "harassment" would be necessary to include the inappropriate touching, vulgar language, and other conduct characteristic of sexual harassment. In 2000, the

Kansas Supreme Court took this approach. It adopted text that 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." In addition, it added commentary stating:

> *"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.*
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> *"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.*

Earlier this year, a former judge in South Carolina pled guilty to battery and was publicly reprimanded for inappropriate contact with a female court employee at work that he had considered merely "jovial." In the Matter of Lee, 613 S.E.2d 370 (South Carolina 2005). An explicit prohibition in the text of the code is no doubt not sufficient to end this type of misconduct, but it is the least the judiciary can do and the ABA Joint Commission can propose. Following is a list of other cases in which judges were disciplined for sexual harassment just since 1990. See In the Matter of Woodard, Final Judgment (Alabama Court of the Judiciary October 14, 1994) (touching females under the age of 21 who were the subject of proceedings and touching adult females who worked in court system); In the Matter of Woodard, Order (Alabama Court of the Judiciary November 26, 2002) (inappropriate, unsolicited, and unwelcome physical contact with at least 7 females, including several juveniles; inappropriate comments and inquiries to at least 4 individuals including juvenile defendants); In the Matter of Pearlman, Judgement and Order (Arizona Supreme Court December 10, 1998) (comment about improper backing, comment about playing basketball with check, sexually suggestive comments to clerk); Inquiry Concerning Gibson, Decision and Order Imposing Public Admonishment (California Commission on Judicial Performance January 28, 2000) (cjp.ca.gov./pubdisc.htm) (8 acts of inappropriate conduct in the workplace toward female court employees); Inquiry Concerning Willoughby, Decision and Order Imposing Public Censure (California Commission on Judicial Performance June 27, 2000) (cjp.ca.gov./pubdisc.htm) (improper touching of bailiff's breasts and staring at and asking to see bailiff's breasts; sexually suggestive comment to a deputy sheriff; derogatory reference to female

deputy district attorney; and telling clerk that he wanted her to "sit in the courtroom and look pretty"); Inquiry Concerning Block, Decision and Order (California Commission on Judicial Performance December 9, 2002) (cjp.ca.gov./pubdisc.htm) (pattern of inappropriate sexual conduct); Inquiry Concerning Harris, Decision and Order (California Commission on Judicial Performance March 23, 2005) (cjp.ca.gov/pubdisc.htm) (meeting with two witnesses in two pending criminal actions outside presence of counsel; putting hands on staff member's face and saying "You're so cute;" telling a female public defender that the reason her client wanted a jury trial was that he "wants to sit next to you for three days;" pressing female attorney who regularly appeared before him for lunch appointment; thanking counsel for not exercising challenge against female juror because she was nice to look at); Letter from California Commission on Judicial Performance to Judge James L. Stevens, Jr. (February 14, 1994) (cjp.ca.gov./pubdisc.htm) (improper and offensive remarks and abusive in court proceedings and demeaning and abusive language and behavior toward court staff); Fitch v. Commission on Judicial Performance, 887 P.2d 937 (California 1995) (pattern of misconduct involving inappropriate and offensive comments to and inappropriate and non-consensual touching or attempted touching of female court staff); In re Gordon, 917 P.2d 627 (California 1996) (sexually suggestive remarks to and sexually explicit questions of female staff members, referring to fellow jurist's physical attributes in a demeaning manner, and sexually suggestive postcards to staff members); Inquiry Concerning Hyde, Decision and Order of Public Censure (California Commission on Judicial Performance May 10, 1996) (cjp.ca.gov./pubdisc.htm) (making sexually related comments toward female court employees in addition to other misconduct); Public Admonishment of Hiber (California Commission on Judicial Performance October 23, 1998) (cjp.ca.gov./pubdisc.htm) (sexual innuendoes, repeatedly asking clerk to spend time with him outside of court hours, kissing her on mouth, passing notes from bench that contained jokes of a sexual nature, and other unwelcome and insistent conduct); In re Flanagan, 690 A.2d 865 (Connecticut 1997) (consensual relationship with married court reporter); In re McAllister, 646 So. 2d 173 (Florida 1994) (comments to judicial assistant; abuse of public defender); In re Spurlock, Order (Illinois Courts Commission December 3, 2001) (intimidating and sexually inappropriate behavior toward four assistant state's attorneys; sexual intercourse on two occasions in chambers with court reporter; consensual sexual relationship with employee of state's attorneys office who sometimes worked in courtroom); In the Matter of McClain, 662 N.E.2d 935 (Indiana 1996) (participatory role in harassment directed toward a court employee and her family); In the Matter of Gerard, 631 N.W.2d 271 (Iowa 2001) (intimate relationship with assistant county attorney who appeared before him); Inquiry Concerning a Judge, Findings of Fact and Conclusions of Law (Kansas Commission on Judicial Qualifications May 12, 1994) (putting arm around employees' shoulders and similar conduct); In the Inquiry Relating to Alvord, 847 P.2d 1310 (Kansas 1993) (suggesting to clerk that the two of them might date and rubbing back of her neck while she was working); Inquiry Concerning Litson, Order (Kansas Commission on Judicial Qualifications June 20, 1997) (touching

court employees inappropriately, making inappropriate comments, and having pictures of nude women on computer screen in courthouse); In re Moore, Order (Kentucky Judicial Retirement and Removal Commission February 4, 1991) (solicited sexual favors from a female defendant whose case had recently been dismissed); In the Matter of Nance (Maryland Commission on Judicial Disabilities June 30, 2001) (conduct that was or reasonably could be perceived as inappropriate toward certain women who appeared before him in court or chambers and refusing to allow staff of law firm to review public court file); In re Trudel, 638 N.W.2d 405 (Michigan 2002) (altered screen saver message on subordinate's computer screen to read "Ginger Rogers did everything Fred Astaire did, but on her back and in high heels"); In re Ford, 674 N.W.2d 147 (Michigan 2004) (grabbing and kissing court employee; rubbing her breasts; using court computer to access sexually explicit web site on Internet during working hours); In re Trudel, 663 N.W.2d 471 (Michigan 2003) (pattern of sexually related inappropriate conduct, racially insensitive conduct, and conduct that created appearance of impropriety with certain female court employees); Commission on Judicial Performance v. Justice Court Judge R.R., 732 So. 2d 224 (Mississippi 1999) (statement to clerk about checking out men; touching clerk on shoulder; telling clerk about sexual dream; off-color conversations in court office); Commission on Judicial Performance v. Lewis (Mississippi Supreme Court March 31, 2005) (sexual advances toward two female litigants); Commission on Judicial Performance v. Spencer, 725 So. 2d 171 (Mississippi 1998) (sexual harassment); Harris v. Smartt, 57 P.3d 58 (Montana 2002) (knowingly accessing sexually explicit images on a county computer and monitor); In re Empson, 562 N.W.2d 817 (Nebraska 1997) (offensive and unwelcome conduct toward female court personnel, citizens having business in the courts, and student interns that amounted to sexual harassment); In the Matter of Seaman, 627 A.2d 106 (New Jersey 1993) (pattern of sexually harassing behavior toward employee); In the Matter of Brenner, 687 A.2d 725 (New Jersey 1997) (hugging and kissing subordinate employee); In the Matter of Shaw, 747 N.E.2d 1272 (New York 2001) (sexual harassment); In the Matter of LoRusso, Determination (New York Commission on Judicial Conduct June 8, 1993) (www.scjc.state.ny.us) (course of offensive, undignified, and harassing conduct in which judge subjected subordinate women in the court system to uninvited sexual activity, touching, and crude and suggestive comments; taking advantage of his position as a judge and employer in a series of sexual encounters with his young court reporter and secretary, who was unsophisticated, sexually inexperienced, and submissive); In the Matter of Collazo, 691 N.E.2d 1021 (New York 1998) (passed note to court attorney concerning physical attributes of female law intern, suggested to intern that she remove part of her apparel); In the Matter of Dye, Determination (New York State Commission on Judicial Conduct February 6, 1998) (www.scjc.state.ny.us) (numerous comments to secretary about physical appearance and attributes of other women in the courthouse, boasted of his sexual prowess and experience with other women, commented on physical appearance, and stating he wanted to have sex with her); In the Matter of Magill, Determination (New York State Commission on Judicial Conduct October 6,

2004) (www.scjc.state.ny.us) (discussion about pornographic movie in courthouse with daughter of staff member); In the Matter of Ezzell, 438 S.E.2d 482 (North Carolina 1994) (putting hand on woman's bare ankle and pushing her pant leg up and grabbing her breast); In the Matter of McGuire, 685 N.W.2d 748 (North Dakota 2004) (inappropriate conduct toward female court employees); Office of Disciplinary Counsel v. Campbell, 623 N.E.2d 24 (Ohio 1993) (attorney discipline of former judge for unwelcome and offensive sexual remarks and/or physical contact); Office of Disciplinary Counsel v. Talbert, 644 N.E.2d 310 (Ohio 1994) (touching client while lawyer and touching clerk while judge); In re Cicchetti, 743 A.2d 431 (Pennsylvania 2000) (unwanted sexual advances toward court probation officer, attempt by judge to use position to pressure court employee into acquiescing to sexual relationship); In re Berkhimer, Opinion (Pennsylvania Court of Judicial Discipline April 1, 2005), Order (June 28, 2005) (routinely using improper and offensive language in office in dealing with staff); In the Matter of Nelson, 532 S.E.2d 609 (South Carolina 2000) (acting in loud, disorderly manner with staff of county detention center) (remarking to female deputy that she was attractive, that her appearance was sexually exciting, that after seeing her, he would need to take a cold shower, and that other deputies "wanted her"); Public Reprimand of Matta (Texas State Commission on Judicial October 30, 1998) (hired acquaintance for whom he had romantic admiration as court clerk; condoned and participated in friendly physical touching with employees); Public Reprimand of Hollmann (Texas Commission on Judicial Conduct April 26, 2000) (bondage game with assistant/secretary); Public Warning and Order of Additional Education (Hadden) (Texas State Commission on Judicial Conduct April 26, 2000) (kissing employee under direct supervision and making gender-based comments to second employee); Public Reprimand of Musslewhite (Texas State Commission on Judicial Conduct February 3, 1995) (inappropriate touching and inappropriate comments to female court personnel and prosecutors); In re Barr, Opinion (Review Tribunal Appointed by the Texas Supreme Court February 13, 1998) (sexual harassment); In re Canales, 113 S.W.3d 56 (Review Tribunal Appointed by the Texas Supreme Court 2003) (inappropriate, unsolicited, sexually suggestive conduct toward two young women); In re Locke, Voluntary Agreement to Resign from Judicial Office in Lieu of Disciplinary Action (Texas State Commission on Judicial Conduct July 7, 2004) (inappropriate conduct toward several women); In re Aronow, Stipulation, Agreement and Order of Admonishment (Washington Commission on Judicial Conduct June 4, 1999) (www.cjc.state.wa.us) (conduct toward female employee); In re Ross, Stipulation, Agreement and Order of Admonishment (Washington Commission on Judicial Conduct December 3, 1999) (www.cjc.state.wa.us) (comments of an offensive sexual nature about attorney); In re Adams, Stipulation and Order of Closure (Washington Commission on Judicial Conduct August 26, 1991) (www.cjc.state.wa.us) (sexual harassment); In re Moilanen, Order (Washington Supreme Court November 5, 1993) (www.cjc.state.wa.us) (demeaning conduct toward court personnel, primarily female and primarily working in subordinate positions to the judge); In re Allen, Order of Reprimand and Closure (Washington Commission on Judicial Conduct June 3, 1994)

(comments of a sexual nature); In re Fritzler, Stipulation and Order of Censure (Washington Commission on Judicial Conduct August 9, 1996) (www.cjc.state.wa.us) (consensual sexual relationship with employee); In re Fritzler, Stipulation, Agreement and Order of Censure (Washington State Commission on Judicial Conduct February 6, 2004) (www.cjc.state.wa.us) (consensual sexual relationship with court employee); In the Matter of Hey, 457 S.E.2d 509 (West Virginia 1995) (on a number of occasions, approaching a court employee, speaking to her with lewd and vulgar language, touching and kissing her without her consent, and using language and behavior toward her that were offensive and sexual in nature; on a number of occasions, making comments to another court employee of an offensive nature that may be reasonably construed to be sexual harassment); United States v. Lanier, 73 F.3d 1308 (6th Cir. 1996) (criminal civil rights prosecution of state judge for sexual harassment).]

COMMENT

[1] 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 prejudiced or biased.

[2] 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. This rule does not preclude legitimate references to those factors when relevant to an issue in a proceeding.

[AJS previously proposed that the list of examples of manifestations of prohibited bias include "insensitive statements about crimes against women," a proposal that was supported by the National Judicial Education Program and the National Association of Women Judges. There is a line of cases that demonstrates the necessity of emphasizing the inappropriateness of such comments. See In the Matter of Lehman, 812 P.2d 992 (Arizona 1991) (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) (www.scjc.state.ny.us/) (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 Romano, Determination (New York State Commission on Judicial

Conduct August 7, 1998) (www.scjc.state.ny.us/) (during arraignment of defendant charged with hitting his wife, stated "What was wrong with this? You need to keep these women in line now and again"); 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).]

[3] ~~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.~~"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. A judge's conduct may constitute sexual harassment under this Rule regardless whether the judge's conduct constitutes sexual harassment as defined under state or federal law.

[4] "Harassment on other grounds" includes 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. It includes, but is not limited to, threatening, intimidating or hostile acts that relate to race, color, religion, gender, national origin, age, disability, or sexual orientation and 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.

RULE 2.06: DILIGENCE

A judge shall ~~act~~ diligently ~~in the~~ perform~~ance of~~ all his or her judicial duties, disposing of all judicial matters promptly, efficiently and fairly.

COMMENT

[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.

RULE 2.07: 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 position to influence the judge.

[1] An independent judiciary requires that judges decide cases according to law and facts without regard to whether the law or the litigants are popular or unpopular with the public, the media, 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. It is essential to judicial independence, impartiality and maintaining the public's confidence in the justice system that judges not create a perception that their decisions could be colored by such influences.

RULE 2.08: 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.

[The unfortunate number of cases in which judges have been disciplined for discourteous conduct toward court staff and other judges demonstrates that referring to them specifically in Rule 2.08(b) is necessary. There is certainly no reason not to make that requirement explicit. See Letter from California Commission on Judicial Performance to Judge James L. Stevens, Jr. (February 14, 1994) (improper and offensive remarks and abuse in court proceedings and demeaning and abusive language and behavior toward court staff); Public Admonishment of Coates (California Commission on Judicial Performance April 12, 2000) (pattern of conduct toward court staff and other persons that was not patient, dignified, or courteous, an ex parte communication with jurors); Inquiry Concerning VanVoorhis, Decision and Order Removing Judge VanVoorhis from Office (California Commission on Judicial Performance February 27, 2003) (cjp.ca.gov/pubdisc.htm), petition for review denied (www.courtinfo.ca.gov/ courts/supreme/) (throwing stack of files over ledge of bench while angry at fill-in clerk; belittling clerk by telling her she had wasted 20 seconds of court's time by swearing bailiff in on record; telling deputy sheriff she needed to learn how to do her job); Inquiry Concerning Shea, 759 So. 2d 631 (Florida 2000) (pattern of hostility towards attorneys, court personnel, and fellow judges); Inquiry Concerning Haymans, 767 F.2d 1173 (Florida 2000) (pattern of rudeness and disrespect toward lawyers, parties, witnesses, victims, and court personnel); In the Matter of Holien, 612 N.W.2d 789 (Iowa 2000) (conflicts with almost all people with whom she came in contact); In the Matter of Seitz, 495 N.W.2d 559 (Michigan 1993) (intemperate conduct toward court personnel); In re Moore, 535 N.W.2d 790 (Michigan 1995) (disrupting proceedings before another judge); In re Trudel, 663 N.W.2d 471 (Michigan 2003) (harassing, intimidating, and retaliating against former and current court employees and city council members marked favoritism toward certain employees while harassing and abusing others); In re Rice, 515 N.W.2d 53 (Minnesota 1994) (harassment of staff); Press Release (Minnesota Board on Judicial Standards) (judge who failed to provide court reporters with adequate relief); In the Matter of Prochaska, Reprimand (Nebraska Commission on Judicial Qualifications

May 17, 2001) (criticizing fellow judge during courtroom proceedings); In re Jones, 581 N.W.2d 876 (Nebraska 1998) (sent death threat to another judge and ignited firecrackers in that judge's office); In the Matter of Sullivan, Order of Censure (Nevada Commission on Judicial Discipline June 21, 1993) (treated staff etc. rudely, used profane language, indulged in fits of temper); In re Vincent, Order (New Mexico Supreme Court January 3, 2002) (referred to another judge in an inappropriate, derogatory, gender-biased manner); Disciplinary Counsel v. O'Neill, 815 N.E.2d 286 (Ohio 2004) (repeatedly made misrepresentations to lawyers, other judges, and court personnel in the course of her duties; numerous acts of judicial intemperance to judges, other court personnel, counsel, litigants, and members of the public) In the Matter of Nelson, 532 S.E.2d 609 (South Carolina 2000) (acting in loud, disorderly manner with staff of county detention center); Public Admonition of Martin (Texas State Commission on Judicial Conduct December 21, 2004) (dispute with jail staff); In re the Matter of Allen, Order of Reprimand and Closure (Washington Commission on Judicial Conduct June 3, 1994) (intemperate behavior toward another judge; verbal abuse of court staff; comments of a sexual nature)]

(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.

COMMENT

[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] If a judge exercises caution and is not otherwise prohibited by law, a judge may meet with jurors after trial to answer questions about and discuss ways to improve the jury 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 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.

[There is no legitimate purpose to be served by a judge telling jurors that a particular attorney was competent or dilatory or which witness the judge found most persuasive. Also, such comments would give rise to questions about the judge's impartiality and impliedly criticize or praise the juror's verdict, depending on whether their verdict corresponded with the judge's evaluation of the performance of counsel or witnesses.]

RULE 2.09: 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.

COMMENT
[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 do 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.

RULE 2.10: 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 as provided in sections (1) through (45), below:
(1) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters are authorized, provided:
(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication, and (b) the judge makes provision by delegation or otherwise, promptly to notify 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 on the law in a proceeding before the judge if, before the information or opinions are solicited, the judge gives notice to the parties of the person to be consulted and the substance of the information or opinions sought, and affords the parties reasonable opportunity to respond.**~~

> *[The only appropriate and desirable method for a judge to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae. Ex parte communications with experts are fraught with the potential for inappropriate influence and unnecessary. Alaska, Illinois, Kansas, Massachusetts, New Hampshire, and Oregon omitted the expert exception when they adopted other parts of the 1990 model code. At the least, if ex parte consultation with a legal expert is allowed, the parties should be allowed to object to the expert before the judge contacts the expert and should be given notice and an opportunity to respond to the information or opinions given, not just those sought in case the expert expounds on additional topics.]*

(23) A judge may consult with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges unless the judge knows that the person consulted has a disqualifying interest in the proceeding or is on a subordinate or appellate court that may hear the matter and provided that 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 and shall consider only the evidence presented.
(c) A judge shall make reasonable efforts, including the provision of appropriate training and supervision, to ensure that Rule 2.10 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.

COMMENT

[1] An "ex parte communication" is any communication about a case (including a communication 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 personal is a participant in the proceeding.

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

[32] Whenever the presence of a party or notice to a party is required by Rule 2.10, 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.

~~[3] 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.~~

[The substance of this comment is incorporated in new comment [1] proposed by AJS].

[4] Certain ex parte communication is approved by Rule 2.10 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 Rule 2.10 are clearly met. A judge must disclose to all parties, in a manner that ensures notice, all ex parte communications described in Rules 2.10(a)(1) and 2.10(a)(2) regarding a proceeding pending or impending before the judge.

[5] A judge may, with notice to the parties, ~~An appropriate and often desirable method of obtaining the advice of a disinterested expert on legal issues is to~~ invite a disinterested ~~the~~ expert on the law to file a brief *amicus curiae* on a legal issue and give the parties an opportunities to file responsive briefs.

[6] ~~A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with other judges who have previously been disqualified from hearing the matter.~~ An ex parte communication with other judges and court personnel is not appropriate 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.

> *[Another judge would only have previously been disqualified from the matter if the case had previously been assigned to the judge. If it had not been assigned to the judge but the judge would have been disqualified if it had been assigned, a communication with that judge should also be prohibited. AJS's proposed language (prohibiting communication with another judge whom the presiding judge knows has a disqualifying interest in the proceeding) is more apt.*
>
> *Whether a judge is prohibited from communicating ex parte with a probation officer varies from state to state depending at least in part on whether probation officers are part of the executive or legislative branch in the state. Compare In re Interest of Chad S., 639 N.W.2d 84 (Nebraska 2002) (affirming trial judge's denial of motion to recuse herself based on in-chambers conversation with probation officer in juvenile case and holding that, based on statutes creating the probation office, probation officers were "court personnel," as that term is used in Canon 3B(7)(c) of the Nebraska Code of Judicial Conduct, and that any communication between the probation officer and the trial judge did not violate Canon 3B(7)(c)), with Virginia Advisory Opinion 00-4 (a judge may not have an ex parte communication with a probation officer preparing a pre-sentence report for a case being tried by the judge; after sentencing, a judge may not have ex parte communications with a probation officer concerning matters relating to terms and conditions of probation); Washington Advisory Opinion 97-7 (judge is required to have defense attorney and prosecutor present when speaking to probation officer about additional information that should be covered in recommendation regarding deferred prosecution of a DUI charge; judge may receive written ex parte communication from probation officer to determine if exigent circumstances exist to issue bench warrant because of alleged probation violation; judge may not have ex parte contact regarding a presentence report with community corrections officer, who must attend the hearing unless excused by both parties).]*

[7] 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.

[8] Case law allows a judge to take judicial notice of only two categories of facts: facts generally known with certainty by all the reasonably intelligent people in the community and facts capable of accurate and ready determination by resort to sources of indisputable accuracy. The prohibition on independent investigations by judges does not prevent a judge from taking judicial notice where appropriate. However, not all information available on the internet or similar services falls within either category, and, therefore, the prohibition against a judge independently investigating the facts of a case, ~~independently~~ personally 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 when the law permits it.

> *[Numerous cases and an advisory opinion from Indiana and two recent cases from Kansas indicate that judges have permitted attorneys and parties to abuse the ex parte procedures for obtaining changes of custody. See, e.g., Indiana Advisory Opinion 01-1. It is unlikely that such a practice is confined to those states, and it is important that the code remind judges that the "authorized by law" exception does not eliminate their responsibility of strictly following the law authorizing ex parte proceedings.]*

[10] The exception for ex parte communications "expressly authorized by law" includes communications specifically permitted by the special procedures adopted by so-called 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 proposed this language in previous comments in response to the Joint Commission's request for special provisions for problem-solving courts. By tying the exception to what is authorized by law in the particular jurisdiction, it allows the model code to address the issue without having to draft a provision that would fit the wide variety and changing nature of problem-solving courts, probably an impossible task. It is consistent with a recent advisory opinion from New York stating that a judge presiding over a drug court may engage in ex parte communications with court personnel pursuant to a statute concerning information obtained by such personnel but should give notice to and inform the defendant's attorney of the content and nature of those communications and may consider ex parte communications from drug court team members provided there has been consent as required under an administrative order. New York Advisory*

Opinion 04-88.]

RULE 2.11: JUDICIAL STATEMENTS ON PENDING AND FUTURE CASES
(a) A judge shall not make any public comment on ~~that might reasonably be expected to affect the outcome or impair the fairness of~~ a matter pending or impending in any court 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. 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.

[AJS is concerned that the phrase "might reasonably be expected to affect the outcome or impair the fairness of a matter" would be considered unconstitutionally vague in a restriction on speech. Commentary to the Maine code of judicial conduct, for example, notes that "the difficulty of assessing the impact of public comment on an unknown audience justifies the absolute bar." The phrase was presumably added in 1990 to narrow the prohibition in response to First Amendment concerns. But a broader restriction would not be subject to strict scrutiny as it is not based on content and does not apply to campaign speech but is a time, place, and manner restriction; despite the rule, judges may make any comment on a pending case as long as it is on the record in the case, in other words, when and where judges are supposed to be commenting on cases in fulfillment of their responsibilities. A judge's first responsibility is to explain his or her decision to the parties; if that is done, then the public and the media are also adequately informed. If it is necessary to narrow the rule, a clearer approach would be to create an exception for comments in teaching or for cases pending outside the judge's jurisdiction.]

(b) ~~The~~ A judge shall require similar abstention on the part of staff, court officers, and others subject to the judge's direction and control.
(c) 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 judicial office.

COMMENT
[1] Rule 2.11 restrictions on judicial speech are essential to maintaining ~~the maintenance of~~ the integrity, impartiality and independence of the judiciary. 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.

[2] This prohibition applies even to cases not currently pending before the commenting judge. A pending matter 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 matter is "impending" whenn~~r~~e 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 Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases such as a writ of mandamus, however, where the judge is a litigant in an official capacity, the judge must not comment publicly.

[4] Provided that the judge meets the requirements of 2.11(a) and (b), this Rule does not prohibit judges from ~~making public statements in the course of their official duties, from explaining the procedures of the court to the public, or from~~ responding directly, or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter. 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.

[5] Speaking to a journalist is a 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.

~~[5] Subject to the provisions of this Rule, candidates for judicial office may respond to unjust criticism. See Rule 5.01, Comment [12].~~

RULE 2.12: DISQUALIFICATION

(a) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might be questioned by a reasonable person, including but not limited to circumstances where:

(1) 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;

(2) 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~~:
(i) is a party to the proceeding, or an officer, director or trustee of a party;
(ii) is acting as a lawyer in the proceeding;
(ii) is known by the judge to be a person who has more than a de minimis interest that could be substantially affected by the proceeding;
(iv) to the judge's knowledge is likely to be a material witness in the proceeding; or
(v) presided as a judge before whom the proceeding was heard or tried in a lower court.

(3) the judge knows that he or she, individually or as a 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;

(4) the judge knows or learns by means of a timely motion that a party or party's lawyer has within the previous [1 years] 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].

(5) 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;

(6) the judge (i) 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; (ii) 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. (iii) served in governmental employment and in such capacity participated as lawyer, advisor, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy; or (iv) served as a material witness concerning the matter (v) previously presided as a judge over the proceeding in the same or another court.

(b) 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.

[c] A judge subject to disqualification by the terms of this Rule, other than paragraph (a)(1), 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 such waiver is permitted by law. If the parties and lawyers, without participation by the judge, agree that the judge should not be disqualified, and it is permitted by law, the judge may participate in the proceeding. Such a remittal agreement shall be written and shall be incorporated in the record of the proceeding.

COMMENT

[1] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless whether a motion to disqualify has been filed.

[21] 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 Rule 2.12(a)(1)–(6) 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.

[32] 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 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.

[43] A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Rule 2.12(a)(6)(i); 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.

[54] 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. However, the judge must disclose the relationship to the parties and their attorneys, and the judge's disqualification may be required if~~, however,~~ "the judge's impartiality might reasonably be questioned" under Rule 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 Rule 2.12(a)(3) ~~the judge's disqualification may be required~~. In deciding whether to disqualify, a judge should consider whether the judge's relative is a salaried or equity partner, shareholder, associate, or of counsel in the firm; the size of the firm; whether the fee the firm will receive is based on an hourly fee or is contingent on the client winning the case; the nature of the case, in particular, its financial impact on the relative's law firm; the prominence of the judge's relative's name in the firm name; the size of the court; the size of the community; the frequency of the firm's appearance in the judge's court; the degree of kinship between the judge and the relative; any other connections, dealings, or relationships to other members of the firm.

> *[This situation arises frequently (it is the subject of many judicial ethics advisory opinions), and, therefore, judges should be given as much guidance as possible with respect to what factors to consider.]*

[65] 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 basis for disqualification. ~~A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification.~~

~~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~~ A judge should ~~may wish to~~ have all parties and their lawyers sign any remittal agreement.

[Much of this comment is repetitive.]

[~~7~~6] "Fiduciary" includes such relationships as executor, administrator, trustee and guardian.

[~~8~~7] An "economic interest" does not extend to such holdings or interests as a judge might have, for example, in mutual or common investment funds, deposits a judge might maintain in financial institutions, mutual savings associations or credit unions, or government securities owned by a judge, unless a proceeding pending or impending before the judge could substantially affect the value of such holdings or interests, or the judge is involved in the management of such entities' holdings. The fact that securities might be held by an educational, charitable, fraternal or civic organization in whose service a judge or the judge's spouse, parent or child may serve as a director, officer, advisor or other participant does not thereby give a judge an economic interest in such an organization for the purposes of this Rule.

D. 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.

[This proposal is a response to the scandal several years ago in New Hampshire in which it was revealed that a supreme court justice was involved in almost every way but voting in the appeal of his divorce and his colleagues did not stop him. There are also examples of trial court judges failing to sufficiently distance themselves from cases in which they are disqualified. See, e.g., Inquiry Concerning Hyde, Decision and Order (California Commission on Judicial Performance September 23, 2003) (cjp.ca.gov/pubdisc.htm) (asked successor judge ex parte to "back him up" on bail decision); In the Matter of Canfield, Determination (New York State Commission on Judicial Conduct September 19, 2003) (www.scjc.state.ny.us) (delayed in transferring case after disqualifying herself; issued amended order of protection after disqualifying herself and engaged in an ex parte communication with the victim).]

ADMINISTRATION
RULE 2.13: ADMINISTRATIVE COMPETENCE AND DILIGENCE

A judge shall discharge the judge's administrative responsibilities diligently, competently, and promptly and without bias or prejudice, maintain competence in judicial administration, and shall cooperate with other judges and court officials in the administration of court business.

COMMENT

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

[Rule is straightforward; comment is not necessary.]

RULE 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, courteously, competently, and ~~act~~ in a manner consistent with the high standards of conduct expressed in this code.

[Administrative failures by judges and their staff make up a great many of the cases leading to judicial discipline, suggesting that this provision needs emphasis and clarification.]

COMMENT

[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 ensure that the conduct of personnel subject to their direction and control is consistent with the 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 fulfills 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 the staff member's impartiality might reasonably 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.

RULE 2.15: SUPERVISION OF OTHER JUDGES

A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt, efficient and fair disposition of

matters before them and the proper performance of their other judicial responsibilities.

COMMENT

~~[1] Public confidence in the courts depends on timely justice. 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.~~

[Comment is just a paraphrase of the rule.]

RULE 2.16: ~~ADMINISTRATIVE~~ APPOINTMENTS

[Assigned counsel, referees, commissioners, special masters, receivers, and guardians are not administrative appointments.]

(a) A judge shall not engage in nepotism and 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 ~~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.

COMMENT

[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 prescribed by Rule 2.16.

[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.

[3] "Nepotism" is the appointment or hiring of any relative within the degree of relationship established by statute or rule or, in the absence of a definition under state law, to 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.

Rule 2.17: REPORTING JUDICIAL MISCONDUCT
A judge having knowledge or reliable information that another judge has committed a violation of this Code that raises a substantial question as to the judge's honesty, trustworthiness integrity, temperament, diligence, or fitness as a judge in other respects shall inform the appropriate authority. A judge who receives information indicating a ~~substantial~~ likelihood that another judge has committed a violation of this Code shall ~~should~~ take appropriate action.

[In 1990, the ABA changed the standards for reporting judicial and lawyer misconduct due to "weakness of the language" and "a perceived deterioration in the professional conduct of lawyers and judges." Milord, The Development of the ABA Judicial Code at 25 (1992). Unfortunately, that change was not sufficient. There are almost no examples of judges being publicly disciplined for violating this provision, and the number of reports to judicial conduct commission by judges remains very low. Given the important interests served by the rule, the language must be strengthened. For example, because the reporting obligation is triggered only by personal knowledge, the provision does not require a judge to report serious misconduct that may be conveyed to the judge by court staff or attorneys who turn to the judge for assistance. Thus, the requirement should also be imposed by the receipt of "reliable information" (as in the Arizona code). Similarly, by providing only that a judge "should" take appropriate action, the provision allows judges to ignore minor misconduct by other judges and lawyers, even though minor misconduct, uncorrected, may be repeated and become part of a pattern of substantial misconduct. Thus, many states (for example, Alaska, Florida, Louisiana, Massachusetts, Minnesota, Nebraska, and Utah) require that a judge "shall" take appropriate action in response to even minor misconduct. Moreover, the requirement that the obligation to report to disciplinary authorities arises only when the violation raises "a substantial question as to the other judge's fitness for office" means that a great deal of serious misconduct will go unknown by the disciplinary authorities. While a single act of misconduct may not indicate a judge's unfitness for office, it may require some sanction, and an isolated violation may be part of a pattern that the disciplinary authority can discover only if each act is reported or as the result of an investigation into one report. Therefore, some states have broadened the reporting requirement to cover violations that raise a question as to the other judge's "honesty, trustworthiness or fitness" (Arizona and Oregon), "honesty, integrity, trustworthiness, or fitness" (Massachusetts), or any unprofessional conduct (Oklahoma).]

COMMENT
[1] As an officer of the judicial system, each judge has a responsibility to participate in efforts to ensure public respect for the system's operation. Ignoring or denying known misconduct by ~~among~~ one's fellow judges undermines that responsibility. Taking affirmative action to address known misconduct is therefore a judge's obligation.

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.

RULE 2.18: REPORTING LAWYER MISCONDUCT

A judge having knowledge that a lawyer has committed a violation of the [Model Rules of Professional Conduct] [other title for the jurisdiction's rules for lawyer conduct] 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.

COMMENT

[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.

RULE 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.

COMMENT

[1] Taking or initiating corrective action by way of referral to an assistance program can fulfill several laudable purposes. For example, an intervention can be the first step toward a successful recovery program. That action alone may satisfy the mandates expressed in this Rule. 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] "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question to correct the problem.

2.20 During disciplinary proceedings, including investigations, a judge, including a respondent judge, shall cooperate and be candid with the judicial conduct commission or attorney disciplinary board, shall not knowingly misrepresent a material fact, shall not provide inaccurate or incomplete responses to inquiries, shall not engage in willful concealment, shall not knowingly fail to disclose a fact necessary to correct a misapprehension known by the judge to have arisen, and

shall not fail to respond to a lawful demand for information. A judge 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.

[The standards for judges should be at least as high as those for attorneys. AJS's proposed language creates for judges a responsibility similar to that imposed on attorneys by Rule 8.1 of the Rules of Professional Responsibility.]

RULE 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.

COMMENT

~~[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.~~